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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF KANSAS.

By W. C. WEBB,

REPORTER.

VOL. XVII.

**CONTAINING CASES DECIDED AT THE JULY TERM, 1876, AND
JANUARY TERM, 1877.**

**SECOND EDITION, ANNOTATED TO AND INCLUDING
VOLUME XXXIII.**

**ST PAUL.
WEST PUBLISHING COMPANY.
1912.**

Entered according to act of Congress, in the year 1877, by
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JUDGES OF THE SUPREME AND DISTRICT COURTS OF KANSAS,

DURING THE PERIOD COVERED BY THIS VOLUME.

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HON. SAMUEL A. KINGMAN, CHIEF JUSTICE,.....Topeka,

Until 31st December, 1876.

HON. ALBERT H. HORTON, CHIEF JUSTICE,.....Atchison,

From and after January 1st, 1877.

HON. DANIEL M. VALENTINE, ASSOCIATE JUSTICE, Ottawa,

HON. DAVID J. BREWER, ASSOCIATE JUSTICE, Leavenworth.

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*THE terms of Judges IDE, HUDDARD, and BASSETT, expired on the second Monday of January 1877. Their respective successors are—First District, Hon. ROBERT CROZIER, Leavenworth; Second District, Hon. ALFRED G. OTIS, Atchison; Fourth District, Hon. N. T. STRICKER, Lawrence.

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THE DISTRICT COURT is held at Topeka on the second Monday in April,
and at Leavenworth on the second Monday in October, in each year.

THE CIRCUIT COURT is held at Leavenworth on the first Monday in June,
and at Topeka on the fourth Monday in November, in each year.

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REPORTER'S NOTE.—Chief Justice KINGMAN, after fourteen years service as a member of the supreme court—four years as Associate Justice, and ten years as Chief Justice—resigned in December last. During the last three years he was in quite feeble health. While he wrote but few opinions during the last two or three years, he nevertheless presided at all the sessions of the court, and attended the consultations of the Justices, taking part in the consideration and decision of causes submitted. Finding that there was no prospect of immediate restoration to health if he continued to give his attention to the duties of his office, he tendered his resignation, to take effect 31st December 1876. Hon. ALBERT H. HORTON, of Atchison, was appointed by the Governor to fill the vacancy thus created.

THIS volume contains 121 cases—namely, 61 of those decided at the July Term 1876, and 60 of those decided at the January Term 1877, and being all in which opinions were filed previous to April 1st 1877, and not before reported.

THE following table was published in 8 Kas., p. 6, showing the number of cases reported in each volume of Kansas Reports, from the 1st to the 8th inclusive, and the number of opinions (exclusive of dissenting opinions) written by each Justice during the time covered by such volumes:

Name, and Years of Service.	Volumes.								Total No. of opinions by each Justice.
	1.	2.	3.	4.	5.	6.	7.	8.	
EWING, C. J., (1861-2,) 2 years.....	9								9
COBB, C. J., (1863,) 1 year.....	11	4							15
CROZIER, C. J., (1864-6,) 3 years.....		10	35	2					47
BAILEY, J., (1861-3,) 8 years.....	11	7	6	20					44
KINGMAN, J., (1861-4,) 4 years.....	19	19	4						42
SAFFORD, J., (1865-1870,) 6 years.....			12	29	21	22			84
KINGMAN, C. J., (1867-1871,) 5 years.....				24	27	16	17	35	119
VALENTINE, J., (1869-1871,) 3 years.....					84	17	23	37	111
BREWER, J., (1871,) 1 year.....							23	26	49
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THE following table will show the number of cases reported in each volume from the 9th to the 17th inclusive, and the number of opinions (exclusive of dissenting opinions) written by each Justice during the time covered by such volumes:

Name, and Years of Service.	Volumes.									Total No. of opinions by each Justice.
	9.	10.	11.	12.	13.	14.	15.	16.	17.	
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DISSENTING OPINIONS, not included in the above tables, are published, as follows: Vol. 1, by COBB, C. J., p. 355; Vol. 5, by SAFFORD, J., p. 84, by VALENTINE, J., p. 461; Vol. 7, by VALENTINE, J., pp. 66, 86, 326, by BREWER, J., p. 549; Vol. 8, by VALENTINE, J., p. 409; Vol. 9, by VALENTINE, J., pp. 292, 426, by BREWER, J., p. 631; Vol. 14, by VALENTINE, J., pp. 381, 494; Vol. 15, by VALENTINE, J., p. 233, by BREWER, J., p. 571; Vol. 17, by VALENTINE, J., p. 440, by BREWER, J., pp. 196, 632.

SUPREME COURT,

STATE OF KANSAS.

JULY TERM, 1876.

PRESENT:

HON. SAMUEL A. KINGMAN, CHIEF JUSTICE.
HON. DANIEL M. VALENTINE, } ASSOCIATE JUSTICES.
HON. DAVID J. BREWER, }

THOMAS W. WATERSON *et al.* v. FRANCIS KIRKWOOD.

1. **FINDINGS; *Special; Request of Party.*** Where the court makes a general finding of facts and of law covering all the issues presented by the pleadings, and then renders judgment upon such findings, and one of the parties then asks the court to find specially, but does not designate any particular question or issue upon which he desires the court to so find, and the court then makes special findings, *held*, that such party cannot take any advantage of any failure of the court to find specially upon some particular question or issue in the case.
2. **CHANGE OF VENUE; *Discretion; Substantial Right.*** The granting of a change of venue in a civil case, is, to a great extent, within the discretion of the trial court; and, where it does not appear that such discretion was abused, or that any substantial right of the objecting party was materially affected by the change, the supreme court will not reverse an order of the district court granting such change, although it may not appear that the district court was clearly bound to grant the change. [*R. R. Co. v. Reynolds*, 8-628; *Peyton's Appeal*, 12-406.]
3. **STATUTE OF LIMITATIONS; *Absence from State of Debtor.*** P. mortgaged his land to K., and then, after an action had accrued on the mortgage, but before the same was barred by the statute of limitation, left the state and has never returned. Just before he left he transferred his interest in the land to W. W. and K. have remained in the state, and a sufficient time has elapsed to bar all action on the mortgage, provided P.

Waterson v. Kirkwood.

had also remained in the state: *held*, that W. stands merely in the place of P., and therefore, as P. could not plead the statute of limitation in a suit on the mortgage, W. cannot. [*City Fort Scott v. Schulenberg*, 22-658; *Schmucker v. Sibert*, 18-104; *Sibert v. Wilder*, 16-176; *Pears v. Wilson*, 23-346; *Ryun v. R. R.*, 21-367.]

Error from Nemaha District Court.

THIS case was in this court in 1871, on error from Marshall district court, and is reported in 8 Kas. 463. The subsequent proceedings, and all the facts, are fully stated in the opinion, *infra*. The plaintiff below, *Kirkwood*, had judgment at the April Term 1874, and *Waterson* and *Edwards* bring the case here on error.

Horton & Waggener, for plaintiffs in error.

Price & Heatley, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action on a note and mortgage brought by Francis Kirkwood against William H. Pearsoll and wife, and said Waterson and Edwards. The facts of the case seem to be substantially as follows: The note was executed July 28th 1860, by said Pearsoll to John Potter for \$150, due in one year, with interest from date at the rate of twenty per cent. per annum. The mortgage was executed at the same time by Pearsoll and wife to Potter on the S.W.¼ of sec. 9, township 4, range 6, in Marshall county, to secure the payment of the note, which mortgage was duly recorded 20th November 1860. During the same year Potter assigned said note and mortgage to said Kirkwood. On January 23d 1864, Pearsoll paid Kirkwood \$2 on said note, for the purpose of postponing the operation of the statute of limitation thereon. On February 8th 1864, Pearsoll and wife conveyed by a quitclaim deed all their interest in and to said land to Thomas W. Waterson, one of the plaintiffs in error. R. R. Edwards, the other plaintiff in error, (who was also a defendant below,) claims under Waterson; and since February 8th 1864 the land has been in the possession of Waterson and his grantees, who have paid the taxes as-

Opinion of the Court.

ceased against it, and made improvements thereon. On May 25th 1864 Pearsoll and wife became non-residents of Kansas, and have never since been within the boundaries of the state. During all said time, however, all the other parties above mentioned have continuously resided in Kansas. On March 8th 1865, Waterson obtained a tax deed for said land. In March 1864 Waterson purchased said land at sheriff's sale, and received a sheriff's deed therefor, which deed was duly recorded May 28th 1864. On August 30th 1869, Kirkwood commenced this action in the district court of Marshall county. He made Pearsoll and wife, and Waterson and Edwards, parties defendant to the action. He asked for a personal judgment against Pearsoll for the amount of said note, and interest, and that the land be sold for the purpose of paying such judgment. Service was obtained on Pearsoll and wife by publication, and on Waterson and Edwards personally. Waterson and Edwards answered, each filing a separate answer; Pearsoll and wife made default. Kirkwood replied to portions of Waterson's and Edwards' answers, but demurred to the 6th defense stated in Waterson's answer. This defense set up the statute of limitations. The court overruled Kirkwood's demurrer; and then, without rendering any judgment, or giving Kirkwood any leave to plead over, (but neither of these was asked for,) granted a change of venue on Kirkwood's application therefor to Nemaha county, which county is in another judicial district. After the case was taken to Nemaha county, the district court of that county permitted Kirkwood, upon certain terms and conditions, to file a reply denying generally all the allegations of the answers of both Waterson and Edwards; and the case was then continued till the next term of the court. At such next term the case was tried by the court without a jury; and the court made general findings of fact and of law upon the issues, as follows:

"And the court, after hearing the testimony and arguments of counsel, and being fully advised in the premises, does find the issues for the plaintiff, and does find that there is due the

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plaintiff upon the note sued on this action the sum of \$562.98, and that the said lands and tenements mentioned in plaintiff's petition stand charged with the payment of the same."

The court then rendered judgment upon these findings in favor of the plaintiff below, and against Pearsoll for the said sum of \$562.98, and costs, and ordered that the land be sold to satisfy said judgment; and then comes the following journal entry:

"And thereupon, at the request of defendants, the court reduced its findings of law and of fact to writing, and filed them in this case; to all of which findings of law and of fact, defendants duly excepted."

Among the papers in the case is found a paper containing certain special findings of fact and conclusions of law, signed by the judge of the court that tried the cause. We do not think that these special findings are in any particular inconsistent with the general findings, although it is possible that the special findings do not cover the entire ground, as the general findings do, and possibly do not decide every issue

1. Findings.
Request for
special
findings.

raised by the pleadings. But even if they do not decide every issue presented by the pleadings, still we do not think that the plaintiffs in error are in any proper condition to complain. After allowing the court to make general findings, covering all the issues, and to render judgment, if the plaintiffs in error then desired special findings, they should have designated specifically the questions or issues upon which they wished the court to find specially. And every question or issue which they did not so specifically designate and call the attention of the court to, should be considered as found against them. Under the circumstances of this case, we must consider every question and issue not covered by the special findings, if there is any such question or issue, as found against the plaintiffs in error.

The plaintiffs in error claim that the court below erred in granting such change of venue. We think the showing for the change was weak, and if the court below had refused to grant it its ruling would probably not have been considered

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2. Change of venue. as material error. But the court below has a great deal of discretion in granting changes of venue in civil cases; and we cannot in this case say that the court below abused its discretion by granting the change. Besides, we cannot see from the record in this case that any substantial right of the plaintiffs in error was materially affected by the change. There was evidently no substantial error committed in allowing said reply to be filed. It probably raised no new issue. But even if it did, the court below did not err in permitting it to be filed.

We now come to the main question raised in this case, to-wit: Was the plaintiff's cause of action as against Waterson and Edwards barred by the statute of limitations at the time this action was commenced? The writer of this opinion is inclined to think, but with great doubts, that it was; but the other justices of this court have overruled him.

3. Limitation of actions. Absence from state. If the decision in the case of *Wood v. Goodfellow*, 48 Cal. 185, states the law correctly for Kansas, then the action was barred. A majority of this court think that that decision is not good law in Kansas. That is the only case, of which we have any knowledge, which will exactly apply to this case. We all agree that as to Pearsoll and wife, the action never was barred. The note became due July 28th 1861; and the action which then accrued thereon could not have been barred by any statute of limitations earlier than on July 28th 1864; (Laws of 1859, page 84, § 20.) But before that time a payment was made on the note, and Pearsoll and wife removed from the state. The payment was made on the note on January 23d 1864, before the note or mortgage was barred, while Pearsoll still owned the land, and before Waterson and Edwards ever had any interest therein. This payment on the note so postponed the running of the statute that the action on the note and mortgage could not under any circumstances have been barred prior to January 23d 1867; (Laws of 1859, page 86, § 31.) But long before this time elapsed, even before July 28th 1864, and on May 25th 1864, Pearsoll and wife left the state, and have never returned.

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The statute of limitations therefore wholly ceased to operate as to Pearsoll and wife on May 25th 1864, (Laws of 1859, page 85, § 28,) a time when by no possibility could the action on the note and mortgage have been barred. The grounds upon which a majority of this court holds that Waterson and Edwards cannot plead the statute of limitations are as follows: Waterson and Edwards have merely succeeded to the rights of Pearsoll. They stand in his shoes. They have got just what he would have if he had not transferred his interest in the land to them. They have nothing more than he at any time had the right to transfer to them. The stream has not risen and cannot rise higher than the fountain, nor can they by their purchase of Pearsoll's interest in the land cast additional burdens and inconveniences upon the holder of the mortgage. And therefore, as Pearsoll has never obtained or had the right to plead the statute of limitations, his grantees, Waterson and Edwards, have no such right. It is unnecessary to state the argument on the other side. Taking this view of the question, the sixth defense of Waterson's answer stated no defense to Kirkwood's petition.

We have considered all the questions presented to us. The plaintiffs in error do not seem to claim that their sheriff's deed and tax deed raise any questions different from those which we have discussed. Hence we have said nothing about those deeds.

The judgment of the court below must be affirmed.

All the Justices concurring.

H. W. CONVERSE v. THOMAS B. SAFFORD.

CHATTEL MORTGAGE; Consideration; Good Faith; Duress. Where C. was prosecuted for an offense in a justice's court, found guilty, and sentenced to pay a fine of five dollars and costs, but the justice did not, at the time of said sentence or afterward, issue any warrant for the arrest, detention, custody, or commitment of the defendant, and on the next day the defendant gave to S. a mortgage on a horse to secure the payment to S. of the amount of said fine and costs, with the understanding and agreement between C. and S. that S. should pay the same for C.; and afterward S. did pay the same; and the whole transaction was in good faith, *held*, that the mortgage is not void as being executed in violation of law or public policy, although S. may have been at that time an under-sheriff, and may have acted as an officer of the justice's court during the trial. [*Wolfley v. Rising*, 12-535; *Same v. Same*, 8-297.]

Error from Crawford District Court.

REPLEVIN, brought by *Safford*. Trial and judgment for plaintiff, at the September Term 1874. *Converse* brings the case here on error.

Playter & Pursell, for plaintiff in error.

M. A. Wood, and *W. C. Webb*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action of replevin for a horse, brought by *Safford* against *Converse*. The case was tried by a jury, who found that the plaintiff was entitled to the horse, that the horse was worth fifty dollars, and that the plaintiff was damaged ninety-three cents by reason of the wrongful detention of the horse by the defendant. Judgment was rendered in favor of the plaintiff for a return of the horse, or in case a return could not be had, then for \$50, the value of the horse, and also for said ninety-three cents, and for costs. The defendant brings the case to this court. He claims that the court below erred, 1st, in overruling the defendant's demurrer to the plaintiff's evidence; 2d, in overruling the defendant's

motion for a new trial; 3d, in rendering judgment for \$50, instead of for \$32.45 and interest.

I. The plaintiff's evidence, as well as his pleadings, showed that he claimed to be entitled to the horse by virtue of a chattel mortgage executed to himself by the defendant to secure the payment of a promissory note for \$32.45. The mortgage was introduced in evidence, and appeared to be valid upon its face, and to entitle the plaintiff to the horse; and there was nothing in the plaintiff's evidence that showed the contrary. As to overruling a demurrer to evidence, see *Simpson v. Kimberlin*, 12 Kas. 579. The court below did not err in overruling said demurrer.

II. The defendant claimed and now claims that said mortgage was void, for the reason that it and the note were given for an illegal consideration; and he introduced evidence for the purpose of showing that it was void. None of the instructions of the court below are brought to this court, and the jury that tried the case said in effect by their verdict that the evidence did not show that the mortgage was void. Therefore, if we should now hold that the mortgage was void, we should not only be required to reverse the decision of the court below upon the law and the facts, but would also be required to reverse the findings of the jury, made upon the evidence in the case. This we cannot do, for there was some evidence, and sufficient evidence, to support every finding of the jury. The uncontradicted evidence did not all show that the mortgage was void. On the contrary, the plaintiff's evidence showed that the mortgage was at least *prima facie* valid. But passing from the *prima facie* case made by the plaintiff, the facts were probably about as follows: Converse was prosecuted before a justice of the peace for assault and battery. He was found guilty, and sentenced to pay a fine of five dollars and costs, amounting in the aggregate to \$32.45. Safford was at the time of the trial in the justice's court, acting as an undersheriff; and acted during the trial as an officer of the justice's court. When the trial was terminated, and the defendant was sentenced, he was orally placed in the charge of Safford. No

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warrant of commitment, nor indeed any warrant for the custody or detention of Converse, was issued by the justice, or placed in the hands of Safford. Both Safford and Converse then went to their respective homes. Next morning each returned to the justice's office. Converse desired that something should be done to save him from going to jail. Safford then proposed to lend him the money to pay his fine and costs, provided Converse would give him a chattel mortgage on his horses. Converse agreed to do it, and gave the mortgage under which the plaintiff Safford now claims the horse in controversy. The mortgage was made to secure the sum of \$32.45, the amount of the fine and costs. Converse was then discharged by Safford and by the justice. Safford then paid the fine and costs, although he did not pay all of the same on that day. The whole transaction was evidently considered by all the parties, Safford, Converse and the justice, as a loan of money from Safford to Converse to pay said fine and costs. The entire transaction was conducted in the best of faith. And we cannot now say that it was in violation of any law, or of good morals, or of public policy. Besides, technically, Converse was not at the time the mortgage was executed in the legal custody of Safford. The trial had terminated the day before, and nothing was left to be done in the case further than for the justice to issue his warrant of commitment, or an execution, or both, to enforce his judgment. But the justice had not yet issued either, nor any writ or warrant. Converse therefore had a right to go wherever he chose. Safford had no warrant for the commitment or detention of Converse, or by which he could take or hold Converse in his custody. Safford was then just like any other deputy sheriff. Converse might at some future time come into his custody, or might not; but Safford had no legal right at that time to take Converse into his custody. Indeed, it is not shown that Safford ever had any warrant of any kind for the arrest, detention or custody of Converse. Safford testifies that he did not consider that he had any charge of Converse at the time the note and mortgage were given; and as the jury in this case found in favor of Safford, we must presume that

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all the testimony given in his favor was true. There is nothing in the record of this case showing that Safford ever had the legal custody or charge of Converse, except the evidence that shows that Safford acted as the officer of the justice's court during the trial.

The judgment of the court below will be modified so that if a return of the horse cannot be had, the plaintiff may recover \$32.45, the amount of his debt, with interest, costs, etc. (*Wolfley v. Rising*, 12 Kas. 585.) In all other respects the judgment will be affirmed.

All the Justices concurring.

LEWIS D. WILLIAMS *et al.* v. TIMOTHY F. HERSEY.

1. **BILL OF EXCEPTIONS; *Signing, and Certifying; Filing of Record.*** Where a bill of exceptions commences with, "Be it remembered," etc., and concludes with, "The defendants therefore ask that this their bill of exceptions may be signed by the judge and made a part of the record in this case, which is accordingly done;" and the judge then, on the same piece of paper, certifies to the correctness of the bill, and signs the certificate, without calling the paper a bill of exceptions, or ordering it to be made part of the record, *held*, that the paper is nevertheless a bill of exceptions, and a part of the record.
2. **INTEREST; *Running Account.*** It is not error for the court to instruct the jury, that "interest cannot be claimed on an open and running mutual account, except by an agreement of the parties."
3. **EVIDENCE OF VALUE; *Former Appraisal, not Competent.*** It is not error for the court to exclude evidence attempted to be introduced for the purpose of proving the value of certain land, where such evidence merely tends to prove that two men at a previous time appraised said land at a certain amount, and where better evidence of the value of the land can be obtained.

Error from Mitchell District Court.

ACTION by *Hersey* against *Williams* and wife, and *James Finnegan*, to have a certain deed absolute in form adjudged to be a mortgage in fact, and to compel *Williams* and wife to reconvey certain property to plaintiff, and to recover from *Williams* and *Finnegan* an alleged balance due plaintiff on account. Trial at the December Term 1874. The testimony and special findings show, that *Hersey* on the 3d of March 1873 was indebted to *W. & F.* in the sum of \$580; that on that day *Hersey* and wife conveyed to *Williams* by said deed a large number of lots in the town of Beloit; that said deed was so given to secure the payment of said \$580 to said *W. & F.*; that before the commencement of this action *Williams* had sold and conveyed a large amount of the property described in said deed; that such sales made by *Williams* were made for cash, and at different times, and to different parties; that the sums realized on such sales respectively were \$50, \$125, \$125, \$200, and \$500—total, \$1,000—all of which came to the hands of *Williams & Finnegan*. *W. & F.* paid taxes due on said lands, to amount of \$16.93, for which they claimed credit. They also claimed \$26 as interest on the \$580 due thereon from *Hersey*, as aforesaid. *Hersey* claimed that he should be allowed interest on each of the aforesaid sums received by *W. & F.* on the sales of lots, from dates of sales respectively. The jury found generally in favor of *Hersey*, for \$403.07, for which judgment was given, and a decree was entered that *Williams* and wife reconvey to *Hersey* the unsold lots described in the deed first mentioned. (It is evident that the jury, under the instructions of the court, did not allow interest in favor of either party.) *W. & F.* bring the case here on error. The instructions and proceedings complained of are fully stated in the opinion.

Horton & Waggener, for plaintiff in error.

H. & L. Cooper, and *A. J. Banta*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: The defendant in error raises the question, that a certain portion of the transcript filed in this case, and claimed to be a bill of exceptions, is not a bill of exceptions, and is not part of the record of the case. The ^{1. Bill of exceptions.} plaintiffs in error make no reply thereto. Said supposed bill of exceptions commences with the words, "Be it remembered," etc., and then includes various proceedings of the court below, and rulings to which the plaintiffs in error, defendants below, excepted, and then concludes with the following words: "The defendants therefore ask that this their bill of exceptions may be signed by the judge and made a part of the record in this case, which is accordingly done." Then immediately following these words, and on the same piece of paper, comes a certificate, purporting to be a certificate of the judge and signed by the judge, certifying to the correctness of the matters and things previously set forth in the foregoing paper. The judge does not in his certificate call the paper a bill of exceptions, nor does he in said certificate order that it be made a part of the record. But still, as he knew what it was intended for, and approved it and signed it, we think it should be considered as a bill of exceptions, and as a part of the record in the case. Considering it then as a part of the record, does the record show any error in this case? In considering this question we shall follow the brief of plaintiffs in error.

We perceive no substantial error in the first instruction given by the court to the jury; and the plaintiffs in error have not pointed out to us where or how it could possibly prejudice their substantial rights.

We do not think the court erred by giving the second instruction to the jury. It reads as follows: "Interest cannot be ^{2. Interest on running account.} claimed on an open and running mutual account except by an agreement of parties." It would be strange if each item of an open, running, long-continued, mutual account should separately and on each side draw interest

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from the earliest inception of each respectively until paid. It would even be strange if the ever-varying balances due on such an account should draw interest without any agreement therefor. We do not think that the statute provides for any such interest. The statute, (Laws of 1871, page 250,) does provide however, that "money due on settlement of accounts from the day of liquidating the same and ascertaining the balance," shall draw interest. And the statute also provides, that "money due and withheld by an unreasonable and vexatious delay of payment or settlement of accounts," shall draw interest. But the statute nowhere provides that where there has been no settlement, and no delay of settlement by either party, and the account is mutual, and still open and running, that the various items, or ever-varying balances on either side, shall draw interest. The plaintiffs in error claimed \$26 as interest; and the judgment of the court below could easily be modified to that extent, if we thought the foregoing instruction erroneous; but we do not think that it is erroneous.

It was not error for the court to exclude certain evidence which was attempted to be introduced for the purpose of proving the value of certain land, and which merely tended to prove that two certain men at a previous time appraised said land at a certain amount. Said evidence was not the best that could be procured, and was in its nature, hearsay. Better evidence was in fact introduced on the trial.

We think there was no error in "refusing to give other instructions asked for by the plaintiffs in error." There was only one instruction refused, and we think that all that was proper to be given was substantially given in other instructions.

The judgment of the court below will be affirmed.

All the Justices concurring.

1. Proof of
value.

ISRAEL NICKLISSON v. LUCY F. HOLMAN *et al.*

1. PETITION; *Insufficiency; Judgment—Trial—Evidence.* Where no objection is made to the petition in the court below, and no special findings are asked for by either party, and the court finds generally in favor of the plaintiff and against the defendant, and judgment is rendered accordingly, the supreme court will not disturb the judgment, because of any supposed insufficiency of the petition or of the evidence, if, by a liberal construction of the petition and of that portion of the evidence which tends to sustain the judgment, it is found that the petition and evidence are sufficient to sustain and uphold the judgment. [*Brenner v. Weaver*, 1-488; *McBride v. Hartwell*, 2-411; *Hale et al. v. Johnson et al.*, 6-137; *Greer v. Adams*, 6-203; *Moore v. Wade*, 8-380; *Mitchell v. Milhoan*, 11-625; *Polster v. Rucker*, 16-116; *Moody v. Arthur*, 16-419.]
2. PRINCIPAL AND AGENT; *Knowledge of Agent.* In law, whatever comes to the knowledge of an agent comes to the knowledge of the principal; and whatever is done by an agent within the scope of his agency, is done by his principal. The agent, with reference to third persons, and within the scope of his agency, is, to all intents and purposes, the principal. [*Hardten v. State*, 32-639; *McCubbin v. Graham*, 4-398; *Swenson v. Aultman et al.*, 14-278; *Perry v. Jones*, 18-552; *Hannon v. Houston*, 18-561.]
3. SALE OF LAND—*Contract—Conveyance; Presumption.* Where a sale and conveyance of real estate is made, and all is done within fourteen days, it will be presumed, in the absence of anything to the contrary, that whatever operated to produce the sale, operated to produce the deed.

Error from Franklin District Court.

THE facts, and the errors complained of, are sufficiently stated in the opinion. *Holman and Holman*, as plaintiffs, had judgment at the November Term 1874, and *Nicklisson*, defendant, brings the case here on error.

J. W. Deford, and *B. C. Whitford*, for plaintiff in error.

Benson & Parkinson, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by Lucy F. Holman and her husband O. Holman against Israel Nicklisson, to set aside a certain sale and conveyance of real estate made by them to him. The title to said real estate was in Mrs. Holman, and she through her agents C. Holman and J. R. Hibbard

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sold the same to said Nicklissan, and then she with her husband executed a proper deed for the premises to Nicklissan. The action was tried by the court, without a jury. The court found generally in favor of the plaintiffs, and against the defendant, and judgment was rendered accordingly, and the defendant brings the case to this court. The principal objections urged in this court to the proceedings in the court below are, that neither the petition below nor the evidence is sufficient to sustain the judgment. No objection was made to the petition in the court below; and neither party asked the court to find otherwise than generally. Therefore, unless we should find some fatal defect in the petition, or the evidence, it would be our duty to affirm the judgment. If by a liberal construction of the petition, and of that portion of the evidence which tends to sustain the judgment, we should find that they are sufficient to sustain and uphold the judgment, then it would be our duty to say that no substantial error was committed in the case. And so construing the petition and the evidence, we think they are sufficient. The evidence is probably weakest in showing that the defendant made false and fraudulent statements, and that the plaintiffs relied upon the same, and were thereby induced to make said sale and conveyance. But as the court below found upon these matters, as well as upon others in the case, in favor of the plaintiffs and against the defendant, and as there was some evidence to support all these findings, and as such findings are findings of fact, and not of law, we are not authorized, merely because of such weakness of evidence, to reverse the judgment of the court below and grant a new trial. Within the rules heretofore enunciated by this court, we think the evidence was sufficient.

The alleged false and fraudulent statements were however not made directly to Mrs. Holman, but were made to her agents, C. Holman and J. R. Hibbard; and it is now claimed that such statements were never communicated to her. Whether this is true or not, as a fact, it is not true in law. In law, whatever comes to the knowledge of an agent, comes to the knowledge of his principal; and whatever is done by an agent, within the

Gamble v. Hodges.

scope of his agency, is done by his principal. The agent, with reference to third parties, and within the scope of his agency, is to all intents and purposes the principal. Whatever Nicklissson said to Mr. Holman and Hibbard affecting the negotiations, he in law said to Mrs. Holman. But it is further claimed that it was not sufficiently shown that the effect of said statements was still operating on the minds of plaintiffs when they executed said deed. We think it was. The negotiations commenced about December 20th 1873, and ended January 3d 1874, when said deed was made, occupying about fourteen days. And the whole of these negotiations from the beginning to the end, including the sale and the deed, were merely parts and portions of only one and the same transaction. Whatever operated to produce the sale, it will be presumed, in the absence of anything to the contrary, operated to produce the deed, although the deed may not have been executed on the same day the sale was made. There was not a particle of evidence tending to show that the effect of said statements had ceased to operate on the minds of the plaintiffs when they executed said deed. We must therefore infer that the execution of said deed was induced by said alleged false and fraudulent statements.

The judgment of the court below will be affirmed.

All the Justices concurring.

EBENEZER J. GAMBLE V. W. B. HODGES.

ASSIGNMENT OF ERROR; When Judgment will be Affirmed. Where the only assignment of error is, that the the judgment was given for the defendant when it ought to have been given for the plaintiff, and the findings are sufficient to sustain the judgment, and seem to be correct, and no motion was made to set aside the findings, or for a new trial, and no exceptions were taken by the plaintiff to any ruling, finding or decision made in the case, the judgment of the court below must be affirmed. [*Brown v. Rhodes*, 1-359; *Green v. Dunn*, 5-262.]

Error from Cowley District Court.

REPLEVIN. The material questions are stated in the opinion. Trial, and judgment for defendant, at October Term 1874. The plaintiff brings the case here on error.

Pryor & Kager, for plaintiff

J. M. Alexander, for defendant.

The opinion of the court was delivered by

VALENTINE, J.: This was an action of replevin, brought by Ebenezer J. Gamble against W. B. Hodges. The judgment in the court below was in favor of the defendant and against the plaintiff, and the plaintiff now brings the case to this court. He assigns for error in this court, "That the said judgment was given for the said Hodges when it ought to have been given for the said Gamble, according to the law of the land." (See *Brown v. Rhodes*, 1 Kas. 359; *Green v. Dunn*, 5 Kas. 262.) This is the only error assigned. The case was tried in the court below, without a jury. The court found generally in favor of the defendant and against the plaintiff in the following words: "The said court, after hearing the evidence and the arguments of counsel, doth find that, at the time of the commencement of this action the right of possession of said property was in the defendant, and that the value of said property was the sum of \$108." No motion was made to set aside this finding, or for a new trial. No exception was taken thereto; and we are inclined to think it is correct. It is certainly sufficient to sustain the judgment. "The defendant excepted to the judgment"—in these very words. But the plaintiff took no exception to the judgment, or to any ruling, finding, or decision made in the case.

The judgment of the court below must be affirmed.

All the Justices concurring.

DAVID H. MITCHELL v. WASHINGTON D. WOODS.

TRESPASS; Injured Party, wrongfully in Possession; Damages. Where W. is wrongfully in possession of a building and is doing business therein, and M., who is rightfully entitled to the possession of the building, irregularly ousts W. therefrom, W. is not entitled to recover damages for the loss of the prospective profits which he might have made had he been permitted to carry on his business in said building. [*Fitzpatrick v. Gebhart*, 7-46; *Tallman v. Jones*, 13-448; *Wallace v. Hall*, 22-276.]

Error from Leavenworth District Court.

TRESPASS, brought by Woods. The facts are fully stated in the opinion. Trial at the November Term 1874. Verdict and judgment for plaintiff for fifty dollars damages. Defendant *Mitchell* brings the case here on error.

F. P. Fitzwilliam, for plaintiff in error.

Taylor & Gillpatrick, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action for damages, brought by Washington D. Woods against David H. Mitchell, for unlawfully removing the plaintiff and his property from a certain building occupied by him as a livery stable. Both parties claimed to be entitled to the possession of the building, and each claimed the same in his own right. The facts of the case, so far as it is necessary to state them, are substantially as follows: The lot upon which the building stood belonged to John A. Halderman. Halderman leased the same to A. T. Kyle & Co. The firm of Kyle & Co. was composed of A. T. Kyle and Nannie E. Woods, the wife of Washington D. Woods. On October 5th 1873, the firm of Kyle & Co., and each member thereof, with the consent of Halderman, assigned said lease to Mitchell; but by an agreement with Mitchell said firm was to occupy said premises upon certain terms and conditions, which terms and conditions were however never performed. W. D.

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Woods the general agent of the firm, did nearly all their business, and was perfectly cognizant of all the foregoing facts. On November 5th 1878, Nannie E. Woods attempted, for and in the name of the firm of Kyle & Co., to sub-lease said premises to her husband, said W. D. Woods. But this was done without the consent or knowledge of either Kyle or Halderman. It was wholly outside of the scope of the copartnership business; and by the terms of the copartnership organization Mrs. Woods had no authority to transact any business for the copartnership. W. D. Woods and A. T. Kyle were the only persons authorized to transact business for the copartnership. Up to November 14th 1878, W. D. Woods continued to recognize Mitchell's rights in and to said premises. On December 17th 1878, Mitchell gave notice to said firm and to each member thereof, and to W. D. Woods, to vacate said premises. On December 22d 1878, Mitchell commenced an action of forcible detainer against the firm and each member thereof, but not against W. D. Woods, to oust them from the premises. The action terminated in favor of the plaintiff, and against the defendants. W. D. Woods was present at the trial, and was cognizant of all the proceedings. A writ of restitution was then issued to an officer to restore the premises to Mitchell. The officer and Mitchell then proceeded to execute the writ, and then and for the first time so far as Mitchell knows, W. D. Woods claimed the possession of the property in his own right. Up to November 5th 1878, W. D. Woods had possession of the property as the agent of Kyle & Co., and Mitchell supposed he still occupied the property in that capacity. The officer, at Mitchell's instance, then executed the writ by removing all the property found on the premises, and giving to Mitchell the possession of the premises. W. D. Woods then commenced this action against Mitchell for unlawfully removing him and his property from the premises. Now, whatever may have been W. D. Woods' right to the premises as against his wife or Kyle, or Halderman, or the firm of Kyle & Co., we think it must be conceded that he had no right thereto as against Mitchell. Even if we should consider

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the judgment in the forcible detainer case as void, and the lease from Woods' wife to himself as valid, still, under the agreement between Mitchell and Kyle & Co., (as its condition had previously been broken,) Mitchell was entitled to the possession of the property as against Kyle & Co. and all persons holding under them. In fact, so far as anything is shown in this case, Mitchell was entitled to the possession of the property as against all the world. Now Woods, at most, obtained only the rights of Kyle & Co. by virtue of the lease from his wife to himself; and he was perfectly cognizant of all the rights of Mitchell. Woods therefore had nothing but the mere naked possession of the property, without right thereto as against Mitchell; and Mitchell had the right thereto, but without the possession. Both claimed the right of possession, and Mitchell believed that his right gave him the right to take possession. But as the writ did not run against Woods, and as Woods was then claiming the property in his own right, and not as agent for Kyle & Co., Mitchell was probably mistaken. It is possible however that this whole claim of Woods was a mere sham and trick. There was no apparent change in the business, and although Woods claims that his wife executed said lease to him on November 5th 1873, yet he recognized Mitchell's rights down to November 14th. We think the court below erred in instructing the jury that they might allow Woods damages for injuries to his business and for loss of profits therein. He had no right as against Mitchell to carry on business in that building; and by doing so he committed a wrong upon Mitchell's rights. Is he entitled to recover for the loss of the fruits of such wrong? Is he entitled to recover for the loss of the prospective profits of his own intended wrongdoing? Is he entitled to be paid for his own intended wrongdoing? Can he found a right of recovery upon any such intended wrongdoing? And will he recover from the person against whom he intended to commit the wrong? Is he entitled to recover from Mitchell all that he might have made by carrying on a business in violation of Mitchell's rights? The court below limited the amount that he might recover as fol-

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lows: "If he resumed business at some other place, and realized profits there in his business, he cannot keep those profits and at the same time recover *the full amount* he might have been making at the old stand. He could only recover the difference in that amount." We do not think he was entitled to recover any prospective profits which might have resulted from his own intended wrongdoing. The most that he could recover would be nominal damages for the irregular ouster, and actual damages for the actual injuries to his property. There was no injury done to his person. And he had no right to recover for the use of the building, a thing which he had no right to use at all.

The judgment of the court below must be reversed, and cause remanded for a new trial.

All the Justices concurring.

A. T. & SANTA FE RAILROAD CO. v. COMM'RS OF JEFFERSON CO.

1. MUNICIPAL BONDS, IN AID OF RAILROADS; *Curative Act of 1868*. The curative act of February 25th 1868, (Gen. Stat., p. 892,) was intended to cure irregularities in the proceedings had in any county on the question of county subscription to railroads, and to remove all technical hindrances to the carrying into effect of the will of the majority. It was not designed, and did not have the effect, to legalize illegal votes, or to authorize a county subscription of stock and issue of bonds without the vote of a majority of the qualified electors of the county voting upon the question. [*Troy v. R. R.*, 11-519; *Lewis v. Comm'rs*, 12-186; *R. R. v. Comm'rs Miami Co.*, 12-230; *R. R. v. Fort Scott*, 15-436; *R. R. v. Comm'rs Anderson Co.*, 16-302; *Leavenworth Co. Comm'rs v. Higginbotham*, post, 62; *Comm'rs Anderson Co. v. R. R.*, 20-534; *R. R. v. Comm'rs Phillips Co.*, 25-261; *Turner v. Comm'rs Woodson Co.*, 27-314.]
2. — Upon the testimony presented in this case it is apparent, and the court finds, that a majority of the qualified electors of Jefferson county voting upon the question did, on the 7th day of January 1868, vote against subscribing to the capital stock of the Atchison, Topeka & Santa Fé Railroad Company.

Original Proceedings in Mandamus.

THIS action was commenced in this court in September 1872. On the return of the alternative writ of mandamus, the defendant moved to quash the writ because the action was brought in the name of "*The State of Kansas*," as plaintiff, instead of the *Railroad Company*, the real party in interest. This motion was sustained at the January Term 1873; (11 Kas. 66.) The proper amendment being made, the defendants answered, setting up several defenses. One of these defenses was *res adjudicata*—alleging and setting forth a decree rendered by the United States circuit court for the district of Kansas at the May Term 1870. The plaintiff moved to strike this defense from defendants' answer, and said motion was heard and decided, and sustained, at the July Term 1873 of this court; (12 Kas. 127.)

The action is brought to compel the defendants to issue and deliver to plaintiff the bonds of Jefferson county, to the amount of \$150,000, in payment of the subscription of that county for that amount of the capital stock of the plaintiff company. The petition for mandamus alleges that on the 6th of December 1867, the board of county commissioners of Jefferson county made an order submitting to the voters of the county the question of subscribing for the stock of the plaintiff to the amount of \$150,000, and issuing the bonds of the county in payment therefor; that on the 7th of January 1868, the election was held, that a majority of the votes cast were in favor of the proposition submitted, and that the county commissioners duly met, canvassed the vote, and declared the result, (showing that 862 votes had been cast in said county in favor of said proposition, and 776 against it—or, a majority of 96 in favor of the subscription;) that on the 14th of January 1869, the county commissioners, by their proper officers, made a subscription in writing for the stock in accordance with the terms and conditions mentioned in the proposition submitted at said election, which subscription was reported by the county board, and by it approved; that on the 17th of

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February 1869, said subscription was duly accepted and received by the plaintiff, and thereupon the company entered upon the work of constructing its road, and in all respects has fully complied with the requirements of law, and the terms and conditions of the subscription made by the county. The petition also alleged that the plaintiff's railroad was completed through Jefferson county in May 1872, and that on the 5th of June thereafter a certificate of the chief engineer of the completion of said road was duly filed with the county clerk, as required by law. On the 17th of June 1872, the plaintiff tendered the stock to the county commissioners, and demanded the bonds of the county, and the commissioners refused to accept the stock or to issue the bonds. Upon this state of facts the plaintiff commenced this action. As a defense to plaintiff's action, the defendants allege that the election-order of 6th December 1867 was made without the necessary and proper petition therefor; that more than a hundred illegal and spurious votes were cast in favor of the proposition at the election of 7th January 1868; that a majority of the *legal* votes cast at said election were against making the subscription and issuing the bonds; and that the subscription to the stock of said *Railroad Company* made by order of said county commissioners on the 14th of January 1869, was wholly without authority of law, and void.

Upon the trial of the issue so joined, a vast amount of testimony was taken and submitted, the character of which is sufficiently stated in the opinion, *infra*. The briefs and arguments of counsel are voluminous, but being mainly upon questions of fact, they are omitted.

John Martin, and *M. H. Case*, for plaintiff.

Thacher & Stevens, *Keeler & Gephart*, and *L. A. Myers*, for defendants.

The opinion of the court was delivered by

BREWER, J.: This is a proceeding in mandamus, brought originally in this court, to compel the issue of one hundred

and fifty thousand dollars of the bonds of defendant in payment of a subscription of a like amount of the capital stock of the plaintiff. The vote on the question of subscribing this stock and issuing these bonds was had on the 7th of January 1868, and the canvass by the county commissioners showed a majority in favor of the subscription and the bonds. The defendant challenges that vote, claims that a large number of illegal votes were cast, and that a majority of the qualified electors voted against the subscription and the bonds.

Two principal questions are presented, one of law and the other of fact. The question of law arises on the force and effect to be given to the curative statute of 1868; and this, if resolved in favor of the plaintiff, will waive the necessity of any inquiry into the question of fact. 1. Municipal bonds in aid of railroads. Curative act of 1868. Sec. 1 of the act referred to, an act approved February 25th 1868, and by its terms applicable to all cases in which the election was held prior to January 21st 1868, reads as follows:

"Whenever a majority of the persons voting at any election called by the board of county commissioners of any county have heretofore voted in favor of subscribing stock and issuing bonds to any railroad company or companies, the board of county commissioners of such county may subscribe to the capital stock of such railroad company or companies to the amount and on the conditions specified in the orders of such board of county commissioners in such cases, and pay such subscriptions by issuing, to each company, bonds of such county, at par, * * * *whether such orders and elections, or either of them, have been made in compliance with the statutes in such cases made and provided, or not,* or whether the proposition submitted at the election had was for the subscription of stock and the issuance of bonds to one or more railroad companies." (Gen. Stat. 892.)

The contention of plaintiff is, that this act in effect legalizes all votes put in the ballot-box; that the phrase, "persons voting," includes *illegal*, as well as *legal* votes; and that it was the intention of the legislature to preclude all inquiry back of the returns. On the other hand, defendant insists that the intention and effect of this act were simply to cure all defects in

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the election proceedings, to uphold the will of the majority, and prevent its defeat by any technical omission. The argument of plaintiff is plausibly and forcibly put, by its learned counsel. He says that the legislature had unquestioned power to authorize county boards to subscribe for stock in railroad companies, and issue county bonds in payment therefor, without first submitting the question to a vote of the people, and cites in support thereof, *McCulley v. The Mayor, &c.*, 3 Head, (Tenn.) 317; *Shelby Co. Court v. C. & O. Rld. Co.*, 8 Bush. (Ky.) 209; *McMillen v. Boyles*, 6 Iowa, 304; *McMillen v. The Co. Judge*, 6 Iowa, 391; *K. C. St. J. & C. B. Rld. Co. v. The Aldermen, &c.*, 47 Mo. 349; *State, ex rel. v. Nodaway Co.*, 48 Mo. 389; *Napa V. Rld. Co. v. Napa Co.*, 30 Cal. 435. And proceeding with his argument, counsel for plaintiff states, that—

“Prior to this curative act of 1868, the state had run wild on the railroad question, and a mania had seemed to seize the public mind, that railroads were projected in all directions, that every town and village was to be advanced immediately to the rank of a city by means of railroads, and every community to grow rich from them; that this excitement necessarily led to excesses and extravagances on the part of the people of counties, cities and townships, and bonds were recklessly voted to imaginary and worthless railroad enterprises. The legislature was largely influenced by this so-called ‘spirit of enterprise’ that pervaded the whole body politic. The result was, that bad and carelessly-framed laws were passed on the subject. No attempt was made to restrain this feeling, by wise and wholesome legislation. Upon the contrary, it was encouraged. New plans and schemes were devised by each succeeding legislature to encourage what was delusively termed ‘the spirit of enterprise,’ ‘the grand policy of public improvement,’ and ‘the development of the wonderful resources of the country.’ Under this unnatural system, and a disastrous public policy, much had been and was done. In many instances, capitalists, acting in perfect good faith, had been induced to invest their money and property in these railroad enterprises, and had been encouraged and induced to do so by the anxiety, the pledges and promises of the people, individually and in their corporate and representative capacities. Under the pressure of excitement and anxiety on the subject of rail-

roads, it is unquestionably true, that many irregularities occurred in calling and conducting the elections. It is equally clear that illegal and fraudulent voting occurred at very many of these elections. In fact, a fair and honest bond or county-seat election is of rare occurrence; and the same statement is unfortunately true of nearly all elections. We may and do regret this fact, but it is a fact, nevertheless. We do not justify it. It is a wrong to the public, and to individuals, to be condemned at all times and under all circumstances. The people knew of the existence of these irregularities, and of such illegal voting; the men who had invested their money in railroads thus created, knew it; the legislature knew it. * * * Every thoughtful man knew that this unreasonable excitement on the subject of building and aiding railroads must end sometime, and that when the end should come, that the very men who had been the most active promoters of it would be the loudest and most violent in their efforts to undo their work. One extreme follows another. The most radical advocates of a popular proposition of to-day, are the most radical opponents of that same proposition as soon as it becomes unpopular. They are the quickest to find fault with, and condemn the very acts that they were guilty of in the midst of this popular excitement. They accept cheerfully the benefits that have accrued to them and to the public as the results of the excitement, but are ready to doubt the morality and question the propriety of their former actions in producing these benefits. The truth of this proposition, in its full force, is clearly and forcibly illustrated by the evidence of witnesses in this action. The legislature knew that after the roads were built, and this popular excitement had subsided, and the public were in the enjoyment of all the benefits accruing from such enterprises, that pay-day must come; that in many cases the people would be doomed to disappointment in their estimate of the benefits and advantages that would result from these railroad enterprises, and that when they were confronted with these disappointments, and pay-day should come, and even after they had obtained the real advantages of a good railroad, that they would seek out some advantage, real or technical, to avoid a compliance with their contract, and prevent the payment of their debt, and that every failure to fully realize their expectations would be attributed to some fault of the railroad company, and that they would seek every possible advantage or opportunity, fair or unfair, to avenge their disappointments, and avoid the very burdens that they had imposed upon themselves. Having a full knowledge

of the truth of all these matters, and for the purpose of preventing controversies respecting the legality and regularity of such elections, and of the persons voting thereat, and as a matter of sound public policy, the legislature enacted the law now under consideration.

"Now, in view of the condition of affairs existing at the time of the passage of this act (of February 25th 1868,) is it not clear that it was the intention of the legislature to make valid and binding *all contracts* and agreements thereafter made, and all proceedings theretofore had under the laws then in force, whether the orders and elections out of which such contracts, agreements and proceedings grew had been in compliance with the statutes in such cases made and provided, or not? We think it was. If this act was not intended to do the things expressed in it, then it becomes a dead letter, and is incapable of construction or any rational solution. If, however, it means what the language used clearly imports, it is immaterial whether a petition asking for the election was ever presented—even if it was required, which we deny. Is it material whether the judges and clerks were sworn? Is it material whether the election proclamation was published one or twenty days before the election, or whether it was published at all? Is it material whether the election returns were regular, or irregular, or whether any returns were made at all? Is it material whether one, or twenty, propositions for taking stock in as many different railroads were submitted at the same election? Is it material whether the persons who voted at such election were *legal*, or *illegal* voters? Are not all these matters involved in the *legality and regularity of the election*, and the question whether the election had been in "compliance with the statutes?" If illegal votes were cast at such election, would it be in *compliance with the statute* in such case made and provided? Certainly not; but it would be a clear violation of the law on that subject. From this fact does it not clearly follow, that *illegal voting* was one of the matters that was intended to be remedied by this act—one of the things that had been done *not in compliance*, but in violation of the statute respecting such elections, and therefore made valid? It was illegal acts, and illegal acts of this kind, that the act in question was intended to correct and make valid. This view of the case is strengthened by the very first lines in the act, as follows: 'Whenever a majority of the *persons voting* at any election called by the board of county commissioners of any county have heretofore voted in favor of subscribing stock,' etc.

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Does not the use of the phrase, 'persons voting' at such election, have precisely the same effect as if the act in express terms *legalized all votes put in the ballot-box* at such election? Does it not mean exactly that? and is it not clear, that the legislature intended to do precisely that thing? We submit that this is true, and that the legislature had the power to do this, if it had the power to legalize the election in any other respect."

We have made this lengthy quotation from the brief of counsel, as showing in all its fullness and strength the argument in favor of the construction put upon the law by the plaintiff. To that construction we cannot assent, and will endeavor to give briefly our reasons therefor. Without entering into any discussion of the question, whether the legislature has power to authorize a county to subscribe to the capital stock of a railroad company without the previous assent of a majority of the electors, and conceding for the purposes of this case that it has, it is still a fact that it is against the course of our legislation on the subject. Uniformly the legislature has deemed it right, if not essential, that they who must bear the burden and pay the taxes should decide the question of incurring the liability. We need scarcely add, that there is a justice in this course which commends it to every one. We refer to the principal statutes: Laws 1864, p. 35, an act to enable certain counties to subscribe to the capital stock of two railroads, §1. Laws 1864, p. 69, an act authorizing Wyandotte county to subscribe to the stock of the U. P. Railway Co., §8. Laws of 1865, p. 41, an act authorizing counties and cities to issue bonds to railroad companies, §§1, 3 and 4. Laws 1866, p. 72, an act amending last act, §1. Laws 1867, p. 117, an act for incorporation of cities of the second class, §32. Laws 1868, p. 203, general incorporation act, §51. Laws 1869, p. 103, amendment of last act, §1. Laws 1870, p. 189, an act to enable townships to subscribe to the capital stock of railroad companies, §5. Laws 1871, p. 134, an act concerning cities of the third class, §63. Laws 1872, p. 110, an act authorizing cities and townships to issue bonds for bridges, railroads, etc., §§3 and 9. Laws 1872, p. 210, an act concerning cities

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of second class, § 63. Laws 1874, p. 46, an act amending act of 1872, authorizing cities and townships to issue bonds for bridges, railroads, etc., § 10. Laws 1875, p. 68, an act authorizing the city of Marysville to issue bonds in aid of railroads, § 3. Laws 1875, p. 190, an act authorizing Marysville and other townships to issue bonds in aid of railroads, § 1. Laws 1876, p. 212, an act to enable counties, towns and cities to aid railroads, § 2. Laws 1876, p. 218, an act to enable counties, towns and cities to aid railroads, § 5. There are also several acts authorizing counties and cities to issue bonds in lieu of outstanding railroad-aid bonds, or for funding or compromising existing railroad-aid indebtedness. Many even of these require a previous vote as a condition of the issue of the funding bonds, though in some cases the legislature seemed to think the vote authorizing the indebtedness originally was a sufficient assent of the people. As against this, it is doubtless fair to state, that there were some charters granted by the legislature of the territory to railroad companies which seem to embody authority to counties and cities to subscribe to the stock of the companies without any prior vote of the people. Laws 1855, p. 907, § 17; p. 912, § 14. And that in 1873 the legislature passed an act authorizing Toledo township, Chase county, to issue five thousand dollars of its bonds "for the purpose of building a side-track and depot on the line of the A. T. & Santa Fé railroad, * * * for the use and benefit of the people of said township;" (Laws 1873, p. 95, § 1;) and also an act authorizing cities of the first class to purchase or condemn sites for depots "to be held for the common use of all railroad companies now or hereafter connecting at such cities," and to issue their bonds therefor. These two acts are scarcely exceptions to the general course of legislation, as in each case it would seem that that for which the bonds were to be issued, was to be and remain the property of the municipality, and for the especial use of its citizens. And the private charters were granted long before railroad building commenced in this state, or the attention of the legislature was seriously called to the matter. So it may fairly be said, that the course of our

legislation has uniformly been to require the assent of the people as a condition of the burden of railroad-aid bonds. It would seem therefore that before a law passed in the very midst of this legislation, and while the subject was uppermost in the thoughts of all, should be construed as conflicting with the constant rule, the intention to deviate therefrom should be manifest and clear. Again, while the legislature might, in view of the condition of affairs so forcibly and graphically pictured by counsel, wisely and justly so legislate as to guard the railroad companies against loss through any mere irregularities or omissions in the proceedings of the county officials, and to secure to them all that the majority of the voters had agreed to give them, it would seem equally wise and just that the people of every community should be protected from the imposition of burdens which they had actually refused to assume, and for which an apparent majority had been secured only by illegal and fraudulent votes. While any legislation may in particular instances work injustice, yet the spirit, the intent, the natural operation of every law should be to secure equal justice to all parties to be affected by it. And surely, it is justice to companies and people alike, if the former receive all that the latter agreed to give, and the latter are protected from all burdens which they have refused to assume. Any legislation which aims at that, and attempts to remove all technical obstructions thereto, aims at justice. Any which aims to the one side or the other, is unequal and partial.

But turning to the act itself, we think the true, the natural interpretation of its terms is in harmony with the course of our legislation, and the dictates of justice. The language is, "whenever a majority of the persons voting at any election * * * have heretofore voted." This defines and describes the cases to which the law may apply. Now, the term "persons," standing by itself, is of course broad enough to sustain the construction claimed by counsel. It includes all, infants and adults, males and females, white and colored, citizens and aliens. But the word does not stand alone. The only persons

referred to are "persons voting," and *voting* is a legal act. "Voting" is not the mere physical act of depositing a piece of paper in a box. The physical act must be performed under certain conditions, and with certain concomitants, to render it voting. There must be an election held under some authority of law. The time and place must in some way be legally designated. Election-officers, acting under legal warrant, must be present to receive the votes, and decide as to the qualifications of voters. The question to be decided, or the offices to be filled, must be named by law. The person voting must possess certain qualifications of age, sex, citizenship, and residence, as provided by law. All these must exist, and attend the physical act of depositing the paper in the box, to make it voting—so that when the statute speaks of "persons voting," it describes those who are possessed of the legal qualifications to perform the physical act of depositing their ballots in the box under the circumstances and conditions prescribed by law. Only *electors* vote. Hence, when the statute names "persons voting," it means those electors who at the election named have exercised their right of voting. That the language used, strictly construed, implies this, will scarcely be questioned. But the claim is, that some who are not electors do actually vote; that their votes are counted; and that hence a statute speaking of "persons voting," means all whose votes are received and counted, whether electors or not. To this we reply, that it is a general rule of construction, that when the law speaks of an act done or to be done, it implies that it is *legally* done or to be done. When it speaks of an election, it means a *legal* election. When it speaks of a vote, it means a *legal* vote. When it names a class or body of persons, it implies that the persons *truly and rightfully* belong to that class or body. When it names electors, it means *legal* electors. When it speaks of a legislature, it means a *legal* legislature. Again: While it is true that votes are counted as votes which are cast by persons not entitled to vote, it is not because the law considers them rightfully there, but because through the imperfection of its machinery it has

failed to eliminate the false from the true, and so is bound to assume all as true. Whenever it is able to detect the false, it rejects it. The election board is created in the first instance to judge of the qualification of those offering to vote, and to prevent those not qualified from exercising a right belonging only to those qualified. The law considers the action of the board as evidence that they whose ballots they received were legal voters, *prima facie* evidence only it is true, but still in the absence of other testimony conclusive. It therefore speaks of those persons as "voters," and the ballots they cast as "votes." But aware of the liability of this board to err, or be imposed upon, it provides a way of further inquiry; and if upon such further inquiry it appears that a ballot has been received from one not entitled to vote, it rejects that ballot, and no longer calls it a vote, nor the person casting it a voter. It treats it as though it had never existed. It is like a deed void upon its face, no deed at all. So that, when it speaks of a "majority of the persons voting," it means a majority of those rightfully voting. When it says that the person receiving a majority of the votes cast at an election shall be elected, it means a majority of the votes rightfully cast. The canvass may give one result, and if there be no contest that result determines what votes were rightfully cast. A contest may give another result, and this result is a more conclusive determination of the votes rightfully cast, and controls the result of the canvass. And yet the law, speaking of a majority of the votes cast, has reference all the while to those votes which the processes of the law determine are rightfully cast. It implies legality. It assumes truth. If it intends to class the legal with the illegal, to mix the false with the true, it will use language not merely broad enough to include both, but either necessarily including both, or plainly indicating the intention to mingle both. But again, the latter portion of the section shows what was intended to be remedied by the act—what omissions and errors it sought to cure. If a majority voted in favor of the subscription, it might be made, whether the "orders and elections, or either of

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them, have been made in compliance with the statutes in such cases made and provided, or not, or whether the proposition submitted at the election had, was for the subscription of stock and the issuance of bonds to one or more railroad companies." So far as this last proviso is concerned, it refers to a matter upon which it was known there had been conflicting decisions, and was intended to prevent controversy in the courts thereon. (See the discussion of this question, and the authorities cited, in *Lewis v. Bourbon Co.*, 12 Kas. 213.) It bears upon the question here, only as indicating what matters were in the thought of the legislature, and the character of the defects intended to be cured. The first proviso is alone material—though the "orders and elections were not made in compliance with the statutes in such case made and provided." The qualifications of electors were prescribed by the constitution, not the statutes. This is an act legalizing and validating elections. Did it intend to legalize votes which the constitution forbade? Was the scope and purpose of this language to ignore the constitutional qualifications of electors, or simply to obviate any defects in the processes of the elections which the legislature had itself prescribed? Plainly, as it seems to us, the latter. It was intended to cure any irregularities in the proceedings, to make good any defects or omissions therein; and beyond that, left the original statutes authorizing these bond elections in full force; and by them the question of subscribing for stock and issuing bonds was to be determined by the qualified electors of the county, city or town. We had this act presented to us in the case of *Lewis v. Bourbon County*, 12 Kas. 186, and the views we now express are those we then held.

We pass now to the other question, the question of fact; and that is, whether a majority of the legal votes cast at said election were in favor of the subscription. And here we are confronted by an immense mass of testimony—some record evidence, the oral testimony of three witnesses, and the depositions of three hundred and eighty witnesses. We have patiently and carefully gone through with

2. Majority vote
against issuing
bonds.

an examination of this testimony so far as it bears upon the election in Grasshopper Falls, and hastily looked through that concerning the election in Oskaloosa. Of course it will be impossible for us to refer to all this testimony in detail. We can only attempt to give some idea of its character, and then state the conclusions to which it has led us. A very full and accurate abstract and analysis was prepared by the counsel for defendant, and has materially lightened our labors in the examination of this volume of testimony. The result of the canvass as declared by the commissioners showed a vote of 862 in favor, and 766 against the subscription, or a majority of 96 in favor thereof. There is no testimony challenging the vote elsewhere than in the two townships of Grasshopper Falls and Oskaloosa. The return from the former township showed a vote of 447 in favor, and of 8 against the proposition. To this vote the bulk of the testimony has been directed. Three months prior to this election, and on October 1st 1867, a similar proposition had been submitted to the people of Jefferson county, and lost by a vote of 700 to 723. At that election the vote of that township had been 334 in favor and 12 against. At the intervening general election the vote on the various county officers had ranged from 278 to 285. On the 30th of September 1865, the vote on the question of issuing bonds to the plaintiff had been 180 for, and 8 against. The vote therefore as returned was 109 larger than at a similar election three months prior, and 170 above that of the regular county election two months prior, or a good deal more than half as large again. The two poll-books and returns were taken by one of the judges of the election and placed, one in his desk, he being the township trustee, and the other in the hands of the county clerk for the commissioners' canvass on the succeeding Friday. This canvass was made early Friday morning, and apparently with only the friends of the measure present. A few moments thereafter opponents came in, and complaining of the early canvass, asked to see the poll-books of Grasshopper township, but the county clerk's copy had disappeared. A

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subpcena was sent to the township trustee to bring the copy he had retained, and it also had disappeared. And for seven years both copies were securely hid. In the absence of the poll-books, and without any list of the supposed voters at that election, the defendant proceeded to take testimony showing the different tracts of land and town lots within the township, and the names of all qualified voters on those respective tracts and lots in January 1868. Finally, by some means not disclosed, one of the poll-books was secured by the defendant, and has been identified and introduced in evidence before us. One hundred and ninety-four of the names on this poll-book are challenged by the defendant, and testimony is offered tending to show that they were not the names of legal voters. Twenty are shown by positive testimony to have been minors—nine of them by their own oaths, three by the testimony of their fathers, one by the testimony of his brother, and eight by the testimony of other relatives and acquaintances. Fifty-seven are by equally positive and direct testimony shown to have been non-residents of the township. Three by their own testimony were colored men, and not then legal voters. Twenty-two testify that they did not vote at all, though their names appear on the poll-books, some of them declaring that they were out of the state at the time of the election. Between seventy and eighty of the names on the list are declared by more than a score of the citizens (who testify that they are well acquainted with all the people of the township, and have resided there three years before and after this election,) to be entirely fictitious, and that no such persons ever lived in the township. While the return shows only *eight* votes against the proposition, *twenty-four* whose names are on the poll-books testify that they voted upon that day against it. Besides this, there is a volume of testimony, and from many witnesses, showing in a general way, and without positively identifying persons and names, that boys, colored persons, and non-residents were voting, and that in many instances the same persons voted three or four times. Again, one of the judges

testifies that he was out of the election room several times during the day, and that on his return he saw one of the other judges calling off names from a book, and the third depositing ballots in the box, while the clerks at the same time were recording names. On the other hand, we have the testimony of the two judges and the clerks denying this positively, and denying that illegal votes were received or recorded upon that day, and denying any fraud or illegality in the election proceedings. The value of their testimony is much impaired by the contradiction it receives from record as well as oral testimony. We quote the following criticism from the abstract and analysis furnished by the defendant, which is fairly supported by the record:

"Hillyer, Gunn, Gaines and Whitman testify that no colored man voted at that election except David Smith; and Hillyer, Gunn and Whitman positively and specifically testify that neither Ewin Hedspeth, Johnson May, nor Monroe Tompkins voted at that election; and all of them testify that no boys under 21 years of age voted at that election to their knowledge; and Hillyer testifies positively that neither E. B. Northrup, A. W. Robinson, Wm. Johnson, W. R. Hogan, Walter Ferguson, John Marion, Wm. Gragg, jr., John Dodson, nor Wm. Dodson voted at that election. Gunn testifies that E. B. Northrup, A. W. Robinson, Wm. Johnson, A. Frazier, W. R. Hogan, Walter Ferguson, and John Marion did not vote to the best of his knowledge and recollection. Whitman testifies more positively that A. W. Robinson, E. B. Northrup, Wm. Johnson, Walter Ferguson and John Marion did not vote. The names of all these persons so named by Hillyer, Gunn and Whitman are on the poll-book. Gunn, Hillyer and Whitman all testify positively that S. B. Hogan did not cast votes for or in the names of James Gordon, John Gordon and William H. Mears; but the testimony of S. B. Hogan shows that he did cast these votes, and the names of the two Gordons and Wm. H. Mears are on the poll-book, and all three of them testify that they were not at the election and did not vote. Gunn, Hillyer and Whitman also testify positively that Daniel Weiser did not vote but once, and did not vote in the name of Luther Grigsby; but we have proved by Weiser himself that he voted three times, and cast one of

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his votes in the name of Luther Grigsby. The name of Luther Grigsby is found on the poll-book in the handwriting of said Whitman. In his testimony Whitman stated, as a reason for his positiveness, that said Grigsby was a relative of his wife, and frequently at his house, and he knew that he did not write Grigsby's name upon the poll-book. We also prove by W. A. Cowan and R. K. McCartney that said Cowan and Robert Riddle and T. H. Elliott cast votes in the names of J. H. Cowan, James Elliott and Martin Elliott; and we prove by Zach. Gragg that said Whitman cast a vote in the name of John Gragg; and we prove by W. H. Coffman that Henry Marion with said Hillyer's knowledge and consent cast a vote for Henry Coffman, and that Henry Marion cast a vote in the name of George Cain. We also prove other repeating at that election, all of which is generally and most of it specifically denied by plaintiff's witnesses; but the poll-book contains the names of the persons so voted for, and the persons are proven either to have been non-residents, or not to have voted at that election."

Other matters also appear in the record tending to weaken their testimony, which it is unnecessary to notice. There is also testimony tending to impeach in some degree the election at Oskaloosa, but into that we have not made very careful examination, for from the matters to which we have alluded we are convinced that there were more than enough illegal votes polled at Grasshopper Falls to have changed the result. We know that allowance must be made for the imperfections of memory, and that some of those who say they did not vote may in fact have voted as the poll-book indicates, and that some who testify that they voted against, may have forgotten, and really voted for the measure. But making allowance for all this, and still we must hold as we do. It does not seem probable that in a community no larger than this, seventy or eighty men could live and become qualified voters and still their very names be unknown to so many citizens, living so long, and by their business and habits so familiar, with the community, as are the witnesses in this case. The identification of so many individuals, and the proof of their want of qualification as voters, the general evidence of repeating, and ille-

gal voting, the marked increase of the vote over that of the two immediately prior elections, all point to an illegal vote largely in excess of the majority disclosed by the canvass. It is with no feelings of pleasure that we have examined the testimony in this case, or reached the conclusions we have stated. No thoughtful man can read the story of an election conducted with such flagrant disregard of law and right, and be indifferent. More than one-fourth of the entire vote is shown to have been illegal and fraudulent, and this not in one of the crowded wards of a populous city, where we must expect outrages on the purity of the ballot-box, but in a quiet country community. The fact alone carries its own comment, and speaks its own shame.

One single remark more, and we are done. Counsel speaks of the fact that the plaintiff has built its road through Jefferson county, and honestly and fairly performed its part of the agreement, and that good faith requires of the county like performance. It is a fact disclosed by the pleadings in this case, and indeed one of public knowledge, that the validity of this canvass was denied at the time, and that in a very few days proceedings were commenced in the United States circuit court to enjoin the commissioners from subscribing to the stock of the plaintiff and issuing its bonds therefor, and that such proceedings terminated in a perpetual injunction. (12 Kas. 127.) So that it cannot be said that the people waited quietly until the company had built its road, and then denied for the first time the validity of the canvass. They have contested it from the first, and the company has acted with full knowledge. While this fact does not bear upon the validity of the election, it does upon the good faith and conduct of the parties, and ought therefore to be stated.

The judgment will be entered for the defendant.

All the Justices concurring.

CHARLES E. MUSICK *et al.* v. JEROME BEEBE, *as Adm'r, &c.*

1. **ADMINISTRATORS' SETTLEMENTS; *Annual and Final.*** While all settlements of estates by administrators are in a certain sense judicial determinations, yet there is a broad distinction between annual and final settlements. The one is wholly *ex parte*, and without notice; the other can be made only upon due publication of notice to creditors and all persons interested. The one is made annually, or oftener at the pleasure of the court; the other, only when the estate is fully administered. The one is for the information of the court and the convenience of the administrator in the management of the estate; the other for the protection of the administrator, and is a final adjudication of the respective rights and obligations of administrator, creditors and heirs. The one is only *prima facie* correct, and is subject to correction of any errors or mistakes thereafter discovered in it without appeal, or any direct proceeding to review it or set it aside. The other is conclusive and final, unless set aside by appeal or direct proceeding therefor, or impeached for fraud. The one is, so to speak, a judgment *de bene esse*, the other a final judgment. [*Klemp v. Winter*, 23-705.]
2. ——— ***Revocation of Letters of Administration.*** A settlement may be final as to an administrator, as when his letters are revoked, without being technically a final settlement.
3. ——— On an examination of the record of the probate court in this case, and giving to the entries and proceedings a fair and reasonable construction, it is held, that the so-called final settlement was intended as a settlement final only as to the administrator whose letters were revoked, and was intended to be and was in fact only an annual settlement as to the intestate's estate. [*Smith v. Bank*, 24-528.]
4. **LIABILITY OF SURETIES, on *Administrator's Bond.*** Where an administrator is appointed, gives bond, and takes possession of all the property of the decedent, inventories and sells it as the individual property of the decedent, and receives the proceeds thereof, the sureties cannot thereafter defend an action against him and them for a part of such proceeds upon the grounds that, as to a part of this property, a third party had before the decedent's death purchased an interest as partner, giving therefor his notes secured by chattel mortgage on the interest so purchased, and good because so secured, and which notes still remain the property of the decedent, when it appears that such partner had, prior to any appointment, refused to take charge of and settle the partnership business, and had subsequent to the appointment relinquished all interest therein by agreement with the administrator, and for a consideration rendering worthless the notes, and when the amount not accounted for and paid over by the administrator and for which the action is brought,

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is less than one-half the value of the notes rendered worthless by such agreement and relinquishment. [*Brown v. Graves*, 23-235.]

5. ——— Where an administrator sells and delivers to a purchaser personal property of the estate, and receives in payment therefor part cash and part a note of the purchaser, and the probate court afterward makes an order setting aside such sale, but the possession of the purchaser is never interfered with, nor the property returned to the estate, nor the cash or note returned to the purchaser, nor the sale in fact disturbed; and where the administrator *de bonis non* subsequently sues and collects said note from said purchaser, *held*, that the administrator should pay the cash received on such sale to his successor in office; and on his failure so to do, an action can be maintained against him and the sureties on his bond therefor.

Error from Leavenworth District Court.

JOHN BRENNAN died intestate, at the county of Ellsworth, May 26th 1868. On the 22d of August, Noah Newbanks was appointed administrator of Brennan's estate, and gave a bond as such administrator, in the sum of \$80,000, with *Charles E. Musick, Evander Light, Philetus M. Thompson, and W. H. Weed* as sureties. Newbanks acted as such administrator, until the 24th of July 1869, when his letters of administration were revoked by the probate court of Ellsworth county. In October 1869, Miles Brennan was appointed administrator *de bonis non* of said estate, but his letters of administration were revoked in November following. The estate being still unsettled, said probate court afterward, and on the 23d of said November, duly appointed *Jerome Beebe*, as administrator *de bonis non*. In February 1872, *Beebe*, as such administrator, brought this action, in the district court of Leavenworth county, against Newbanks and his sureties, on the administration bond of 22d August 1868, to recover \$35,000 alleged to be due to said Brennan's estate from Newbanks for moneys and property received by him and unaccounted for. Service of summons was made on *Musick* and *Light*, who appeared and answered. Newbanks voluntarily appeared and filed a separate answer. No service upon and no appearance by the other sureties. The action was tried at the September Term 1878. The jury returned a special finding of fact, upon which the

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court gave judgment in favor of the plaintiff, and against Newbanks, *Musick* and *Light*, for \$4,237.36, and costs. Defendants *Musick* and *Light* bring the case here on error. The opinion contains a sufficient statement of the facts and proceedings.

Stillings & Fenlon, for plaintiffs in error.

B. Gray, and *English & English*, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This was an action brought in the district court of Leavenworth county by the administrator *de bonis non* of the estate of John Brennan, deceased, against Noah Newbanks, a former administrator of the same estate, and the sureties on his official bond, to recover assets in his hands belonging to the estate and not paid over to his successor. The case was tried before a jury, who returned a special verdict. Upon this, judgment was rendered in favor of the administrator *de bonis non* for \$4,237.36, to reverse which this proceeding in error has been instituted. The evidence was not preserved, so that the case stands before us upon the pleadings and the special verdict. Upon these, is any error apparent in the judgment? The amount of the judgment is made up of four items: 1st, \$566.56, the value of the use of the property belonging to the estate used by the administrator for his personal benefit; 2d, \$2,000, cash paid to the administrator on a sale made by him; 3d, \$605.80, interest on the above amounts; and 4th, \$1,065, the value of personal property converted by him to his own use. That as general propositions, an administrator is chargeable with the value of the use of property belonging to the estate, used by him for his personal benefit, with money received by him on the sale of property of the estate, and with the value of such property converted to his own use, and that an administrator *de bonis non* may recover therefor against the administrator and his sureties, will not be questioned. (Gen. Stat., p. 435, § 26.) So that upon these findings alone, the judgment would unquestionably be correct. We must look

therefore to the defense, and see what facts are shown to avoid such liability. And there are three matters of defense: 1st, that there was a final settlement of the estate made by the administrator, and approved by the probate court, by which the estate was found to be in debt to the administrator, and that therefore this matter is *res judicata*; 2d, that the property which passed into the hands of the administrator was the partnership property of the firm of Brennan & Atkins, and that therefore the sureties on the bond of the administrator of the individual estate of Brennan are not liable; and 3d, that as to the \$2,000, the sale under which it was received was set aside by the probate court. Of these in their order.

Was there a valid final settlement? Administration on the estate was had in Ellsworth county. A copy of the records of the probate and district courts of that county, affecting this estate, is made a part of the special verdict, and to that must we look for an answer to the question. It appears from that, that on August 18th 1868, Newbanks was appointed administrator, and on the 22d his bond, with Musick and Light as sureties, was approved. On the 22d of May 1869, at the close of an order setting aside a sale of personal property, is an order in these words: "It is further adjudged that if sufficient security be given, that the administrator, at the expiration of one year from the date of his letters of administration, turn over all the assets of the estate to the next of kin of the deceased, and make a full statement thereof." On the 27th of May, on application of his sureties, the administrator was ordered to "file additional security within ten days." This order does not appear to have been complied with. On June 14th, this order was entered: "It is ordered by the court, that Noah Newbanks, administrator, be required to turn all books and papers and money belonging to the estate of John Brennan deceased, to Miles Brennan, heir-at-law of said estate, by the 1st day of July 1869." On July 9th is this entry: "In compliance with an order of the court dated June 14th 1869, Noah Newbanks, administrator of John Brennan deceased, comes into court to make final settlement, presented the following bills

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for allowance." Then follows a long list of claims, which seem to have been presented on several succeeding days, amounting in the aggregate to \$12,252.61, and at the close are these words: "July 24th 1869, the above accounts credited to Noah Newbanks, administrator of John Brennan deceased." On July 23d is filed what is called "an inventory of property sold," but which includes money received from other sources than sales, and amounting to \$11,834.21. On July 24th is this entry: "The letters of administration of Noah Newbanks of the estate of John Brennan deceased are hereby revoked." Then, on July 25th, appears this entry: "It appearing to the court upon final settlement of Noah Newbanks, administrator of John Brennan deceased, that the said administrator has properly disposed of the personal property of the said estate, and has received as assets of the same, from various sources, to the value and amount of \$11,834.21, and has paid and distributed claims and expenses of the same in the amount of \$12,260, and that there is now in his hands and unadministered the following personal property belonging to the said estate, to-wit, 87 mules, * * * it is therefore ordered and adjudged, that the said Noah Newbanks turn over and deliver to the said Wm. Brennan, heir-at-law and next of kin to the said John Brennan deceased, the said property aforesaid." Then follows, of same date, a bond by Wm. Brennan, with sureties, approved on same day by probate judge, and which recites among other things, that, "whereas the letters of administration aforesaid have been revoked by said court, leaving a part of said estate unadministered, and whereas the said Wm. Brennan has asked for and obtained an order from said court for the said estate unadministered to be turned over to him as the heir-at-law as aforesaid, now therefore, if the said Wm. Brennan shall well and truly pay or cause to be paid all legal claims that are due from and unpaid by said estate, of any nature or character whatever, then this obligation to be void." Then appear notices of appeal both by the administrator and Wm. Brennan, the former appealing from the disallowance of two small claims amounting to \$288.66, and the order to turn over the personal

property, and the latter from the allowance of some eleven items included in the administrator's statement, and amounting to \$3,320.19. The notices of appeal did not on either side indicate an appeal from the entire settlement, but only from those matters specifically named as above stated. Thereafter was filed in the probate court a transcript of the proceedings in the district court, which recited the appearance of both parties therein, and an adjudication affirming the disallowance of the \$283.66, and disallowing the \$3,320.19. No order seems to have been entered by the probate court upon its records on the filing of this transcript. On November 23d 1869, the defendant in error was appointed administrator *de bonis non*. An order was also entered directing Newbanks to turn over the money, papers and other valuable property to the administrator *de bonis non*. It also appears there were debts due by the estate at the time of the settlement. No notice of final settlement, or any proof of publication of one, or any finding or reference by the court to one, can be found. To the transcript is attached a certificate of the judge, that the same is a 'full, true, perfect and complete transcript of all the pleadings and proceedings, records and papers, filed and had in said court in and about the matter of the administration of the estate of John Brennan, deceased.' To this let it be added, that during the few months of these proceedings, four gentlemen held in succession the office of probate judge, and that the transcript discloses a gross disregard of the requirements of law in the management of the estate, and in the record or proceedings, or both, and we are in a position to determine the validity and effect of the so-called "final settlement." That settlements of administrators, approved by probate courts, are in the nature of judicial determinations, and binding upon the estate, has been decided. *Shoemaker v. Brown*, 10 Kas. 393. So that this settlement, however irregularly entered, is an adjudication against the estate, and all who represent it, or claim from it, as to all matters actually or by necessary implication covered by its terms. But there is a great difference between ordinary annual settlements, and what is technically known

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as a final settlement. The former is simply a statement of the administrator, that he has received such amounts, and paid out such; and the approval finds that statement to be true. It is therefore in the nature of an adjudication, a judicial determination. But it is, so to speak, only a present adjudication, and *prima facie* correct — one made for the purpose of enabling the court to keep watch of the estate, and to control the disposition of its assets, and the payment of its debts. Unquestioned, it is accepted as an adjudication, and made the basis and starting point of further administration. But it may be challenged without appeal, and in the same court, and without motion for rehearing, or any direct proceedings to set it aside; and any errors or mistakes in it may be corrected at any subsequent settlement. Gen. Stat. 462, § 158. These accounts are settled *ex parte*, and without even the pretense of notice by publication or otherwise to any parties interested. But the final settlement of an estate is a more stringent and less easily avoided adjudication. It is more emphatically a judgment. True, it may by the probate court be opened up, and the administration continued; but this requires a direct proceeding therefor. While generally *ex parte*, yet it can only be made upon notice. Gen. Stat. 461, §§ 150, 151; *Winborn v. King*, 35 Miss. 157; *Revis v. Patty*, 43 Miss. 343. The idea is, that it is that adjudication of the management of the estate, to which all interested are directly summoned, and by which all having a day in court are concluded. It is a direct adjudication that the estate is fully administered, and that means either that all the debts are paid, or that all the assets are exhausted. It implies that the administrator has received not merely all the money he admits in his statement, but also no more. In other words, that he has fully accounted for all that he has received, or ought to have received, and that, so far as it was sufficient, he has used it in the discharge of the debts. See upon this question, as pointing out distinctly the difference between an annual and final settlement, *Winborn v. King*, 35 Miss. 157; *Bronson v. Ward*, 8 Paige, 189, and especially *Picot v. Riddles, Adm'r*, 35 Mo. 39. This case has a full discussion of the question, and a citation and review of the

authorities, and its conclusions are in accord with the views herein expressed. There may be a settlement which is, so to speak, final as to the administrator, without being strictly a final settlement. Thus, if for any reason an administrator's letters are revoked, and administration entrusted to an administrator *de bonis non*, the settlement made by such administrator at the time of the revocation is final as to him, but is not technically a final settlement. It is no more than an ordinary settlement. And that, it seems to us, must be the fact concerning the so-called final settlement in this case. We do not rest this conclusion upon any mere technical omission, for the orders and proceedings of probate courts are to receive a reasonable construction. We must endeavor to ascertain what was intended, and not by imposing a technical meaning on terms attempt to force a construction not designed. But no notice of a final settlement appears to have been given. Perhaps the evidence of the record does not prove that there was no notice. Perhaps the presumption would be, that all things necessary to confer jurisdiction were regularly done. That is a question of law, into which we do not care to enter. It is a question of construction, and not one of law, we are now considering. And in this direction, the fact that no notice appears, and that there is no reference to it in any form, strongly tends to show that none in fact was given. Again, the prior orders tend to show that no final settlement of the estate was intended. On the 27th of May the administrator is ordered to give additional security in ten days; on June 14th, to turn over all papers, books and money to the heir by the first of July. And in compliance with this last order it is said, on July 9th, that he comes into court to make final settlement. As four weeks' publication is required of a notice of final settlement, it is evident that the order on June 14th, to turn over the property to the heir by the 1st of July, did not contemplate a final settlement. Again, on the 24th of July the letters of the administrator are revoked—an order wholly inconsistent with the idea of a final settlement. And again, in the order of the succeeding day, the so-called order of final

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settlement, it is specifically found that the estate is not wholly administered, and the court can only make a final settlement when it appears that the estate "has been fully administered." Gen. Stat. 461, § 151. And in the bond executed before and approved by the probate judge on the same day, the heir bound himself to pay the debts. All these things together indicate to us that the court, although in its order it uses the words "final settlement," was not intending to make the technical final settlement of the estate, but was intending to turn the estate over to the heir for him to settle. Whether such proceedings were regular or not, it is unnecessary to decide. It is enough to show that such seems to have been their purpose and scope. Again, in this order of July 25th, it is found that certain property remains unadministered, and the administrator is ordered to turn it over to the heir. As we shall see, the major portion of the judgment in the case at bar is founded upon the dealings of the administrator with this property, so that it is to that extent rather in accord than in disregard of the settlement. Still again, while there may have been irregularity in the taking of the appeals, yet both the administrator and the heir appeared in the district court, and submitted to its jurisdiction. And by its decision a large amount allowed to the administrator by the probate court was disallowed, and thus the administrator is left several thousands of dollars in debt to the estate. It does not seem to us therefore, that there is enough in this so-called final settlement to bar this action, or compel a reversal of the judgment.

A second objection is, that the property belonged to the partnership of Brennan & Atkins, and that therefore the sureties on the bond of the administrator of the individual estate of Brennan were not responsible. The facts are these: Prior to his death, Brennan was a freighter, and owned a train. He sold a half-interest to Atkins for \$9,800, and took five notes therefor, secured by chattel mortgage on the interest sold. These notes were unpaid except as to \$89.31, and were good because so secured. After Newbanks became administrator, Atkins relinquished his interest in the

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train for the sum of \$2,978.47 allowed him by the probate court, and the notes then became worthless. Newbanks, as administrator, inventoried the property as the property of the estate, had the exclusive control and possession of it until sold by him. In addition, the inventory shows more property than the jury find Atkins purchased any interest in; and indeed, there is nothing in it in any manner tending to show that Atkins had any interest in any of the property. So that it appears, that by means of this bond the administrator got possession of this property, treated it as the property of the estate, bought in the only outstanding interest in it, sold it as the property of the estate, used part of the proceeds in the payment of debts, and keeps the balance in his pocket. More than that, the amount now in dispute, and not paid over by the administrator, is less than one-half the value of the notes rendered worthless by this settlement with Atkins, and which unquestionably belonged to the individual estate, and were covered by the bond. We think it too late now for the sureties to interpose this objection.

Finally, it is objected that the sale under which the \$2,000 was received was set aside by the probate court. Here the facts are these: Newbanks, on November 14th 1868, sold certain property to Musick, one of his sureties, for \$6,298.40, receiving \$2,000 in cash and the balance in a note. On May 23d 1869, the court made an order setting aside the sale, and in the order of July 25th 1869 it finds that the property so sold is in his possession, and orders him to turn it over to the heir. As a matter of fact, he did not have the possession of the property, but did have the note and the cash. The latter he still holds, and has never paid to anybody. The note he surrendered to Miles Brennan, appointed first administrator *de bonis non*, under a stipulation that he would not enforce against said Musick the order setting aside the sale, a similar stipulation being also signed by the heir. Suit was afterward brought on the note by the present defendant in error, as administrator *de bonis non*, judgment rendered thereon against the purchaser, and by him paid. We see nothing in this to discharge the ad-

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ministrator or his sureties. He made a sale, which in fact has never been disturbed. He surrendered to the purchaser certain property of the estate, which has never been returned to it, and which the purchaser still holds or enjoys the benefit of. He received for such property, so lost to the estate, cash and securities. The latter he surrendered to his successor, and by him they have been enforced against the purchaser, thus practically ratifying the sale. The cash still remains in his hands. It belongs to the estate, and should be transferred to its representative.

We have thus noticed the objections to the judgment, and are of the opinion that none should prevail. We have been much embarrassed in the examination of this record by the fact heretofore noticed, of the defects, omissions and irregularities in the record of the proceedings of the probate court. We are still in great doubt as to the scope and purpose of many of the orders and entries in that record, and can only say in conclusion, that we have not been satisfied that there is anything in the record which shows that the jury erred in finding the amount which they did to be due from the plaintiffs in error.

The judgment will be affirmed.

All the Justices concurring.

COMM'RS OF POTTAWATOMIE COUNTY V. P. O'SULLIVAN.

1. **HIGHWAY; Damages of Land-Owner.** In the appropriation of the right of way for a public road, the public has a right, in the absence of any special statutory or constitutional restrictions, to reduce the damages to be awarded to the land-owner, by the amount of the benefits which inure to him as the direct and special result of the proposed road, but not by any which he receives in common with the rest of the public. In Kansas, this right has not been restricted by statute or constitution. [*Venard v. Cross*, 8-248; *Tobie v. Comm'rs Brown Co.*, 20-16; *Comm'rs Lyon Co. v. Kiser*, 27-279; *Trosper v. Comm'rs Saline Co.*, 27-393; *R. R. v. Andrews*, 30-594.]
2. **CONSTITUTION; Construction of Sec. 4 of Art. 12.** Section 4 of article 12 of the constitution, which provides that "no right of way shall be appropriated to the use of any corporation until full compensation therefor be first made, irrespective of any benefit from any improvement proposed by such corporation," applies only to canals, railroads, and other similar cases in which some corporation takes a use or benefit in the proposed way other than the use and benefit enjoyed by the public. [*R. R. v. Orr*, 8-419; *Hunt v. Smith*, 9-145; *R. R. v. Weaver*, 10-350; *R. R. v. Ward*, 10-356; *R. R. v. Callender*, 13-496, 515; *Reimer v. U. D. & R. R.*, 27-388; *R. R. v. A. T. & S. F. R. R.*, 28-455; *R. R. v. Andrews*, 30-597.]

Error from Pottawatomie District Court.

IN November 1873, upon proper petition and by proper proceedings, a highway was laid out over and across the lands and improvements of *O'Sullivan*. *O'Sullivan* duly presented to the road-viewers his written application for damages, claiming "for $1\frac{1}{2}$ acres of land under cultivation, \$45; for removal and destruction of 140 rods of rail fence, \$70: total, \$115." The viewers allowed *O'Sullivan* \$12 as damages, and their report and such allowance were thereafter confirmed by the *Board of County Commissioners*. From such allowance for damages, *O'Sullivan* appealed to the district court, where a trial was had at the February Term 1874, without a jury. The court found—

"That there is due from the defendants to the plaintiff the sum of seventy-four dollars; and the court further finds, as a construction of law, that no advantage accruing to the plain-

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tiff in consequence of the laying-out and opening said road through the plaintiff's land can be deducted from the damages sustained by the plaintiff in the value of the land taken by the road, or the cost of removing and resetting his fence."

Defendants excepted to these findings. Judgment for the plaintiff for \$74 and costs, and defendants bring the case here on error.

J. T. Brown, for plaintiffs in error.

J. A. Beal, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: The question presented in this case is as to the measure of damages on the laying-out of a public road. The court permitted the land-owner to show the value of the land taken, and the cost of removing a fence, whose removal was necessitated by the opening of the road. This was right, and no objection can be raised thereto. But the court refused to permit the county to show what benefits accrued to the land of claimant from the opening of the road; and of this the plaintiff in error complains. The question was presented to the court in two or three different ways, and the ruling of the court was direct and positive, that no benefits resulting from the road could be set off against the damages. Was this error? Outside of any special constitutional or statutory restrictions,

1. Damages for
lands appropriated for
highways.

the right of the state to take private property for public use, and the corresponding right of the individual to receive compensation for the property thus taken, may be assumed. We know that the existence of this right to compensation is denied; but we shall assume in this case that it exists. But this compensation is secured if the individual receive an amount which, with the direct benefits accruing, will equal the loss sustained by the appropriation. We of course exclude the indirect and general benefits which result to the public as a whole, and therefore to the individual as one of the public; for he pays in taxation for his share of such general benefits. But if the proposed road or other improve-

ment inure to the direct and special benefit of the individual out of whose property a part is taken, he receives something which none else of the public receive, and it is just that this should be taken into account in determining what is compensation. Otherwise, he is favored above the rest, and instead of simply being made whole, he profits by the appropriation, and the taxes of the others must be increased for his special advantage. Upon general principles then, and with due regard to right and justice, it should be held, that the public may show what direct and special benefits accrue to an individual claiming road damages, and that these special benefits should be applied to the reduction of the damages otherwise shown to have been sustained. *State v. Blanvelt*, 84 N. J. 263. There is nothing in the statute to alter or restrict the rule thus founded on the general principles of right and justice—nothing to indicate what matters are to be taken into account, and what omitted, in ascertaining the compensation to which the landowner shall be entitled. Its language is, "Said viewers shall also assess and determine the amount of damages sustained by any person or persons through whose premises the said road is proposed to be established." Gen. Stat. 899, §5; Laws 1872, p. 353, §8; Laws 1874, p. 166, §5. The word "damages" is of general import, and is equivalent to compensation. It includes more than the mere value of the property taken, for often the main injury is not in the value of the property absolutely lost to the owner, but in the effect upon the balance of his property of the cutting out of the part taken. He is damaged therefore, more than in the value of that which is taken. Conversely, the appropriation of the part taken to the new uses for which it is taken may operate to the direct and special improvement and benefit of that not taken. Surely, this direct increase in value, this special benefit resulting from the improvement the public is making, and for which it must be taxed, reduces the damages he has sustained. Nor does the constitution change the rule. Art. 12, §4, provides that, "No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made, * * *

2. Constitution construed.

Opinion of the Court.

irrespective of any benefit from any improvement proposed by such corporation." This has been construed by many as applying to the opening of public roads. Such seems to have been the view of the learned justice of the U. S. circuit court for this circuit. *Eidemiller v. Wyandotte City*, 2 Dillon, 376. But we are constrained to think this is a mistake. The section is in an article on corporations. True, one section, §5, refers to municipal corporations proper, "cities, towns, and villages;" and the manifest scope of the article is limited to private corporations, and municipal corporations proper. *Beach v. Leahy*, 11 Kas. 23. Another article is devoted to county and township organizations (Art. 9.) But chiefly, the language of the section itself seems to exclude public highways. "No right of way shall be appropriated to the use of any corporation." But a public road is not for the use of a "corporation;" it is for the use of the *public*. Its use is not limited to any one, nor especially designed for any one. No individual, no corporation, private or municipal, has any special use or benefit from it. It is free to all, and all have equal rights in it. Certain ways are appropriated to the use of corporations, such as turnpike roads, railroads, canals, etc. In these the corporations owners have a special use, and derive a special benefit. The rights of the public are limited, and subordinate to the rights of the corporation. In a true and natural sense of the language, the way is appropriated to the use of the corporation. Again, the compensation is to be made "irrespective of any benefit from any improvement proposed by such corporation." But in a public road no corporation is proposing an "improvement." No corporation has any necessary connection with the road. True, the ordinary proceedings for the opening of roads are had before the county commissioners, but this is not necessarily nor always so. Section lines are often by direct legislative enactments declared highways. Commissioners are also often appointed by the legislature to lay out highways. And the functions of the county commissioners may as well, so far as any question of power is concerned, be committed to any other body or officer. They are simply a part of the machinery

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which the legislature has in its wisdom provided for opening and securing to the public the use of all necessary highways. In short, there is no element of corporation use or interference in public roads. And the section is limited to those cases in which some corporation takes a use or benefit in the proposed way, as distinguished from the use and benefit enjoyed by the public. In some states the constitutional provision concerning the appropriation of land for public uses explicitly mentions and includes public roads. Const. of Iowa, 1857, art. 1, §18. Of course therefore, in that state, the general rule as heretofore stated is thus limited; but where, as with us, there is no special constitutional or statutory restriction, the general rule applies.

The judgment of the district court will therefore be reversed, and the case remanded with instructions to grant a new trial.

All the Justices concurring.

COMM'RS OF LEAVENWORTH CO. V. JOHN HIGGINBOTHAM.

1. **COUNTY INDEBTEDNESS**—*Not Discharged by mere Levy of Tax.* The mere levying and collecting a tax with which to pay certain county indebtedness, does not relieve the county from paying such indebtedness. [*Leavenworth Co. v. Miller*, 7-541.]
2. ——— *When Action not Barred.* Where a county owes a debt in writing, which has been due for more than five years, but the county has paid the interest on such debt up to within less than five years, and has otherwise, within that time, in writing and repeatedly, acknowledged its own liability to pay such debt, *held*, that the five-years statute of limitation has not barred an action for the recovery of such debt.
3. **STATUTES; Not to be Lightly Impeached.** Where an action of the legislature was passed and published more than eleven years ago, and since that time all the departments of the state government have held it to be valid, and its validity has never been questioned upon the grounds which are now urged against it, and the only objection ever before urged against its validity was, that the legislature had no constitutional power to pass such acts, which objection was long ago overruled by the courts, and many rights have accrued under the act in the honest belief of its validity, *held*, that unless a very clear showing of invalidity can now be made out, it will be the duty of the courts to hold the act valid. [*State*

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v. Robinson, 1-18; *Reyburn v. Brackett*, 2-227; *Atchison v. Bartholow*, 4-124; *Comm'rs Leavenworth Co. v. Miller*, 7-479; *Beach v. Leahy*, 11-28; *R. R. v. Comm'rs Douglas Co.*, 18-184.]

4. ——— *Passing Bills; Yeas and Nays, on Concurring in Amendments.* Where such an act was duly passed by both branches of the legislature more than eleven years ago, and the senate journal shows that the senate concurred in certain slight amendments made to the bill by the house, but does not show affirmatively whether the yeas and nays were taken on such concurrence, and the yeas and nays on such concurrence are not entered on the journal, and the act has generally been considered valid, and many rights have accrued thereunder, *held*, that said act will not now be declared invalid, merely because the said yeas and nays were not entered upon the senate journal, as aforesaid. [Following *Haynes v. Heller*, 12 Kas. 383, 392. See also, *Division of Howard County*, 15 Kas. 195, 214.] [*State v. Francis*, 28-731.]

5. AUTHENTICATING BILLS PASSED; *Signatures of Presiding Officers.* The signatures of the presiding officers of the two houses of the legislature to an enrolled bill, are only portions of the many evidences of the due passage and validity of such bill; and courts must decide as to the passage and validity of a bill upon the whole of the legal evidence applicable in such cases. Therefore, where the enrolled bill of a certain act, and the legislative journals, taken together, clearly show that the bill was duly passed by the legislature, and approved by the governor, and where all the intrinsic evidence having any application to the case, also clearly shows the same thing, *held*, that the bill should be held to be valid, although it may not have the signature of the presiding officer of the senate affixed to it. [*State v. Hitchcock*, 1-187; *Haynes v. Heller*, 12-383.]

6. ——— The publication of said act in the "Leavenworth Daily Conservative," the failure to publish the signatures to the act, and other matters, considered in the opinion.

Error from Leavenworth District Court.

ON the 20th of March 1874, *Higginbotham* commenced his action in the district court against the plaintiff in error, to recover the principal and interest due on bonds numbered 33, 34, 68 and 77 of series B, and 32, 33, 68, 98 and 104 of series C, of the bonds of the county of Leavenworth made and issued to the Union Pacific Railroad Company on the 1st of August 1865. The action was tried by the court below without a jury, at the May Term 1874. Special findings of fact were made and found, and judgment thereupon rendered

in favor of *Higginbotham* for \$3,464.46, and costs of suit. It was claimed by the county, and the court found as a fact, that there was once duly levied and collected by the county sufficient funds to pay the bonds in question; but the court also found that the funds so raised and paid into the county treasury "were appropriated for different purposes and were not used in paying these bonds." Other facts, and the facts in regard to the passing and publishing of the act under which the bonds are issued, (ch. 12, Laws of 1865, pp. 41, 42,) are stated in the brief of plaintiff in error, and in the opinion, *infra*. The *Board of County Commissioners* brings the case here on error.

John C. Douglass, and *M. L. Goddard*, for plaintiff in error:

Plaintiff in error rests its defense to the action below upon two different theories: First, That the pretended bonds sued on are void *ab initio*, and have never been so ratified as to become the bonds of the county; and, *second*, that plaintiff below has no cause of action against said county, as it appears from the evidence and by the finding of the court below, that the county had *levied and caused to be collected*, taxes for the express purpose of paying these bonds, and sufficient in amount to pay them long before this suit was commenced.

1. The application of funds to other purposes than the sinking fund, is *ultra vires* of the county, and of its officers and treasurer. *Brice Ultra Vires*, 59, 58, 62, note *g*, and pp. 88, 84, note *s*. The county board had performed its whole duty in the premises. The holder of its bonds had a complete remedy against the treasurer and his bond to compel the proper application of the funds collected for his use; and if he negligently stood by and silently acquiesced in its misappropriation by the treasurer, he cannot now compel the county to make a second levy upon all the property of the county to pay his claim that had been previously provided for. (4 Kas. 250, 260, 421.) And the county board had a duty to perform of a corporate character, and having performed that duty once, its power to do that act was exhausted. It had no power to act

a second time. Moreover, if these bonds were valid, it was the legal duty of the county board to levy a tax in 1866 to pay "Series A," and in 1867 to pay "Series B," and in September 1868, to pay "Series C," and sufficient to pay the same; and if the county board did not do so, a cause of action arose against the county and in favor of the holders of these bonds at the date of each such default of duty, which in each case was more than five years before the commencement of this suit, and hence the same was barred; Civil code, § 25; Dil. on Munic. Corp., § 405, note 4; 4 Texas, 470; 17 Cal. 172.

2. But our primary defense to this action was based on our theory above, that the bonds sued on were void from the beginning, and have never been validated. We do not care in this case to raise the question of constitutional authority in the legislature to authorize the issuance of bonds in aid of railway companies; and for the present will consider the question as affirmatively settled by this court. Yet we submit, that the following propositions must be admitted as true, to-wit: that against the settled view of constitutional authority, there exists a very vigorous and very respectable minority protest; "that this invention to aid the enterprises of private corporations has proved itself baneful in the last degree;" (Dil. Munic. Corp., § 104;) that all those maxims of the law requiring strictness of construction against corporations and inferior courts in determining their grants of power, and the mode of exercising the same, should be applied without stint or reserve in this case; that the board of county commissioners is an inferior court of special and limited statutory jurisdiction, and its records are the *only* evidence of its proceedings, (26 Mich. 44,) and that it must appear therefore upon the face of the proceedings, that its actions were conformable to the requisitions of the statute governing it; 10 Ind. 861; 2 Ind. 53; that when statutory powers are conferred upon a court of inferior jurisdiction, and a mode of executing these powers is prescribed, the course pointed out must be substantially pursued, or the acts and judgments of the court are *coram non judice*, and void: A. & A. Corp., §§ 211, 253; 2 Kas. 115, 128,

371; 12 Iowa, 158; 37 N. Y. 208; 1 Pet. 840; 3 Cranch, 331; 27 Ind. 235; 5 Blackf. 462. (Sec. 2 of Kas. code of 1859, and § 2 of code of 1868, do not apply to statutes other than the code, hence the exception proves the rule.)

In the light of the foregoing premises, we submit that the pretended session of the county board, (the plaintiff in error,) on the 6th of June 1865, was void. This was the *eleventh* meeting of said board in its May term, and on that day the order was made calling the election to vote these bonds. Under the law the board could not meet more than *nine* days in one term. Hence the meeting was void, and all its acts, votes, and orders on that day were *coram non judice*, and void: Comp. Laws of 1862, p. 411, § 12; 50 Mo. 321; 27 Me. 114. Only in exceptional cases could the board meet more than six days, and in these only nine—the language is equivalent to a negative: 10 Ind. 359; 8 Blackf. 471, 476; 2 Scam. 227; 1 Cent. Law. Jour. 218. And the county board could not adjourn to a day beyond the term prescribed by law: 8 Cow. 286; 1 Seld. 22; 4 N. Y. Dig., "Towns and Town Meetings." The said meeting of June 6th was the same as no election—a nullity—and hence the question in this case is, are bonds issued by the county board, without an election or vote of the people, valid in the hands of the plaintiff? See Dill. Munic. Corp., §§ 186, 418, 419, 423, 426; A. & A. on Corp., §§ 111, 253; *Lewis v. Bourbon Co.*, 12 Kas. 186; 15 Ohio Stat. 437; 27 Penn. St. 389; 38 Ill. 44; 19 Iowa, 199, 210; 10 Wall. 676; 36 N. Y. 224; 22 Ind. 88, 503; 51 Mo. 488; 18 Grat. 338; 15 Mass. 537; 21 How. 356.

3. By said act—Laws of 1865, ch. 12—there are a number of steps or acts that are material and preliminary to the issuing of railroad-aid bonds, and that are *conditions precedent to the power to issue*, which are wanting in these bonds. The law requires the amount of stock subscribed to be first fixed—determined by the people by vote. They cannot delegate this power to the commissioners, as was done in this case; 27 Penn. St. 389; 22 Ind. 88; 23 Mo. 488. The record nowhere shows, nor do the bonds recite, nor does the petition allege, nor does the evidence show, that these bonds were issued in payment of assess-

Brief of Plaintiff in Error.

ments made upon all the stock of the company. Of the bonds which were issued, and all done as one act, \$100,000 were made payable September 1st 1885, more than twenty years from the date of their issue; 1 Cent. Law Jour. 106; Story on Agency, §§ 169, 175; 2 Johns. 48. These bonds are made payable in the city of New York, being without the limits of the county and state, and not authorized by any law; 19 Ill. 414. The rate of interest being seven per cent. per annum, payable semi-annually, is equivalent to $7\frac{1}{2}$ per cent., and is, by so much, in excess of power, and therefore the bonds are void; 5 Ohio St. 118; 1 Wend. 556. The question of *subscribing for stock* was not submitted to the voters, but only the question of *issuing bonds*. The exact amount of the bonds or stock, whether \$100,000, or \$250,000, the time to run to maturity, whether one year or twenty years, the rate of interest, whether one per cent. per annum, or more, so as not to exceed $7\frac{1}{2}$ per cent. per annum, were not submitted to the voters; nor did the voters fix or at all determine any one of these fundamental points as requisites. These matters were for their own deliberation and choice, and the voters could not delegate them to the county board. And much less could a small minority of voters so delegate such power; *Lewis v. Bourbon County*, 12 Kas. 186; Dil. Munic. Corp., § 428; 27 Penn. St. 889; 48 Mo. 242; 22 Ind. 88; 27 N. Y. 489. There is no evidence that notice was given of the said pretended election, either in the record of the proceedings or the face of the bond. There is no evidence that the Union Pacific Railway, or the Kansas Pacific Railway, was located to, into, through, from or near the county of Leavenworth in 1865, or even at the time this suit was commenced. And it follows, that the county had no power to issue these bonds, or any bonds to said railroad, and hence they are and were void; 1 Dillon C. C. Rep. 268.

4. These bonds, void at the beginning, have not been ratified or validated. The county board alone could not ratify by the levy of taxes, nor indeed by any act the most solemn, inasmuch as it could not in the first place *ex suo sponte* create the debt or issue the bonds; 38 Ill. 44; 57 Ill. 80; 14 Ohio, 569; 19 Wis.

280; 10 Wal. 676; Dil. Munic. Corp., §§ 385, 387; 8 Kas. 121; 8 Paige, 527; 24 Wend. 432. The people of the county alone could not ratify by silence, nor by paying taxes, nor by any vote or public expression, unless in some mode authorized by constitutional law—and all reasonable doubts as to the intent of the legislature should be resolved in favor of the citizens; 27 Wis. 522; 30 Wis. 237. The legislature alone could not ratify; Dil. Munic. Corp., § 387; 2 Kas. 115; 51 Ill. 17, 58; 55 Ill. 33, 133; 29 Wis. 413; 26 Wend. 192; 17 N. Y. 449, 454; Cooley Const. Lim. 231, 235, 379, 382. Nor have these bonds been ratified or validated by the combined acts of the legislature, the county board, and the people of the county. We are referred to ch. 32, Private Laws of 1868, p. 69, "an act to authorize Leavenworth county and the city of Leavenworth to dispose of stocks in railroad corporations." Viewed as an act intended to ratify or validate these bonds—that which is claimed for it—it becomes repugnant to § 16 of art. 2 of the constitution. The title to said ch. 32 contains no allusion to these or any other bonds. It contains one subject, and but one, and that is clearly expressed.

5. But, we deny that the pretended law, under which it is claimed that these bonds were issued, was a law at the date of the issue of these pretended bonds, or that it is a law now, or that it ever became a law of the state of Kansas. By the terms of the 10th section of said act, and the certificate of the secretary of state, it appears that the act was not published as directed by the legislature. The court cannot say that the "Leavenworth Daily Conservative" is the "Daily Conservative." And, until published by the authority of the legislature, it did not become a law; Const., art. 2, § 19; 34 Ill. 298; Cooley Const. Lim. 157; 16 Ill. 361; 10 Wis. 186; 20 Wis. 50; 16 Ind. 48; 9 Kas. 550. Again, the act was not published in the Conservative, inasmuch as it did not contain the signatures of the presiding officers; Const., art. 2, § 14. And all the acts of the county, and of the voters of the county, precedent to the issue of these pretended bonds, had occurred, so

Brief of Defendant in Error.

far as they did occur, prior to the 19th of June 1865, when said act was published in the statute book.

6. This pretended law is shown by the senate journal not to have been passed as required by the constitution. The yeas and nays were not taken on its final passage, and entered on the journal; Const., art. 2, § 10; Senate Journal 1865, p. 275, Feb. 8th. House amendments, on motion, were concurred in without yeas or nays, or entry on journal; Cooley's Const. Lim. 135, 140; 14 Ill. 326; 14 Ill. 297; 25 Ill. 183; 2 Cal. 168; 16 Peters, 56; 20 Ohio St. 1, 17; 2 Hill, 81.

7. This pretended law of 1865 is shown, by reference to the original enrolled bill, never to have been signed by the presiding officer of the senate, as required by Const., art. 2, § 14. These requirements of the constitution not being observed, the law is a nullity; 8 Ind. 157, 160; Cooley Const. Lim. 152; 2 Hill, 81; 4 Hill, 884; 2 Cal. 168. And this, notwithstanding the governor's signature; 52 N. H. 622; 26 Penn. St. 450; 3 Penn. St. 42; 8 Heisk. (Tenn.) 422; 2 Minn. 330; 2 Cal. 172. And it is equally void whether the signatures of only one or both of the presiding officers are wanting.

Clough & Wheat, and *Wm. Higginbotham*, for defendant in error:

1. It appears from the findings that the bonds in suit were issued, dated of the 1st of August 1865, as part of \$250,000 in amount of bonds of said county issued in conformity with the act entitled "An act to authorize counties and cities to issue bonds to railroad companies," approved February 10th 1865—being ch. 12, Laws of 1865, pp. 41, 42. And we refer to that part of the opinion of this court in the case of *Leavenworth Co. v. Miller*, which is on pages 500 and 541 of 7th Kansas, and submit that the same is conclusive against plaintiff in error.

2. Plaintiff in error claims that said act was not constitutionally enacted, or put in force. We suppose that under said decision in the *Miller case*, and the several other cases decided by this court, where bonds had been issued under said act, enough has been determined—at least, when coupled with the

fact that said act has been hitherto by the courts, county, people, legislature and ministerial and executive officers of the state, treated as a valid law in the manner, and under the circumstances under which it has been so treated—to set at rest any question of the validity of that act, and prevent any successful preëmption of a new way to repudiate debts. At its very next session after its passage, the legislature of the state, in the most formal manner that it could, recognized that act by amending the first two sections thereof, and declaring that the third and fourth sections thereof should be applicable to the amendatory act. (See pages 72 to 74, Laws 1866.) And this legislature of 1866, by the joint resolution shown on pages 249 and 250, Laws 1866, also recognized and referred to the stock which the county got for the aforesaid \$250,000 of bonds. But as to whether said act of 1865 was constitutionally enacted or put in force, we refer to the senate and house journals of 1865, and submit that said journals are sufficient to show that whatever was necessary to make valid occurrences in the passage of the bill, and in amendments thereto, was done. See 8 Ohio St. 484; 11 Ind. 433, 484, 485; 12 Kas. 382, 392—and especially the reporter's notes on pages 383, 384, of 12 Kas., and also pages 433 and 434 of the Indiana case, concerning concurrence in amendments. See also, 33 N. Y. 285.

8. With reference to the claim that said act of 1865 was not signed by the presiding officer of the senate, we submit that the presumption is, that the presiding officer of the senate for the time being was absent during the two days mentioned in §14 of art. 2 of the constitution, in which he should have signed; and we further submit that the requirement of that section, that the presiding officers of the two houses should sign, is merely directory; 8 N. Y. 328; 11 Ind. 482; 4 Cal. 388; 8 Ohio St. 483; 6 Ohio St. 179; Potter's Dwarrior on Stats. 221, 222; 25 Ill. 182. Those officers had no discretion in the matter. It was their duty to sign the bill, which duty could have been enforced by *mandamus*, if they could have been got at. Surely, those officers could not defeat the will of

the members of the two houses and of the governor, by keeping out of the way of a mandamus for the two days. If either of those presiding officers could prevent a bill from becoming a law by refusing to sign it, then we submit, he has greater power than the governor. If the county's claim is right in that respect, then if either of the presiding officers refuse to sign, the bill must fall dead right there. *Mandamus* could not ordinarily be made operative in the two days. Those presiding officers probably have the whole of the two days in which to sign. If plaintiff's claim is right could they afterward sign? We submit that said requirement of signing by the presiding officers was only intended as a matter of cumulative evidence, to assist in the matter of determining the identity of the bill, and is only directory. If the makers of the constitution had intended by the language used in that connection, to give either of the presiding officers such great power to prevent legislation, as they respectively would have, if their signatures to bills were necessary, it is, from the provisions of the constitution in relation to the veto power of the governor, and the right of the legislature to pass laws over the governor's veto, evident and certain that provision would have been made to obviate such effect of the want of the signatures of the presiding officers.

4. The claim of plaintiff in error that the law was not duly published, is too fine for extended comment; and further, the same act was published on the 19th of June 1865, with the other laws of the same session, and by § 4 of the act previous submissions were made valid.

5. If for any reason the court shall be of opinion that the bonds were issued illegally, or without authority, or that said act of 1865, was not a valid law, then in addition to the matters aforesaid we refer to the act in relation to taxation in the county of Leavenworth, laws of 1871, p. 326, and to the law amendatory thereof, laws of 1872, p. 290, and to the findings, showing taxes were levied under those laws to pay interest on the bonds sued on with other similar bonds; and to

the findings which show interest on all the bonds sued on paid to defendant in error up to some time in 1878—whereby the issue of said bonds was ratified, and the bonds made legal and valid obligations against the county; 8 Kas. 104, 121. And in the same connection, and as showing ratification, we refer to the joint resolution aforesaid, and to pp. 69, 70, Special Laws 1878, and to § 7, p. 184, Laws 1871, and to the findings, which show that the electors of the county have themselves, by an overwhelming majority, at an election ratified the issuing of said bonds, and by authority of law—said resolution and the section last aforesaid—duly disposed of the consideration, the stock for which said bonds were issued. See also, 44 Mo. 201; Laws of 1874, p. 180. In view of these oft-repeated ratifications, different ones of them sufficient alone to legalize the bonds, it is something more than absurd to claim that plaintiff in error is not now bound to pay the bonds.

6. With reference to the limitation question, we refer to § 24 of the code of 1868, and to the matters aforesaid in relation to ratification which occurred within the five years next before the suit was brought, and to the payments made within that time as shown by the findings; 55 N. Y. 495; 17 Cal. 172.

With reference to the claim of plaintiff in error that some of the laws, and said joint resolution, in relation to Leavenworth county, are void, because of § 1 of art. 12, or § 17 of Article 2 of the constitution, we refer to the case of *Beach v. Leahy*, 11 Kas. 23.

As to the jurisdiction of the county board, we suppose the joint resolution aforesaid, and the act of 1868, (Special Laws, pages 69, 70,) the laws of 1871, 1872 and 1874, about levying taxes, and the doings of the board and county in the matters of ratification aforesaid, unquestionably cure any defect, including the one about such number of days, if it was a defect. But we submit that it is evident from the reading of §§ 12 and 14, page 411, Comp. Laws 1862, that it was simply intended

Opinion of the Court.

to limit their pay to nine days in each term, and not to limit their power within that period.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by John Higginbotham against Leavenworth county on certain bonds issued by said county to the Union Pacific Railway Co. The county says in its brief in this court, that it "rests its defense upon two different theories—*first*, that the pretended bonds sued on are [were] void *ab initio*, and have never been so ratified as to become the bonds of the county; *second*, but if valid, still that the county had *levied and caused to be collected* taxes for the express purpose of paying these bonds, and sufficient in amount to pay them long before this suit was commenced;" and that as these bonds had been due more than five years when this suit was commenced, all action on the same was at that time barred by the five-years statute of limitations. With regard to the second theory of the plaintiff in error, we would say: First—Admitting "that the county had levied and caused to be collected taxes for the express purpose of paying these bonds, and sufficient in amount to pay them long before this suit was commenced," still the county has never paid them; it refuses to pay them, and has used the money collected for their payment for other purposes. Such a defense as the above is therefore hardly sufficient. And second—Admitting that more than five years had elapsed after these bonds became due, and before this suit was commenced, still, the county in 1878 paid all the interest due on said bonds up to that time, and has otherwise in writing and repeatedly acknowledged its own liability on said bonds. The cause of action therefore is evidently not barred. (Civil Code, § 24.)

Turning now to the first theory of the plaintiff in error, defendant below: Are said bonds valid? The defendant below claims that they are void; *first*, because the act of the legislature under which they were issued never became a law; *second*,

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because the bonds were not legally issued under the act. The defendant claims that said act never became a law, and is therefore void, for the following reasons: 1st, because the yeas and nays were not called and entered on the senate journal on the final passage of the act in the senate; 2d, the enrolled bill of the act was never signed by the presiding officer of the senate; 3d, the act was published in the "*Leavenworth Daily Conservative*," when it should have been published in the "*Daily Conservative*;" 4th, the signatures of the officers of the two houses affixed to the act were not published with the act. (Ch. 12, Laws of 1865, pp. 41, 42.) This act was passed and published more than eleven years ago. Since that time all the departments of the state government, the legislative, the executive, and the judicial, have held it to be valid. (Laws of 1866, pp. 72 to 74, 249, 250; *Leavenworth Co. v. Miller*, 7 Kas. 479; *Morris v. Morris Co.*, 7 Kas. 576.) Its validity has never before been questioned upon any such grounds as are now urged against it. The only objection ever before urged against its validity was, that the legislature had no constitutional power to pass such acts; and that objection was long ago overruled by the courts. Many rights have accrued under the act, in the honest belief of its validity. And therefore, unless a very clear showing of invalidity can now be made out against it, it will be the duty of the courts to hold the act valid.

The question raised by the first objection to the act we think has been settled by the decision of this court in the case of *Haynes v. Heller*, 12 Kas. 384, reporter's note, and p. 392, opinion. See also, *Division of Howard County*, 15 Kas. 195, 214. Said act was Senate Bill No. 63, being senate bills Nos. 62 and 63 consolidated. On its final passage in the senate *the yeas and nays were taken and entered on the senate journal*, precisely as the constitution requires. The bill was then taken to the house of representatives where it was properly passed, with certain slight amendments, and was then returned to the senate for its concurrence. The senate journal then shows that, "Mr. Gamble moved that the senate concur

2. Statutes not to be lightly impeached.
4. Passing bills; yeas and nays.

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in the house amendments to Senate Bill No. 68, 'an act to authorize counties to issue bonds to railroad companies.' Motion prevailed." Here is where it is claimed the yeas and nays should have been taken and entered upon the journal. But what is there even here, and in this place, that shows that the yeas and nays were not taken? It is true, the clerk failed to enter them upon the journal; but as to whether they were actually taken or not, the journal is silent. And mere silence of record, does not as a rule invalidate the proceeding. It is a general principle of law, that it will be presumed, in the absence of anything to the contrary, and in favor of the regularity and validity of the official proceedings of any official body having superior jurisdiction, that whatever ought to have been done was not only done, but rightly done. (*McCulloch v. The State*, 11 Ind. 425, 433 to 435. As to courts, see *Hunter v. Ferguson*, 18 Kas. 462; *Ogden v. Walters*, 12 Kas. 283.) The journal shows that the "motion prevailed;" but in what manner the vote was taken, the journal does not show.

Whether the failure of the presiding officer of the senate to sign the enrolled bill of said act, invalidates the law or not, is the main question in this case. Indeed, it is the only new question that merits any consideration from this court. The constitution requires that "Every bill and joint resolution <sup>A. Authentica-
ting bills.</sup> passed by the house of representatives and senate shall within two days thereafter be signed by the presiding officers, and presented to the governor," etc. The regular presiding officer of the senate is the lieutenant-governor. (Const., art. 1, §12.) But the senate may also elect a president *pro tem.* of the senate, who may preside in case of the absence or impeachment of the lieutenant-governor, or when the lieutenant-governor holds the office of governor. Now it seems from the book of enrolled bills of the session of the legislature of 1865, that the regular president of the senate signed very few of the bills passed at that session. The most of them were signed by the president *pro tem.* But some of them however were not signed by any presiding officer of the sen-

ate, among which was the bill now under consideration. The bill now under consideration was signed by the secretary of the senate, by the speaker of the house, by the chief clerk of the house, and by the governor. Does the failure of the presiding officer of the senate to sign said bill, invalidate everything connected therewith? If it does, then the presiding officer of the senate has more power to veto bills than the governor, or than any other person or officer of the state. The legislature may pass a bill over the veto of the governor; but if the plaintiff in error is correct, they cannot pass a bill over the veto (so to speak) of the lieutenant-governor, so as to make the bill become a valid law. The lieutenant-governor is the president of the senate; he holds his office independent of the legislature; they have no power to remove him from office, except by the slow and tedious proceeding of impeachment; they have no power to compel him to sign a bill, except by the equally slow and tedious proceeding of mandamus, and this can only be done in the courts; and if the plaintiff in error is correct, they have no power to make a valid law except with the aid of his signature, so long as he is the acting presiding officer of the senate. Of course, he has the whole of the two days given him within which to sign a bill. He would not be in default—no action could accrue against him for any supposed default, prior to the expiration of the two days. And upon the theory of plaintiff in error, when the two days have elapsed, if the bill has not yet been signed, it has become defunct. Everything connected therewith is dead. All the proceedings of the legislature with reference thereto have been annulled; and there is no power anywhere that can thereafter breathe life or vitality into them again. The constitution provides that when a bill has passed the two houses it "*shall within two days thereafter be signed by the presiding officers,*" etc.: (art. 2, § 14.) And there is no power given by the constitution or elsewhere for the presiding officers to sign the bill at any time subsequent to the expiration of said two days. Plaintiff in error claims that this provision of the constitution

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is absolutely mandatory, and therefore that no valid law can be made unless its terms are fulfilled to the very letter, and therefore no valid law can be made unless the bill is signed by the presiding officers of the two houses within the prescribed two days. To admit that a bill might under any circumstances become a law without being signed within the two days, would be to admit that said provision of the constitution is not mandatory. It would be to admit that a law might be made without said provision being strictly complied with. It would be to admit that a failure on the part of the presiding officers to sign a bill within the two days does not absolutely destroy the life and vitality of the bill, and render all the proceedings of the legislature with reference thereto nugatory. And to admit that an action of mandamus would under any circumstances lie to compel a presiding officer who had failed to sign a bill for more than two days to afterward sign the same would be to admit the foregoing. It would be to admit that a bill might become a law, although it was not signed within the two days as prescribed by the constitution. We think that mandamus would lie in such a case; but ordinarily it would be a very inadequate remedy. It would lie for the purpose of furnishing the additional evidence which the signatures of the presiding officers would give as to the passage and the validity of the laws, but it would ordinarily be a very inadequate remedy, if, as the plaintiff in error claims, the validity of the law depends entirely upon the signatures of the presiding officers; for ordinarily, nearly all the bills of any particular session are passed just before the close of the session; and ordinarily, before any action of mandamus could be heard and determined the legislature would be adjourned *sine die*. Therefore, as the action of mandamus would ordinarily be a very inadequate remedy, it would be extremely unfortunate if it were the only remedy. If it were the only remedy, then the power of the presiding officers to practically annul the proceedings of the legislature, to practically veto the bills passed by the legislature, would be almost as absolute as if no such remedy were in existence. But we think that man-

damus is not the only remedy so far as determining the validity of the law is concerned. The signatures of the presiding officers do not constitute any portion of the law. It is not necessary that the consent of the presiding officers should be had in order to enact the law. The only office that the signatures of the presiding officers is intended to perform, is to furnish evidence of the due passage and validity of the bill. Such signatures are only portions of the many evidences of the due passage and validity of the bill. And a bill may in some instances, as we think, be valid, although the signatures of one of the presiding officers may be omitted. • With one of such signatures gone, the evidence of the passage and validity of the bill would of course be somewhat weakened. If the signatures of both of the presiding officers were gone, the evidence would of course be weaker still. If in addition to this, the journals did not show the passage of the bill, then the evidence of its passage would be almost wholly gone. And taking the whole of the evidence together, if it should not clearly appear to the courts that the bill had been passed by the legislature, and approved by the governor, it would be the duty of the courts to declare that the bill had never become a law. The courts must decide as to the passage and validity of a bill upon the whole of the legal evidence applicable in such cases. If the enrolled bill were perfect and formal in every particular, then the courts might say that the bill had passed and become a law, although there might be omissions from the journals. (See authorities cited in 15 Kas. 211, and *State v. Swift*, 10 Nevada, 176.) Or, if the journals were perfect in every particular, and showing that the bill had been regularly and duly passed, then the courts might say that the bill had passed and become a law, although there might be some omissions from the enrolled bill. The enrolled bills and the journals of the legislature are the principal evidences of the passage and validity of a bill, and generally they cannot be contradicted. Probably they can never be contradicted if they are harmonious with themselves and with each other. (*Division of Howard Co.*, 15 Kas. 194.) But in doubtful cases,

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extrinsic evidence may probably be received to corroborate what they seem to prove, or to explain the doubtful import of their language. We think that the enrolled bill and the legislative journals in the present case, when taken together, clearly show that the bill now under consideration was duly passed by the legislature, and approved by the governor, and that it regularly became a valid law. And all the extrinsic evidence having any application to the case also clearly shows the same thing. Among the evidences (record and extrinsic) which show that said bill has become a valid law are the following: The legislative journals show beyond all doubt that the bill passed the two houses. The senate journal shows that the bill passed the senate. The house journal shows that the secretary of the senate reported to the house, that the bill had passed the senate. The house journal also shows that the bill regularly passed the house, with amendments. The senate journal shows that the senate concurred in the house amendments. The house journal shows that the secretary of the senate reported to the house that the senate had concurred in the house amendments. The senate journal shows that the committee on enrolled bills reported to the senate that the bill had been correctly enrolled, and presented to the governor for his approval. And the senate journal also shows, that the governor reported to the senate that he had approved the bill. The enrolled bill is now preserved in the office of the secretary of state, bound in a book along with the other enrolled bills of that session, and it contains the following evidences of its own passage and validity: It contains the certificate and signature of the secretary of the senate, showing that the bill passed the senate; the certificates and signatures of the speaker and the chief clerk of the house, showing that the bill passed the house, and inferentially that it passed the senate; and the signature and approval of the governor, which inferentially shows that it passed both houses. The bill has been published as a law by the secretary of state, both in a newspaper and in the statute book. (Laws of 1865, pp. 41, 42.) It has subsequently been recognized as a law by the legislature and the

governor; (Laws of 1866, pp. 72 to 74, 249, 250;) and also by the courts; (7 Kas. 479, 576.) And indeed, it has generally been recognized to be as much a law as any other law on the statute book. And the question that it was not duly passed, or signed, has never been raised until recently, although it has been on the statute book for over eleven years. We think the mere failure of the president of the senate to do his duty cannot have the effect to invalidate the law.

The defendant in error says in his brief, that "The claim of the plaintiff in error that the law was not duly published, is too fine for extended comment; and further, the same act was published on the 19th of June 1865, with the other laws of the same session, and by §4 of the act previous submissions [to the people of the question of voting bonds, etc.,] were made valid," etc. We suppose that the plaintiff in error, through its agents and counsel, knows that the "Leavenworth Daily Conservative" was the only "Daily Conservative" in the state, for such was the fact; but how it knows that the signatures of the officers affixed to the act were not published, we are not informed. But suppose they were not published: we do not think that such omission would invalidate the law. If it would, then the plaintiff's present petition in error in this court should be dismissed for the following reasons: Neither the signatures to the act defining the jurisdiction of this court, (Gen. Stat. 299, 300,) nor the signatures to the act authorizing petitions in error, (Gen. Stat. 785, 786,) have ever been published. We think the act in the present case was properly published.

Plaintiff in error claims that said bonds are void because, as it claims, they were not issued in accordance with said act of the legislature, and urges several reasons for this claim. Some of these reasons controvert the facts as found by the court below, and as they ought to have been found; some of them controvert the law; some of them have already been considered and decided by this court in the case of *Leavenworth Co. v. Miller*, 7 Kas. 541; and none of them are tenable. Making the bonds payable in New York, and making the interest seven

per cent. per annum, payable semi-annually, certainly does not invalidate the bonds.

We think the election to vote upon the question of issuing the bonds was valid, although it was called by the county board on the eleventh day of their May term 1865. (See arguments of counsel in their briefs.) There are probably good reasons however why the bonds should be held valid, even if said election was not strictly valid. They have been ratified, not only by the county board, but substantially by the legislature, and by the people of Leavenworth county themselves.

The judgment of the court below must be affirmed.

All the Justices concurring.

F. H. HOSTETTER v. J. S. HOKE.

1. *DECISION ON DEMURRER—Not Excepted to, Not Reviewable.* Where the district court sustains a demurrer to the defendant's answer, and no exception is taken to the ruling of the district court, the supreme court will not consider the same. [*Bliss v. Burnes*, McC.-91; *Brown v. App*, McC.-174; *Garvey v. Schollkopf*, McC.-179; *Osgood v. Haverty*, McC.-182; *Small v. Douthitt*, 1-335; *Grandstaff v. Scoffin*, 5-165; *Lalonde v. Collins*, 5-361; *Crouther v. Elliott*, 7-235; *Lyons v. Bodenhamer*, 7-455; *Lee v. Lov-eridge*, 11-487; *Furrow v. Chapin*, 13-112; *R. R. v. Muhlman*, post, 224; *Joseph v. Bank*, post, 256; *R. R. v. Wilder*, post, 239; *Aitchison v. Byrnes*, 22-68.]

2. *PERSONAL LIABILITY; Mere Words of Description, do not Change Character of Liability.* In an action against F. H. H., personally and individually on a negotiable promissory note, where the defendant and maker of the note, says in the note: "I, administrator of the estate of W. R. G., deceased, promise to pay," etc., and signs his name to the note as follows—"F. H. H., administrator of the estate of W. R. G., deceased"—and judgment was rendered in favor of the plaintiff and against the defendant personally and individually for the amount of said note and interest, *held*, that as such a judgment may under some circumstances be properly rendered on such a note, and as there was no exception taken to any ruling, order, finding or decision made by the court below, such judgment must be sustained by the supreme court. [*Black v. Drake*, 30-27.]

6-17 Kas.

Error from Nemaha District Court.

ALL necessary facts are stated in the opinion. *Hoke*, as plaintiff, had judgment at the October Term 1874. *Hostetter* brings the case here on error.

Joseph Sharpe, for plaintiff in error.

Horton & Waggener, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action on a promissory note. The note reads as follows:

"\$194.00.

January 5th, 1871.

Four months after date, for value received, I, administrator of the estate of Walter R. Gage deceased, promise to pay to J. S. Hoke & Co., or order, the sum of \$194.00, with interest at the rate of 12 per cent. per annum after maturity until paid. Payable at the Exchange Bank, Atchison, Kansas.

F. H. HOSTETTER,

Administrator of the Estate of W. R. Gage, deceased."

The defendant answered, that he executed this note in the capacity of administrator of the estate of W. R. Gage, deceased, and not in his own individual capacity. The plaintiff demurred to this answer on the ground that it did not state facts sufficient to constitute either a cause of action or a defense. The court sustained the demurrer, and no exception was taken thereto. The court then proceeded with the hearing of the case, and found in favor of the plaintiff and against the defendant for the amount of the note and interest, and rendered judgment accordingly. No exception was taken to the hearing, or finding, or judgment. Indeed, no exception was taken to any ruling, order, finding or decision of the court below. Therefore we cannot reverse the judgment of the court below. We cannot even consider the ruling on the demurrer, or any other ruling not excepted to. And just such a judgment as was rendered may under some circumstances be properly rendered on just such a promissory note. Aside from what is shown by the note itself, and by the answer of the defendant,

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which was demurred out of existence, there is nothing to show that said note ever had any connection with the business of said estate, or even that the estate itself ever had any existence in fact. Mr. Parsons says that "An administrator or executor can only bind himself by his contracts; he cannot bind the assets of the deceased. Therefore, if he make, indorse, or accept negotiable paper, he will be held personally liable, even if he adds to his own name the name of his office," etc. (1 Pars. Notes and Bills, 161; see also, to the same effect, Daniel on Negotiable Instruments, 202, § 262.) In the case of *Ferrin v. Myrick*, 58 Barb. (N. Y.) 76, 91, 92, a case cited by plaintiff in error, the court say: "The law is however too well established to admit of question, that an executor or administrator by ordering such expenses [for gravestones] makes himself personally liable for them. This is one proposition, but it does not necessarily follow that the estate he represents may not also be liable. Indeed, if there are assets it is admitted that the estate is ultimately liable. It will be noticed that the note in this case is a negotiable note, and therefore, under all the authorities, the defendant bound himself personally for its payment, even though the estate may also be liable. But it is not shown in this case that the estate is or ever can be made liable.

The judgment of the court below will be affirmed.

All the Justices concurring.

THOMAS SQUIRES *et al.* v. WM. H. CLARK *et al.*

1. RIGHTS AND REMEDIES of Owner of Undivided Interest in Lands. Whether a party having the legal title to an undivided portion of a tract of land, but actually disseised by the party holding the title to the remaining interest, must recover possession before he can proceed under the statute of 1868 for partition, is a question suggested but not decided. [*Scarborough v. Smith*, 18-399; *Ott v. Sprague*, 27-620.]
2. POSSESSION of Tenants-in-Common. Mere possession of a tenant-in-common, no matter how full and complete, does not of itself prove an ouster of his co-tenant. There must be something to show a denial or repudiation of his co-tenant's rights, or the possession will be deemed to be held in subordination thereto.
3. ——— The term "exclusive possession," may imply a repudiation of a co-tenant's rights, and therefore indicate an ouster, or it may be used to denote a full and complete and actual possession irrespective of the title under which it is held.
4. ——— Recognition of Rights of Co-Tenant. Purchase of a co-tenant's rights and interest, and receiving a conveyance thereof, is evidence of a recognition rather than a repudiation of that title and interest.
5. ——— The findings in this case do not show an ouster by the defendant of his co-tenant, the plaintiff, and therefore the decree of partition is affirmed.

Error from Franklin District Court.

ACTION for partition, brought by *William H. Clark*, as plaintiff, against *Thomas Squires*, *Geo. S. Newman*, and *W. M. Pickering*, as defendants. Subsequently, *Ira Davenport* was made a party defendant, as having an interest in the premises, as mortgagee of *Squires*. The lands in controversy, and the respective interests of the parties plaintiff and defendant, are shown in the findings quoted in the opinion, *infra*. Trial at the November Term 1874, and partition adjudged and decreed in accordance with the findings above mentioned. *Squires* and *Davenport* appeal, and bring the case here on error.

John W. Deford, for plaintiffs in error.

W. H. Clark, for defendants in error.

The opinion of the court was delivered by

BREWER, J.: This was an action for partition, tried by the court without a jury. The testimony was not preserved, and the case stands before us upon the pleadings, findings, and judgment. The findings are follows:

"1st. Wa-che-quā, an Ottawa Indian woman, was owner in fee of the E. $\frac{1}{4}$ of the N.W. $\frac{1}{4}$ of section 32, township 16, range 19, being 80 acres of land in Franklin county. She died in the year 1864, leaving her husband, Pem-ach-wung, her sole surviving heir-at-law.

"2d. Kah-ptah-yah-sung, an Ottawa Indian boy, was the owner in fee of the E. $\frac{1}{4}$ of the S.E. $\frac{1}{4}$ of section 31, township 16, range 19, being 80 acres of land in Franklin county. He died in the year 1864, at the age of 12 years, unmarried and without issue, leaving his father, Pem-ach-wung, his sole surviving heir-at-law.

"3d. Pem-ach-wung, an Ottawa Indian man, was the owner in fee of the two tracts above described, and of the W. $\frac{1}{4}$ of the S.W. $\frac{1}{4}$ of section 32, township 16, range 19, being 240 acres of land in Franklin county. He died in the year 1864, leaving his children, Masko, Shah-ne-gush-go-quā, M-tah-yah; Zah-wis, Non-deo and Non-qui-ge-zhick, his sole surviving heirs-at-law.

"4th. Non-qui-ge-zhick, an Ottawa Indian boy, died in the year 1865, at the age of 4 years, unmarried and without issue; and Non-deo, an Ottawa Indian girl, died in the year 1866, at the age of 8 years, unmarried and without issue; and so the lands herein described descended to the four surviving children of Pem-ach-wung, vesting in each an undivided one-fourth interest in each parcel thereof.

"5th. On the 6th of September 1867, Masko, an Ottawa Indian boy, then 19 years of age, executed and delivered to Thomas Squires a conveyance for the lands herein described, and on the 7th of May 1872, Shah-ne-gush-go-quā, an Ottawa Indian girl, then 17 years of age, executed and delivered to A. J. Glover and others a conveyance for the lands herein described; and on the 29th day of July 1872, A. J. Glover and others executed and delivered to Thomas Squires a deed for the lands herein described.

"6th. On the 18th of June 1873, M-tah-yah, an Ottawa Indian girl, then 17 years old, executed and delivered to C. P. Stevens and K. C. Glover a conveyance for the lands herein

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described; and on the 20th of June 1873, C. P. Stevens and K. C. Glover executed and delivered to G. S. Newman and W. M. Pickering a conveyance for the lands herein described.

"7th. On the 24th of May 1873, Zah-wis, an Ottawa Indian girl, then 16 years of age, executed and delivered to Wm. H. Clark a conveyance for the lands herein described.

"8th. Thomas Squires was, at and before the commencement of this action, and has been ever since the year 1867, in exclusive possession of the lands herein described, and has improved and cultivated the same, and has lived on and cultivated a part thereof as a homestead.

"The court therefore finds, that Thomas Squires is the owner of an undivided one-half interest in the lands herein described; that Wm. H. Clark is the owner of an undivided one-fourth interest in the lands herein described; that G. S. Newman is the owner of an undivided one-eighth interest in the lands herein described; and that W. M. Pickering is the owner of an undivided one-eighth interest in the lands herein described."

And upon these findings a decree in partition was entered. So far as the interests of the respective parties are shown by the findings, they warrant a partition; but it is claimed that the findings, taken in connection with the pleadings, show such an exclusive possession in Squires as amounts to an ouster of his co-tenants, and that therefore their title must be established by proceedings in the nature of ejectment before any partition can be decreed. How far the old rule of the equity courts concerning partition obtains in this state, and whether a party having the legal title but actually disseised must first by an action-at-law recover possession before proceeding to obtain partition, are questions we do not deem necessary for decision, although presented by counsel for plaintiff in error. The question is discussed at some length in the following cases cited by him: *Deery v. McClintock*, 31 Wis. 195; *Lambert v. Blumenthal*, 26 Mo. 473; *Florence v. Hopkins*, 46 N. Y. 182; *Penrod v. Damer*, 19 Ohio, 218; *Tabler v. Wiseman*, 2 Ohio St. 211. In 1868 a change was made in the statute concerning partition. Prior to that time the statute seemed to define between whom partition might be made.

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It read, "that all joint-tenants, tenants-in-common, and coparceners of any estate in lands, tenements, and hereditaments within this state, may be compelled to make or suffer partition of such estate." Comp. Laws, 740, § 1. In the revision of 1868 this was left out, and in lieu thereof the statute simply reads, "When the object of the action is to effect a partition of real property, the petition must describe the property, and the respective interests of the owners thereof, if known." And an entire article of the code is devoted to the subject of partition, prescribing the proceedings necessary therein. Gen. Stat. 753, art. 26. But waiving this, and conceding that one actually disseised cannot maintain partition, we think the findings fail to show such disseisin. Exclusive possession of itself does not show a disseisin. The presumption is, that the possession is held in subordination of the rights of co-tenants, and for their benefit. There must be not only an exclusive but an adverse possession, something to show an ouster, actual or constructive. In *Wommack v. Whitmore*, 58 Mo. 448, it is said that "the disseisin or an adverse possession amounting to an actual ouster must be shown in order to prevent the right to an action for partition." In 2 Preston on Abstracts, quoted approvingly in *Owen v. Morton*, 24 Cal. 373, the author uses this language: "To disseise his companions, there must be such acts as are constructively equivalent to an ouster, as the denial of right to the rent, or any part, or the possession of any part of the land, or an exclusive possession for a long time so as to afford the presumption of a disseisin." In *Ricard v. Williams*, 7 Wheat. 121, the court holds that "An ouster or disseisin is not indeed to be presumed from the mere act of sole possession, but it may be proved by such possession accompanied with a notorious claim of an exclusive right." In *Warfield v. Lindell*, 30 Mo. 272, the court says, that "A possession of land by a tenant-in-common for twenty-six years, and an exclusive receipt by him of the rents and profits, without any account rendered, or any demand made, would not of themselves raise a legal presumption of ouster by such tenant-

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in-common of his co-tenants." See also, *Coleman v. Clements*, 23 Cal. 245; *Shaw v. Gregoire*, 41 Mo. 407. It may fairly be deduced from these authorities, and many others, that mere possession, no matter how full and complete, does not of itself prove an ouster. There must be something to show a repudiation of the co-tenant's right. The statute provides in actions for the recovery of real property, that when brought by tenants-in-common against co-tenants, in addition to the matters ordinarily required to be stated the petition must state that the "defendant either denied the plaintiff's right, or did some act amounting to such denial." Gen. Stat. 748, § 597. In other words, the plaintiff must show not merely that defendant is in full and entire possession, but also that he affirmatively repudiates the plaintiff's rights therein. The findings show that Squires was in "exclusive possession." Now the term "exclusive," is sometimes used, it is true, to mean not exactly that the actual possession is sole and complete, but also that it is claimed to be rightfully so, and is held with the intent to exclude the possession of all others; but it is also frequently used to indicate simply that the party holds a full and complete actual possession. The party alone occupies the premises. It is not a joint occupation, but a single and exclusive one. The word being then often used in and fairly susceptible of the two meanings, we should, *certis paribus*, be compelled to hold that the court intended that meaning which supported and harmonized with the judgment, rather than that which overthrows it. But we need not rest on this, for it is clearly shown, that during this period in which the court finds the exclusive possession was maintained, Squires recognized in the plainest possible manner the rights of some of the co-tenants, that is, by purchasing their interests and taking a conveyance thereof to himself. See 5th finding. In other words, while in full possession, (in the language of the court, in "exclusive possession,") he shows that he does not consider himself the sole owner, and alone entitled to possession. He recognizes that his possession is

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subordinate to the rights of others, and seeks by purchase to enlarge the extent of his rights thereto. Surely, the court does not mean to say that he was denying and repudiating rights which he was at the same time purchasing.

We think that it cannot be said that it affirmatively appears that the court erred in entering the decree in partition upon the findings, and therefore it must be affirmed. So far as the interests of the mortgagees are concerned, it does not appear that they have suffered prejudice.

All the Justices concurring.

THE STATE OF KANSAS v. H. T. ANDERSON *et al*

1. *APPEALS FROM JUSTICE, in Criminal Actions; Original Complaint.* On appeal in a criminal case from a judgment of a justice of the peace to the district court, it is the duty of the justice to certify up the original complaint, and it is not sufficient for him to send a certified copy; and it is error for the district court to proceed to trial over the objection of the defendant upon such certified copy.
2. *TRIAL—When no Waiver.* In such case the defendants have not waived their right to object to trial upon such copy, from the fact that at a prior term they had gone to trial without objection.

Appeal from Ellsworth District Court.

APPELLANTS were tried and convicted of an assault and battery, at the May Term 1875 of the district court. *H. T. Anderson* was adjudged to pay a fine of \$40, and one-half the costs of prosecution, and *L. H. Anderson* was adjudged to pay a fine of \$25 and one-half the costs. From such judgment they appeal to this court.

J. G. Mohler, for appellants.

Ira E. Lloyd, *H. L. Pestana*, and *P. T. Pendleton* for The State.

The opinion of the court was delivered by

BRAWER, J.: Defendants were convicted of an assault and battery before a justice of the peace, and appealed therefrom to the district court. The justice, instead of certifying up the original complaint, sent to the district court a certified copy. When the case was called for trial in the district court, the defendants in all proper ways objected to any trial upon such copy, but the court overruled their objections, and the case was tried upon a copy of the complaint certified by the justice to be a true copy. In this we think the court erred, and that the error was a vital one. The statute requires the justice on appeal of a criminal case to "make return of the proceedings had before him," and to "certify the complaint and warrant, together with all recognizances," to the district court, and that court is to "hear and determine any cause brought by appeal from a justice of the peace upon the original complaint, unless such complaint shall be found insufficient and defective, in which event the court at any stage of the proceedings shall order a new complaint to be filed therein." (Gen. Stat., pp. 882, 883, §§ 21, 22.) There is nowhere in the statute any authority for putting a party upon trial upon merely a copy so certified. It is a proceeding without sanction of law, and cannot be sustained. And we think it would be a dangerous precedent; for while a copy may be accurate, yet there is always more or less of doubt thereof. And in criminal cases especially, as far as possible, all doubts should be eliminated, and it be certain that the party is tried upon exactly the charge preferred against him. In respect to indictments, it is true, a trial may sometimes be had upon a copy. But see how carefully the law has provided for the accuracy of the copy. It requires that every indictment shall be recorded by the clerk at the term at which it is found, in a book to be kept for that purpose; that the judge shall compare this record with the original indictment, and certify to the correctness of it; and then, in case of the loss or destruction of the original, the case can be tried on a copy from this record. (Gen. Stat., 839, § 117.) As after the

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discharge of a grand jury, it would be often impossible to reconvene the same jurors, and as the indictment is the record of the determination of a body which, once discharged, has ceased to exist, and a determination which is the foundation of further and important judicial proceedings, it seemed necessary to guard against the failure of those proceedings through the loss or destruction of that record. On the other hand, when the prosecution is by information, which is in the nature of a mere complaint under oath by the prosecuting officer, in case of its loss or destruction he is to file another information, and the trial proceeds upon this as though it was the original and only charge. (Gen. Stat., p. 839, § 118.) Now a complaint before a justice of the peace is more in the nature of an information than an indictment, and in case of its loss or destruction a new complaint should be filed, and trial had upon that. (Gen. Stat., 888, § 22.) Nor do we think the defendants have waived their right to object to being tried upon this copy, from the fact that they had twice at previous terms gone to trial, in each case resulting in a hung jury, upon the copy without objection. They objected at the commencement of this trial, and their previous failure to object was not tantamount to a consent.

We think therefore the judgment must be reversed, and the case remanded with instructions to grant a new trial.

All the Justices concurring.

KANSAS PACIFIC RAILWAY CO. v. S. O. THACHER *et al.*

1. **ATTORNEY'S LIEN**—*In what Actions.* An attorney's lien under § 8 of ch. 11 of the General Statutes, may be created when the only claim in suit is one for damages for personal injuries, unliquidated, and undetermined by judgment or verdict.
2. ——— *Notice to be in Writing.* The notice required to create a lien under said section must be in writing. [*Bander v. Bryan*, 20-389.]
3. ——— *Service of Notice.* It may be served upon the party personally, or upon his attorney of record. But where the adverse party is a railroad corporation, service of such a notice upon a person in charge of its depot in the county where the action is pending, is not sufficient, and does not bind the corporation.

Error from Douglas District Court.

ACTION by *Thacher & Stephens*, attorneys-at-law, to recover from the *Railway Company* as defendant certain moneys alleged to be due to them from defendant by virtue of liens duly acquired on funds in defendant's hands belonging to the parties originally indebted to plaintiffs, as follows: For services in case of Wm. L. Griffiths against the *K. P. Railway Co.*, \$500; in case of Nichols & Palmer against the *K. P. Railway Co.*, \$206; and in case of Nichols & Kennedy against the *K. P. Railway Co.*, \$668.40. Total amount claimed, \$1874.40. Trial at the June Term 1874. Specific findings of fact and law were made by the district court. Some of these are stated in the opinion, *infra*. In regard to the attorneys' liens claimed by plaintiffs, the court found as follows: That *Thacher & Stephens* were retained and employed as attorneys by Nichols & Kennedy to prosecute an action in the district court of Douglas county against defendant, and rendered services of the value of \$668.40; that they were also employed and retained by Nichols & Palmer to prosecute an action in said district court against defendant, and rendered services of the value of \$206; that they were also retained and employed by Wm. L. Griffiths to prosecute an action in said district court against defendant, and rendered services of the value of \$600, and that all of said

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sums remain wholly unpaid; that on the 12th of May 1872, *Thacher & Stevens* served a notice in writing on the defendant, by serving notice on "a person in charge of defendant's depot," claiming a lien for \$350 for compensation as attorneys for *Nichols & Kennedy* in their action above mentioned; that on the 23d of December 1872 they served a notice in writing on defendant claiming a lien (sum not stated) for compensation as attorneys for said *Griffiths* in his action above mentioned; that on the 17th of September 1873, they gave notice (not in writing) to defendant claiming a lien (amount not stated) for compensation as attorneys for said *Nichols & Palmer* in their action above mentioned; that in March 1873, defendant, without the knowledge of *Thacher & Stephens*, and without regard to their lien, effected a compromise and settled with said *Griffiths*, and paid him in full satisfaction of his claim \$300; that on the 17th of September 1873 defendant, without the knowledge of *T. & S.*, and without regard to their claim of lien, effected a like compromise and settled with *Nichols & Palmer*, and paid them in full satisfaction of their claim \$400; that on the 19th of September 1873, defendant, without the knowledge of *T. & S.*, and without regard to their lien, effected a like compromise and settled with *Nichols & Kennedy*, and paid them in full satisfaction of their claim \$675; that afterward the actions so settled were severally dismissed at the costs of the plaintiffs therein; that said *Nichols & Palmer* and *Nichols & Kennedy* are non-residents of the state of Kansas, and are not shown to be solvent or responsible persons, and the residence of said *Griffiths* is unknown. As conclusions, the court held, "that the notice of an attorney's lien must be in writing, and may be served in the same manner as a notice of motion, and when the attorney specifies the sum of his charges no lien attaches for a greater amount;" and thereupon the court further held that *T. & S.* had liens on the moneys due their clients as follows: on the \$300 due to said *Griffiths*, a lien to the full amount thereof; on the \$675 due said *Nichols & Kennedy*, a lien to the amount of \$350, making, in the aggregate, \$650, to which they were entitled to judgment against the *Railway*

Company, with interest thereon from 17th November 1873, the date plaintiff's demand was made against defendant. Judgment accordingly. Both parties excepted to the findings and conclusions. The plaintiffs, *T. & S.*, excepted to that part of the conclusion of law holding that the notice of lien should be in writing, that such notice is to be served in the same manner as a notice of motion, and that plaintiffs are limited to the amount specified in their notice. They also excepted to that part which fixes the amount of the recovery at \$650, claiming that in this action they are entitled to recover for their services in the case of *Nichols & Palmer*. The defendant excepted to each finding of fact and of law. New trial refused, and the *Railway Company* brings the case here on error.

J. P. Usher for plaintiff in error:

1. The petition showed that there was a defect of parties in respect of each cause of action, inasmuch as the alleged creditors of plaintiff in error were not in court. The defendant by demurrer sought to take advantage of the defect, and justice required that it should be done. It was not a question of discretion, but of substantial right. There was error in overruling the motion.

2. Neither of the three supposed causes of action stated in the petition, alleged facts sufficient to constitute a cause of action. In the first, the *Griffiths* case, the lien claimed and which is set up as the first cause of action, the evidence showed that the notice was defective in two points. It stated no amount; it was served upon *Usher*, and not upon plaintiff in error. It also showed that the action was one for unliquidated damages for personal injury, which had not been determined by verdict or judgment, the first verdict having been set aside. There was therefore nothing due from plaintiff in error to *Griffiths*. The petition failed to show that any money whatever was due to *Griffiths*. The mere production of the satisfaction, stating a consideration, was not sufficient. In the *Nichols & Palmer* case, no lien is set up in the petition; and the evidence showed that no notice of lien was given except a

Brief of Plaintiff in Error.

verbal intimation from Stephens to Rockwell, alleged to have been one of the attorneys for plaintiff in error in the case, that his firm had a lien, and that Stephens showed Rockwell notices of lien to that effect. This notice was defective in stating no amount, and in being verbally given to an attorney, and not to plaintiff in error. If it could be given to an attorney at all, it could only be so as a notice in the action: if a notice in the action, the service is defective, not being in conformity with section § 586 of the code, which provides that all notices other than notices of motion must be served like a summons, that is by serving a written copy on the party, and not on his attorney. In the Nichols & Kennedy case the notice cannot support this action, for it was notice of lien on a judgment, which was afterward vacated, and with the judgment, the notice fell to the ground. Moreover the service was defective. The law of 1871 (p. 285, ch. 123,) only applies to notices or process issued by a court or justice of the peace, and only under that law could service on "a person in charge of a depot" be justified.

3. The findings of fact are not sustained by sufficient evidence, but in several respects are contrary to undisputed evidence. The finding that notices were served on defendant is a mere conclusion of law, and we contend an erroneous one. The undisputed facts are, that a written notice in the Nichols & Kennedy case was served on an employé in charge of the depot at Lawrence; that a written notice in the Griffiths case was served on the attorney for the company; and that in the Nichols & Palmer case, the so-called verbal notice was given to Rockwell, an attorney employed at the trial of the case, but not shown to be either one of the ordinary attorneys of the company, or attorney of record in that suit. The findings that plaintiffs in error "affected compromises and settlements" with Griffiths, and Nichols & Palmer, and Nichols & Kennedy, are insufficient to base upon them a conclusion prejudicial to plaintiff in error. It is not found whether the actions were in tort, or upon contract, or that the railroad company owed

the attorneys suing anything. It is found that the railroad paid money; but money paid upon a compromise is no admission of liability, for every one has the right to buy peace if he so chooses. The highest considerations of public policy and common morality make it impossible for the attorney to prevent this, or foment and perpetuate litigation at his pleasure.

4. No lien exists for attorney's compensation in the absence of actual contract or express statutory provision, where, as in our state, the attorney's fees form no part of the costs. The lien must stand or fall on our statute exclusively; *Forsythe v. Beveridge*, 52 Ill. 268. Attorney can have no lien on unliquidated damages before judgment, even by express contract, so as to prevent his client settling the suit; *Pulver v. Harris*, 52 N. Y. 73; 12 Abb. (N. Y.) N. S. 444; 18 N. Y. 489; 19 How. 384. The attorney's remedy is to proceed with the action, and enforce the judgment; 2 Daly, 489; 12 How. Pr. R. 136; 19 Abb. 372; 18 N. Y. 368. Or proceed against his client and the debtor jointly, to have the benefit of a judgment already entered; 40 N. Y. 577.

Thacher & Stevens, defendants in error, for themselves:

The real and only questions in the case as we view it are: 1st, Can attorneys recover of judgment-debtors the amount of the balance due them for services and disbursements when such judgment-debtors pay the judgment to the attorneys' client after notice of the lien? 2d, Are the plaintiffs in the court below entitled to recover of the defendant the full amount of their claim, or only a part thereof as allowed by the court below?

Upon the first proposition, we think that not only the statute but the common law clearly affirms the proposition. See Gen. Stat. of 1868, p. 110, § 8. Having such lien by statute, the attorney becomes, to that extent, the equitable assignee of the money in the hands of the adverse party, and is entitled to recover the same in his own name, (for an action must be prosecuted in the name of the real party in interest.) Being

Brief of Defendants in Error.

the assignee in equity, he may bring the action. And it makes no difference that he is assignee of only part of the demand, for an assignee of a part of a chose in action may maintain a suit in equity or even an action at law to recover his interest in the demand. Besides, the interest of the other party is satisfied. 8 How. Pr. R. 514; 6 N. Y. 179.

The statute does not make the attorney an assignee of the judgment, so that he can use that, but of the moneys in the hands of the adverse party. It is true, the amount of such moneys is evidenced by the judgment, when the judgment has been rendered, but the attorney is not given the machinery of the judgment and the process of the courts in that action to enforce his collection, and hence, when his right is denied, may resort to action in the proper court for his remedy. That action is both a suit in equity, and an action at law, under our practice. And in such action it is not necessary to make the judgment-creditor a party, especially when, as in this case, such assignors (the judgment-creditors) are out of the jurisdiction of the court. (1 Wash. C. C. Rep. 517.) The judgment-debtor is a trustee of the fund, and in an action for neglect to pay over, the creditor is not a necessary party. He may be a proper but not a necessary party. (Story's Eq. Pl., § 221; Barbour on Parties, 458.)

At common law also, and independent of the statutes, we insist that the action should be maintained. By common law the attorney is given a lien upon the judgment and upon the money earned, whether resting in judgment or not, for the amount of his reasonable service. "An attorney has a lien upon a sum awarded in favor of his client as well as if recovered by judgment; and if, after notice to the defendant, the latter pay it over to the plaintiff *the plaintiff's attorney may compel a repayment of it to himself*, and he will not be prejudiced by a collusive release from plaintiff to the defendant." (*Armond v. Tate*, 1 East, 464.) From long prior to the decision in the above case, the English courts, both law and equity, had interfered and protected the earnings of the attorney, holding as the American courts have since held, that the client should

not collude with his adversary and run away with the earnings of the attorney. The courts of this country have also gone as far as the court went in *Armond v. Tate*, and held that it was immaterial whether the demand had reached judgment or not. In the very expressive language of Judge Spencer, in 15 Johns. 405, they have held that "a party shall not run away with the fruits of the case without satisfying the legal demands of the attorney." 9 How. Pr. R. 16; 4 Barb. 48; 19 Johns. 95; 62 Ill. 210. The common-law lien is independent of the statute, and is not abrogated by it. 18 N. Y. 368; 51 N. Y. 140; 44 How. Pr. 498.

The proof, in the case of Griffiths, shows a retainer by Griffiths, and a prosecution of an action in his behalf against defendant; various proceedings in the action; the value of plaintiffs' services, and the service upon defendant of a *written* notice of lien. It also shows that defendant settled with Griffiths without plaintiffs' knowledge, and after service of the notice. The writing showing such settlement, and filed in the case by the defendant, acknowledges the receipt by him of \$300. In the case of Nichols & Kennedy, the proof also shows a retainer and prosecution by plaintiffs for the parties against the defendant, the earnings of the moneys mentioned in the petition; the fact of such moneys being in defendant's hands, and the service of notice of lien. The notice served was duly entitled in the action, and notice given to defendant therein and its attorneys—

"That we claim a lien on the judgment rendered in this action, and upon the moneys secured thereby, for our fees as attorneys for the plaintiffs, which lien is to be satisfied before any moneys are paid to said plaintiffs, or any one in their behalf. The amount of our claim is \$350."

This notice was signed by Thacher & Stephens, and dated and served May 12th 1872, and shows the amount of our claim at that date. After that date, the judgment was reversed by the supreme court; (9 Kas. 235.) In December 1872, the case was again tried. A motion for a new trial was sustained, January 12th 1878. A third trial was had September 16th 1878,

and during the third trial verbal notice of lien was given to Rockwell, one of defendant's attorneys. On the 19th of September 1873, defendant paid to N. & K. the full amount of moneys in its hands, and brought their release into court, and procured satisfaction of the judgment. We insist that the written notice so served, was a notice to the party of our lien at that time; that knowing we claimed a lien for services as attorneys, together with knowledge of our subsequently acting as attorneys for the parties in court, and so earning further compensation, is notice to the party of a further lien. Having notice that a lien was claimed, and that at a certain day it had reached a given sum, and knowing of earnings thereafter, and that the party was having credit, was sufficient to put the defendant upon inquiry, and a subsequent payment was in bad faith. But at the trial, and some days before the money was paid, a verbal notice of lien was given to the attorney of the party. This notice the court below held insufficient. But no good reason is perceived why a verbal notice is not as effectual as if in writing and attested by witnesses. The statute provides simply for "notice," not notice in any specific form; and from that, we understand that something must be said, or some act performed, which directs the attention of the party to the claim. The attorneys being the equitable assignees of the demand, the courts at common law would protect the lien whenever the party had been put upon inquiry. In regard to the sufficiency of the verbal notice in this case, see 4 Barb. 48; 12 Johns. 348; 19 Johns. 95; 15 Abb. 185; 45 Cal. 72; 29 Cal. 149; 9 Paige, 315; 28 N. Y. 287; 7 Foster, 324.

It matters not that Griffiths' claim was for unliquidated damages. The lien given by statute is upon moneys in the hands of the adverse party in any action or proceeding. When the demand in suit is settled and the amount liquidated, that amount is money in the hands of the adverse party, and a payment to the party after notice of the attorney's lien is in fraud of the attorney's right. The notice was given long prior to the settlement, and served upon Judge Usher, the general

attorney of the company, and the attorney in that particular case.

In England and also in New York, the statute gave the costs to the prevailing party, but the attorney's compensation was measured by the statutory costs. By the code of New York the statutes regulating the costs were repealed, and the parties left to make their own contracts. Yet it was held in *Ward v. Wordsworth*, 1 E. D. Smith, 598, that the attorney's lien existed still for costs, and the measure of compensation was either an express contract price, or a *quantum meruit*. 14 Abbott Pr. R. 280.

The opinion of the court was delivered by

BREWER, J.: This was an action brought by defendant in error to recover certain moneys claimed to be due by virtue of an attorney's lien under §8, page 110, of Gen. Stat., which reads: "An attorney has a lien for a general balance of compensation * * * upon money due to his client, and in the hands of the adverse party, in an action or proceeding in which the attorney was employed, from the time of giving notice of the lien to that party."

Several questions arise which demand notice. It may be premised, that in examining authorities upon the questions concerning attorneys' liens, this fact should be borne in mind: In some places and at some times the compensation to be received by an attorney for his services was fixed by statute, and this amount was awarded to the successful party to be recovered of his adversary in addition to the amount due upon the cause of action. This amount was taxed as costs in the case, and though nominally recoverable by the party himself was really for the benefit of the attorney. So also, in some states, New York for instance, where the compensation of the attorney is no longer fixed by statute, but left to the agreement of the attorney and his client, certain fixed sums are taxed as costs to be recovered by the successful party to be applied to the payment of his attorney. While in many

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lien for fees.

states, our own for one, the successful party recovers nothing, either directly or indirectly, for the compensation of his attorney. Each party must bear the full burden of his own attorney's fees. Manifestly, the comments and decisions upon attorneys' liens must be materially affected by these considerations. *Forsythe v. Beveridge*, 52 Ill. 268; *Ward v. Syme*, 9 Howard Pr. Rep. 16. Referring now to the case before us, the first question we notice is this: Will the lien exist where the only claim of the plaintiff is one for damages for personal injury, unliquidated and undetermined by judgment or verdict? In other words, may a defendant when sued in such an action, and before trial and verdict, settle with the plaintiff, pay him a certain amount, obtain a release and satisfaction of the claim, and thus free himself from all further liability either to the plaintiff or to his attorney, notwithstanding such attorney has prior to the settlement given notice of a claim for a lien, and such plaintiff is insolvent and irresponsible? This question must be answered in the negative. The lien will exist, and the defendant cannot thus defeat it. It is unnecessary to inquire whether this would have been the rule independent of statute. This gives a lien not simply upon a judgment, but upon "money due." It does not specify for what the money must be due, nor limit the lien to any particular class of liability or form of action. Wherever an action is pending in which money is due, the attorney may establish his lien. And in an action, the verdict and judgment do not create the liability, do not make the "money due." They are simply the conclusive evidence of the amount due from the commencement of the action.

Again, according to the statute the lien dates from the "time of giving notice." Now in reference to this notice these questions arise: Must it be in writing? Is service upon the attorney-of-record of the adverse party sufficient? In case of a railroad corporation, upon what officer or agent should it be served? Must the amount of the lien claimed be stated? The statute is silent upon these questions; at least it gives no specific answer to them. And yet, taking

1. Notice to be in writing.

K. P. Rly. Co. v. Thacher.

the statute in connection with other statutes, and with general rules of law, we think the matters not difficult of solution. It is a general rule, though one with perhaps some exceptions, that notices required in legal proceedings must be in writing. This seems essential to the certainty and precision of such proceedings. *Gilbert v. Columbia Turnpike Co.*, 3 Johns. Cases, 108; *Miner v. Clark*, 15 Wend. 428, dissenting opinion; *Lane v. Cary*, 19 Barb. 589; *Pearson v. Lovejoy*, 53 Barb. 407; *Wright v. Doolittle*, 5 Vt. 390. Now this notice may be fairly classed as one in legal proceedings. It is not to reach money due generally to the client, but money due in the particular action in which the attorney is employed. It presupposes therefore an action or proceeding, employment of the attorney giving the notice in such action or proceeding, money due in such action or proceeding to the party employing the attorney from his adversary, and is itself a proceeding to create a lien upon such money in favor of the attorney giving the notice, and is almost tantamount to a proceeding to compel an equitable assignment of a portion of the claim in suit. The attorney is to *give notice*. By the notice thus given he seeks to create a lien upon and establish a right to receive a portion of the money due in that action to his client from the adverse party. It seems to us, that it is fairly to be taken as a notice in the action or proceeding, and one which therefore must be in writing. Being a notice in the action, it may properly be served upon the attorney-of-record; for outside of any statutory provisions, the attorney-of-record stands so far as the case is concerned as the representative of the party. He has charge of his interests, speaks for him, represents him in all the matters involved in the action. One of the notices was served upon the person in charge of the defendant's depot in North Lawrence. The writer of this opinion considers this a sufficient service upon the corporation, but his associates think differently. And the reasons for this conclusion are briefly these: Sec. 536 of the code of civil procedure, (Gen. Stat. 734,) which provides that "the service of a notice shall be made as is required by law for the service of summons," applies simply to

s. Service of
notice.

the manner of service, that is, whether by reading, or giving a copy, and does not attempt to define upon whom the service may be made to bind the party. And ch. 123 of the Laws of 1871, which authorizes in certain cases the service of process upon railroad and stage corporations by delivery of a copy to a freight agent, ticket agent, person in charge of a depot, etc., applies only to process strictly so called, or at least does not apply to notices like the one in question, a notice prepared and served by the party, and not issued by or upon the order or at the instance of the court. There is therefore no statute authorizing the service of such a notice upon this agent of the corporation, and it is not a matter at all within the scope of his duties. Hence, neither by statute nor upon general principles is the corporation bound by the notice thus given.

It is unnecessary that the amount claimed be stated in the notice. If the amount is stated, the attorney cannot there-
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lien. after claim a larger amount, and the adverse party may make any settlement with his client not inconsistent with his lien for the specified sum. Where the notice does not specify the amount, and does not claim a lien for anything more than the services in the given action, the lien is secured for the amount agreed to be paid by the client, or, in the absence of any agreement, for the reasonable value of such services. Where the notice in terms claims a lien for services in addition to those rendered in the case, it is secured to the extent of the amount due the attorney from his client. Where after a judgment is rendered in the district court, a notice is served in which a lien is claimed "on the judgment, and upon the moneys secured thereby," and thereafter the judgment is reversed by the supreme court, it is unnecessary to serve a new notice, but the lien is secured to the extent of the amount claimed and then due. Where a defendant prior to a trial settles the claim sued on, and obtains from the plaintiff a satisfaction and release in full, in which the receipt of a certain amount of money is stated as the consideration thereof, and presenting this release and satisfaction obtains a dismissal of the action, in an action thereafter brought by the

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plaintiff's attorney to recover from the defendant for services in said action, and for which he had given notice of a lien, this release and satisfaction may be received as *prima facie* evidence of the amount paid to the plaintiff, and as an admission on the part of the defendant that such amount was due. Where notice of a lien is given, and before trial and judgment the parties settle the case and the suit is dismissed, the attorney may maintain a separate action to recover the amount due upon his lien, and in such action the client is not a necessary party.

These we believe are all the material questions in the case, and the conclusions reached upon them compel us to remand the case, with instructions to modify the judgment by striking out the amount allowed for the lien in the case of "Nichols & Kennedy." In other respects the judgment will be affirmed. The costs of this court will be divided.

All the Justices concurring.

EMORY WILSON v. SCHOOL DISTRICT No. 2.

1. **MECHANICS LIENS—Public School Houses.** The provisions of the lien law of 1872 (Laws of 1872, ch. 141,) are applicable in case of the erection by a school district of a public school-house, and determine the respective rights and liabilities of sub-contractor, contractor, and district. [*Bd. of Education v. Scoville*, 13-27; *School District v. Conrad*, post, 522.]
2. **EXECUTIONS, Against School Districts; Act Construed.** Section 85, page 932, General Statutes, which prohibits the issue of executions upon judgment against school districts, must not be carried beyond the manifest import of its terms, and does not directly or by implication repeal or limit acts granting rights and fixing liabilities before judgment.

Error from Anderson District Court.

EMORY WILSON, on the 3d of January 1878, filed in the proper office his statement for a mechanic's lien, claiming a

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lien on a certain school-house, and the lots upon which it was situated—property of *School District No. 2*, Anderson county. Shortly afterward *Wilson* filed his petition in the district court, claiming a money-judgment against Isaac Usher, who had contracted with said school district to build said school-house, and the foreclosure of a mechanic's lien against said school district, *Wilson* claiming to be a sub-contractor under said Usher. Usher and the *School District* filed their separate answers to said petition, upon which pleadings, and the evidence presented, the case was tried in March 1873. *Wilson* recovered a money-judgment against Usher for \$520.62, and \$95.95 as costs of suit. A further order or decree therein was made as follows:

“It is also found and adjudged by the court, that the materials set out in the petition of the plaintiff (said Emory Wilson) were furnished under a contract, and were used in the construction of said building; and it is further ordered and adjudged that said defendant School District No. 2, Anderson county, pay the said plaintiff any sum that may be due to the said Isaac Usher on the contract to build said school-house described in the plaintiff's petition, not to exceed the amount of the judgment so as aforesaid rendered, and costs of this action. And if a sufficient amount should not be due nor become due to said Usher from said School District to pay said judgment of the plaintiff, and all other liens which may hereafter be established, the said sum to be distributed *pro rata* upon this and such other liens.”

Subsequently to said proceedings, and in May 1874, an amicable action was commenced in the district court, wherein *Wilson* was plaintiff, and said *School District* was defendant, to determine the “rights of the parties thereto” respecting the above-mentioned claim and judgment in favor of *Wilson* for \$580.62, and costs, and interest thereon. In this amicable action the parties signed and filed an agreed statement of facts. This statement sets forth the pleadings and judgment in the above-mentioned action of “*Wilson v. Usher and School District No. 2*,” the statement made and filed by *Wilson* for his said mechanic's lien; and the contract between Usher and the *School District*. From these papers, and the other of the agreed

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facts, it appears that by the contract between Usher and the *School District*, Usher was to furnish all materials and labor and build and finish for the district a school-house at an agreed price or cost of \$17,200; that such building was commenced in 1872, and was to be completed by the 15th of May 1873; that the aggregate of payments made to Usher under his contract was \$14,059.80; that in March 1873, Usher abandoned his contract, removed from Kansas, leaving said school building unfinished, and has never returned to the state; that after Usher's abandonment of his contract, the officers of the *School District* took possession of the building, and caused it to be finished in accordance with the plans and specifications in Usher's contract—to accomplish which they were obliged to pay \$3,000, thus making their payments on account of said school building, \$17,059.80—or \$140.20 less than the amount fixed in Usher's contract; that *Wilson's* judgment for \$520.60 for materials furnished to Usher, and for \$95.95 for costs of suit, recovered in January before Usher left the state, was unpaid; that two other liens on said building had been in like manner since established in favor of other parties, one for \$220.17, and one for \$106.39, and that there was another claim of like nature, not yet in judgment, amounting to \$657.40. To pay off *Wilson's* claim, and the other claims, would require \$1,600.51—thus making the school building cost a sum largely in excess of the contract price. Upon the facts so agreed to, the action was submitted to the district court at the September Term 1874. The court found "in favor of the defendant," and gave judgment against the plaintiff for costs. From this judgment plaintiff appeals and brings the case here on error.

W. A. Johnson, for plaintiff:

It is shown by the agreed facts, that on the 31st of December 1872, the architect agreed upon made his estimate of work then done upon said school-house by Usher, which amounted to the sum of \$15,622, of which only \$14,059.80 was paid, and that ten per cent. of said estimate was reserved from the pay-

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ment to Usher, as provided in the contract, and that the same had not been paid to him at the rendition of said judgment. The amount so reserved is \$1,562.20. It is provided by our lien laws, that any person who shall furnish any material or perform any labor under a contractor, etc., shall have a lien for the amount due for such labor or material on such lot or lots, from the same time, and to the same extent, and in the same manner, as such original contractor; that the owner shall not be liable to the sub-contractor for any greater amount than he contracted to pay the original contractor; (Laws 1872, p. 295, § 2;) and all payments made to the original contractor shall be at the risk of the owner for sixty days after the completion of the building. The ten per cent. so reserved was not to be withheld as security for the performance of the contract on the part of Usher, for he had executed his bond with sureties for the faithful compliance with his contract, so that the school district was protected in the contract by the bond of said contractor. Said ten per cent. so reserved was more than sufficient to cover all liens that were established or existed against said building.

The architect found that the work done on the building on the 31st of December 1872, was \$15,622. Less than \$2,000 of the entire work that was required to complete the building under said contract remained to be done. If the officers of said school district, after the rendition of the judgment for Wilson on said mechanic's lien paid out to said Usher, or to other persons, more money than it would have required to complete Usher's contract, it would not affect the right of plaintiff to have his claim paid; they could not affect his right, or disregard his claim for pay for the materials he had contributed to the construction of said building. They could not excuse the bondsmen of Usher, and deprive the plaintiff of the collection of his claim, under the pretense that it cost them more to complete the building than the original contract with Usher. Wilson was entitled to a judgment on the agreed facts for the sum of \$520.62, and the further sum of

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\$95.95 as costs in the former action, together with interest from 20th March 1878.

A. Bergen, and L. K. Kirk, for defendant:

The record in the action of Wilson against Usher and the school district shows that the court below did not find that Wilson was a sub-contractor, but simply that the materials were furnished "under a contract." With whom the contract was made, the record is silent. The court may have found that the materials furnished by plaintiff were furnished after *all* payments had been made to Usher by the school district. The court viewed the proceedings against the school district in the nature of a garnishment, which we submit is the correct view. A mechanic's lien cannot be had or enforced against a public building such as a school-house. Gen. Stat., p. 932, ch. 92, § 85; Philips on Mechanic's Liens, 255, 610; 37 How. Pr. (N. Y.) 520; 39 Ill. 610.

The court adjudged that the school district should pay Wilson the sum *due* Usher under his contract to build the school house. This on March 20th 1878. To find what *was due* Usher, if anything, from the school district, the plaintiff and defendant presented their agreed statement of facts to the court, upon which statement the court found for the defendant. We submit that the only question properly before this court for determination is, Did the court below err in finding that there was nothing due from defendant to Isaac Usher, on the case presented? The school district had paid its contractor, Usher, \$15,622, less ten per cent. thereof, prior to any notice or claim of lien by plaintiff in error, and prior to the judgment rendered against the school district to pay what was due Usher to Wilson. They paid him nothing thereafter. On the contrary, Usher removed from the state, abandoned his contract to build the school-house, and left the building unfinished. When the building was to have been completed, it was not done. The school district took possession of the unfinished building, and finished it in accordance with the contract between Usher and the district, and expended in so doing all

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that would have been due to Usher had he completed the building under the contract. It is evident therefore that Usher had no just demand against the district; that nothing was due him.

But beyond this, a sub-contractor has no greater rights against the owner of premises subject to the mechanics' lien law, than the original contractor. The proviso in § 2 of ch. 141, Laws of 1872, p. 295, in regard to payment by the owner, does not limit or set aside this proposition of law. Also see Philips on Mechanics' Liens, 200-203; 1 E. D. Smith (N. Y.) 692; 2 id. 560. A contractor who abandons his contract, leaving the building which he agreed to finish, unfinished, and which building the owner then finishes according to the contract, and expends in so doing more (together with what had been paid in good faith to such contractor before knowledge of any liens or claims by sub-contractors) than the original contract-price, has no lien upon such building, nor has his sub-contractor. Philips on Mechanics' Liens, 198, 200, 203; 1 E. D. Smith, 717, 760; 11 Wis. 107.

The opinion of the court was delivered by

BREWER, J.: Are the provisions of the lien law of 1872 applicable in case of the erection by school districts of public school buildings? This is the principal question in this case, and must, we think, be answered in the affirmative. The language of the act is general and contains in itself no express or implied exceptions of school or other public buildings. "Any mechanic or other person who shall under contract with the owner of any tract or piece of land, his agent or trustee, * * * perform labor or furnish material for erecting, altering or repairing any building, or the appurtenances of any building, or any erection or improvement, * * * shall have a lien * * * for the amount due to him for such labor or material." Laws 1872, p. 294. This language could scarcely be made more comprehensive. Any mechanic, the owner of any tract, any build-

ing. Here is no suggestion of any exception. If public school buildings are exempted, it must be because of some other statute, or because they are in the very nature of things not subject to such liens. There is no express exemption by other statute. That upon which counsel rely is §85, on p. 982, of the Gen. Stat., which provides in effect that no execution shall issue upon judgments against school districts, but that the district board shall levy a tax to pay such judgment, and in default thereof judgment may be recovered against the delinquent officers. Hence, as, by this, executions are forbidden, and the power to enforce a lien by levy and sale taken away, it is claimed the lien itself cannot be created. This seems to us a *non sequitur*, and that full force is given to this statute if it is carried as far as its language goes and no farther; that is, if it operates to prevent the issue of process upon judgments, leaving all proceedings and rights prior thereto to be regulated and determined by other statutes. In this way both statutes are made operative. Contractor and subcontractor may secure liens. The latter may be protected against the irresponsibility or the rascality of the former, and the rights of all parties adjusted in accordance with the terms of the lien law. Liens may be foreclosed and placed in judgment, and then like other judgments are met by this statute which provides a tax instead of an execution as a means of enforcement. But it may be said that there is an incongruity in calling that right a specific lien, which is incapable of direct enforcement; and further, that the necessities of public business require that public buildings shall be held exempt from mechanics' liens, or any risk, incident thereto, of their being lost to the public use. But many specific liens exist which cannot at all times be directly or otherwise enforced. A mortgage prior to its maturity, and a decree of foreclosure prior to the time when by its terms process may issue, are examples. So there are liens whose enforcement is suspended during the existence of the title by which defendants hold their property, as the lien in some states of judgments upon homestead property, a lien suspended or

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incapable of enforcement until the homestead-quality is removed. So here, there is nothing to prevent the existence of a lien upon a school building, suspended or incapable of direct enforcement until the public use of the building ceases, or the title passes from the district. Upon the other proposition, we find in *Chicago v. Halsey*, 25 Ill. 595, that a majority of the court held that independent of statute no judgment could be levied upon the public property of a city; and in *Darlington v. The Mayor, &c.*, 81 N. Y. 164, that Ch. J. Denio, giving the opinion of the court, makes this distinction, holding that no property held by a city for public use can be seized on execution, but that any private property belonging to the city and not so held may be thus seized. In *Brinkerhoff v. The Board of Education*, 37 How. Pr. 520, a majority of the common pleas court held that a mechanic's lien could not be had or enforced against a public school-house. See also Philips on Mechanics' Liens, 255, 610, 611; *Wilson v. Comm'rs*, 7 Watts & S. 197; *Williams v. Controller*, 18 Penn. St. 275; *Foster v. Fowler*, 60 Penn. St. 27; *Poillon v. Mayor, &c.*, 47 N. Y. 666; *Shattell v. Woodward*, 17 Ind. 225. That where there is no statutory restriction, process may issue on judgments against municipal or quasi municipal corporations, see city of *Independence v. Trouville*, 15 Kas. 70. Whether upon such execution property held for public use can be taken, is a question as yet undecided in this state, and not necessary to be decided now. For in this case, no execution can issue. And the question is, whether taking away the process for enforcing a lien, takes away all rights to create the lien; and for reasons heretofore suggested, we think it does not. If the lien law applies in determining the representative rights and liabilities of owner, contractor, and sub-contractor, then a payment to the contractor prior to the expiration of sixty days from the completion of the building does not release the owner from liability to the sub-contractor. Laws 1872, p. 295, §2; *Shellabarger v. Thayer*, 15 Kas. 619.

The remaining question is, as to the effect of a judgment. The facts were presented in an agreed case under §525 of the

code of civil procedure, Gen. Stat. 738, and without pleadings. Among the facts, it appears that a judgment was rendered in a suit brought by this plaintiff against the contractor and the school district for the foreclosure of this lien, in which the court finds the amount due from the contractor to plaintiff, and renders a personal judgment therefor; also finds that the materials set out in the petition were furnished by plaintiff under a contract, and were used in the construction of the school building, and then the district is ordered to pay said plaintiff the amount of the judgment out of any moneys due the contractor, provided there is enough left to pay this and all other liens that may be established, if not, then *pro rata*. To this judgment no exception was taken, and no proceeding had to reverse or modify it. Now it is claimed that the effect of this is to discharge any so-called mechanics-lien, and gives to the plaintiff what is equivalent to a judgment against the school district as a garnishee, and that as a matter of fact the district did not and does not owe the contractor anything. There is much in the language of the judgment to sustain this claim of counsel, and it is doubtful whether it should not be held to be well founded. But after considering the pleadings in connection with the judgment, and the facts agreed to in this case, we are constrained to overrule the claim. There is nothing in the pleadings in that case to warrant a mere garnishee proceeding and judgment. It is a suit to foreclose a mechanics-lien, and the issues ran to the fact of the debt and the existence of the lien. The judgment should be based upon the issues, and the forms of expression should be construed in reference thereto. It seems to us therefore, that without doing unreasonable violence to language it may be held that the court intended to and did adjudicate the validity of the lien, and expressed itself in the language used for the sake of avoiding any grant of process to enforce the lien, seemingly forbidden by the section of the statute heretofore referred to. Such a construction places the judgment in harmony with the issues and the pleadings, and the admitted facts in this case.

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We think therefore that the plaintiff was entitled to a judgment; and the case will be reversed and remanded, with instructions to render judgment against the defendant, and in favor of the plaintiff for the amount of his lien, interest, and costs.

All the Justices concurring.

JOHN J. OLIVER *et al.* v. ROBERT FORBES

POTTAWATOMIE INDIAN TREATY; *Deed Executed by Heirs of Deceased Allottee, before Patent issued, Held Valid.* Under the provisions of the Pottawatomie Indian treaty of 1861, (12 U. S. Stat. 1192,) John Riley, a Cherokee Indian by birth, but a Pottawatomie Indian by adoption, was the allottee, and held the certificate, for the land now in controversy. In 1864 he died, leaving a widow who was a Pottawatomie Indian woman, and two minor children, both girls. On July 27th 1867, said widow executed a general warranty deed for an undivided half of said land to Thomas J. and Julia Lazzelle, Julia being a half-breed Pottawatomie Indian woman; and on the same day the Lazzelles executed the same kind of deed for the same land to the Olivers. On October 27th 1868, said widow executed another general warranty deed for the same land, but this time she executed it directly to the Olivers. On April 10th 1869, the said Olivers took possession of said land, have occupied the same ever since, and have made improvements thereon worth from \$1,250 to \$1,500. On May 16th 1870, the United States issued a patent for said land to said allottee, John Riley, and his heirs. On February 3d 1872, said widow executed still another general warranty deed for said land, but this time she executed the same to Robert Forbes. Forbes then commenced an action in the nature of an ejectment to recover said land from said Olivers: *Held*, Under the facts of this case, under the Pottawatomie treaties of 1861, 1866 and 1867, and under the law for the recovery of real property in this state, that said action cannot be maintained. [*Clark v. Lord*, 20-390.]

Error from Shawnee District Court.

EJECTMENT, brought by *Forbes* against *Oliver* and *Oliver*, to recover possession of the N. E. $\frac{1}{4}$ of sec. 35, town 10, range 14, situated in Shawnee county. The action was tried at the

a-17 Kas.

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December Term 1878, and resulted in a judgment for *Forbes*. The *Olivers* bring the case here on error. The briefs of counsel, and opinion of the court, *infra*, contain sufficient statements of all necessary facts.

A. H. Case, and *J. H. Putnam*, for plaintiffs in error:

John Riley, a member of the Pottawatomie tribe of Indians, in 1862, was married to Mary Beaubien, a Pottawatomie Indian woman, by whom he had two children, now minors. In 1863, the United States allotted to him, as under the treaty of November 15th 1861, 160 acres of land, and duly issued a certificate therefor to him. In the year 1864 he died in Kansas, leaving his widow and the two children aforesaid. In 1865 his widow married David Bostick, with whom she is still living. On the 27th of July 1867, she and her husband, by covenants of general warranty, conveyed an undivided-half interest in the land to Thomas J. and Julia Lazzelle, the said Julia being a Pottawatomie Indian woman; and on the same day the Lazzelles, by like covenants, conveyed the same land to the *Olivers*. On the 27th of October 1868, Mary Bostick and her husband, David, again conveyed an undivided-half interest in the land by covenant of general warranty to the *Olivers*. All these deeds were duly recorded prior to May 1870. On the 10th of April 1869, the *Olivers* took possession of an undivided one-half interest in the land, and ever since have occupied it, and have put valuable improvements thereon. On the 16th of May 1870, the United States issued a patent for said 160 acres "to John Riley, and his heirs." On the 3d of February 1872, Mary and David Bostick, by covenants of general warranty, conveyed said land to *Forbes*. The district court held that Mary Bostick had no right and power of alienation in the manner and form shown before the issuing of said patent of May 16th 1870, and thereupon found in favor of *Forbes*.

1. Under art. 2, treaty of 1861, John Riley received his certificate of allotment of land, which by the language of that

article "are set apart for the perpetual and exclusive use of such assignees, and their heirs," and, "until otherwise provided by law," such tracts might be "alienable" only to the United States, and to persons then being members of the Potawatomie tribe of Indian blood, with the permission of the president, and under certain regulation, except as provided in art. 3 of said treaty. Said art. 3 provides for the naturalization of the Indians, and for the issuance of patents, etc. Had John Riley lived, his patent would not have been issued until these conditions of the treaty were complied with; but he died, and under the 8th article of the treaty of 1867, the patent in this case was issued. John Riley, as an allottee, under this article, "is to be regarded for the purpose of a careful and just settlement of his estate as a citizen of the U. S. and of the state of Kansas, and it shall be competent for the proper courts to take charge of the settlement of his estate under all the forms and in accordance with the laws of the state as in the case of other citizens deceased." This 8th article, treaty of 1867, removes the restrictions in the 2d and 3d articles of the treaty of 1861, for it is here in this article "otherwise provided by law" how and in what manner such tracts shall be subject to levy, taxation, sale and disposal, to-wit, "the same as the lands of any other citizen." Any other construction of art. 8 is absurd, and would defeat the end and object of the law. If it was the intention of the treaty-making power to still attach the restrictions contained in the treaty of 1861, such restrictions would have been incorporated in the treaty of 1867 in plain and unambiguous terms; but in this article we are told that the courts of Kansas are to take charge of their estates in case of their decease, where they have no patent, but have their certificates of allotment, "under all the forms and in accordance with laws of state as in the case of other citizens deceased." The United States recognize this art. 8, and in pursuance thereof issue the patent to "John Riley and his heirs." Under the laws of Kansas then in force, (Comp. Laws 1862, p. 469, § 5, and p. 697, § 7,) the land on his decease descended, one-half absolutely to Mary Riley, his widow, (5 Kas.

384.) The title on the assignment and issuance of the certificate, and his decease, passed absolutely to her; (9 Kas. 38; 6 Cranch, 87 to 148.) The issuing of the patent was a mere ministerial act; 2 How. 284; 6 Mo. 106; 1 Ala. 660; 5 Porter, 243; 13 Cal. 419; 2 Wall. 535. And when the patent issued, it related back to 1863, (the original certificate of allotment,) and Riley's title dates from that time; (8 Iowa, 360;) and when issued it inured to the benefit of the Olivers, (who purchased after the treaty of 1867, and before the deed to Forbes;) Comp. Laws 1862, ch. 41, § 4; 3 McLean, 107; 7 Penn. St. 75; 2 How. & McH. 459; 16 La. An. 283; 1 How. & J. 6; 5 Iowa, 189; 29 Mo. 94; 8 Kas. 122. And such title would inure to the benefit of the first grantee, by estoppel, to the exclusion of a second grantee, to whom the grantor shall execute a deed after having acquired a title; 24 Pick. 322; 2 Der. 177; 13 N. H. 389; 53 Penn. St. 351. The title to the land after the restrictions were removed, and before the issuance of the patent, was such that could be devised, aliened; it would descend and might be devised the same as any other legal title; 3 Washb. 176 to 179. Originally, the land was the exclusive property of the U. S., to be disposed of to such persons at such times and in such mode, as well as by such title, as the government may deem proper; 8 Washb. 168, 169. The U. S. saw fit to pass the title by assignment, with restrictions, subject to the restrictions being removed in case of death of John Riley before patent issued; art. 2, treaty of 1861, and art. 8, treaty of 1867. And as soon as the contingency arose, provided for in article 8, the title absolutely passed from the U. S. to Mary Bostick, and it took the character of other property within the state, and was subject to state legislation; 13 Peters, 516, 436; 16 La. An. 89. The restrictions in articles 2 and 8, treaty of 1861, were personal, and did not run with the land; 4 McLean, 82; 3 Kas. 355; 8 Kas. 112; 18 Wis. 291; 29 Wis. 388; 10 Ala. 638, 1 Iowa, 575; 8 Cowen, 189.

The woman must be naturalized under articles 2 and 3, treaty of 1861, and article 6, treaty of 1867, before she could

dispose of the lands allotted to her by the United States, under the treaty of 1861. If the land descended to her were subject to the same restrictions as to sale, she must be naturalized before her deed would convey a title. There is no proof of her naturalization, but proof of her tribal relation, and Indian blood; and until the contrary is shown, she is presumed to be unnaturalized—an Indian, not a citizen. In what way, if not by virtue of art. 8, treaty of 1867, were her disabilities removed? Did the issuance of the patent to her dead husband, remove her disabilities? It did not make *him* a citizen, within the meaning of art. 3, treaty of 1861. It did not make *her* a citizen within the meaning of art. 6, treaty of 1867. If she is still laboring under the disabilities mentioned in art. 2 of treaty of 1861, by what logic and reasoning does the *subsequent deed of Forbes* give him the right of possession against Oliver? If she had any title to convey without the intervention of the president and secretary of the interior, after the treaty of 1867, such right of conveyance was in nowise affected by the issuance of the patent. If she had no right of conveyance after the treaty she had none after the issuance of the patent. That instrument did not give nor take away her right of conveyance. She could not make a *valid deed to Forbes*, unless she could make a *valid deed to Oliver*; and if neither deed is valid, the possession of Oliver could not be disturbed by Forbes.

Martin, Burns & Case, for defendant in error:

By the second article of the treaty between the United States and the Pottawatomie Indians, made November 15th 1861, it is provided that an accurate census of the number of the Indians should be made, and that thereafter there should be assigned to each chief one section of land—to each headman, one-half section—to each other head of a family, one quarter-section, and to each other person, eighty acres of land, and certificates for the tracts so assigned were to be issued to each person. (The certificates were to contain certain facts not necessary to be considered in this case.) It is further pro-

vided in the same article that "until otherwise provided by law, such tracts shall be exempt from levy, taxation or sale, and shall be alienable in fee or leased or otherwise disposed of only to the United States, or to persons then being members of the Pottawatomie tribe, and of Indian blood, with the permission of the president, and under such regulations as the secretary of the interior shall provide, except as hereinafter provided."

In the case at bar it is not claimed that the president ever gave his permission to sell the land in controversy prior to May 16th 1870, nor that the secretary of the interior ever made any rules or regulations providing for or authorizing conveyances of these lands prior to that date. By the 3d article of the same treaty it is provided in substance that under certain circumstances and conditions adults, being males and heads of families might be admitted to citizenship, and that *thereafter* the president was authorized to cause patents to be issued to them "*with power of alienation.*" There is no claim that Riley was ever admitted to citizenship, or that a patent was issued to him in his lifetime. On 29th March 1866, a supplemental treaty was made between the U. S. and the Pottawatomies. By the 1st article of this treaty, the provisions of the 3d article of the first-named treaty was "extended to *all adult* persons of said tribe without distinction of sex, whether such persons are or shall be heads of families or otherwise, in the same manner, to the same extent and upon the same terms, conditions and stipulations as are contained in said 3d article of said treaty, with reference to males and heads of families." On 27th February 1867, another treaty was made between the U. S. and the Pottawatomies, and before the ratification thereof certain amendments were proposed by the senate and agreed to by the Indians. By the 6th article of this treaty the 3d article of the treaty of 1861, (proclaimed April 19th 1862,) was continued in force, with the additional provision, that before patents should issue to the Indians for their lands in severalty, the agent should make a certificate showing that the applicant was competent to manage his own

affairs; and a like certificate was required from the business committee; and by the same article the rights of citizenship are extended to the families of such Indians as have become citizens. The 8th article of this treaty, as amended by the senate, is the only remaining article that has any bearing on the matters in controversy in this action. This article reads as follows:

"Where allottees under the treaty of 1861 *shall have died*, or shall hereafter de cease, *such allottees* shall be regarded for the purpose of a careful and just settlement of their estates, as citizens of the United States and of the state of Kansas, and it shall be competent for the proper courts to take charge of the settlement of their estates under all the forms, and in accordance with the laws of the state, as in the case of other citizens deceased; and in cases where there are children of allottees left orphans, guardians for such orphans may be appointed by the probate court of the county in which such orphans may reside. and such guardians shall give bonds to be approved by the said court, for the proper care of the person and estate of such orphans, as provided by law."

The court will observe, that the grant made by article 2 of the treaty of 1861 was not a grant *in fee*, but is specially limited to "*the exclusive use and benefit of such assignees, and their heirs*," perpetually; and we think it clear, that *Riley took only a life estate*. This being so, it clearly follows, that he had no power to convey it. Upon Riley's death, the estate passed to *his heirs*, not by *descent*, but by *purchase, or grant*, and *they* took the estate subject to all the restrictions and limitations imposed by the terms of the original grant. They had no more power to sell it than Riley had, because the grant followed *to their heirs*, and so on perpetually, until the restrictions and limitations imposed by the treaty should be removed. The primary object of the grant was to furnish a home for the Indians, and *their heirs forever*; and a conclusion different from that which we have arrived at would defeat the very object of the treaty. That the U. S. had a right to make the grant, and to attach the conditions and limitations it did to the grant, we do not suppose will be controverted. Then we find that the govern-

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ment granted to Riley a *life estate* in the land in controversy; that at his death the *same estate* passed to his heirs, and *without power of alienation* in either *Riley*, or *his heirs*, or their heirs, except to persons of Indian blood being members of the Pottawatomie tribe or nation and with the consent of the president under such rules and regulations as the secretary of the interior should prescribe. Said secretary never prescribed any rules respecting such conveyances, nor has the president ever consented to the conveyances made by Mrs. Bostick and her husband to the Olivers. Nor did Riley in his lifetime, nor did his widow after his death and prior to 16th May 1870, comply with or avail herself of the privileges and benefits contained in the 3d article of the treaty of 1861; and in no way or manner could Riley or his heirs, or their heirs, convert his or their *life estate* into an *estate in fee* except by a compliance with the provisions of said 3d article. It is perfectly clear from an examination of art. 3 that *only a life estate* was intended to be granted by art. 2; and the whole object and purpose of art. 3 is to provide a means by which this life estate might be converted into an *estate in fee*, and certain conditions beneficial to the U. S. and the state of Kansas are imposed by art. 3 upon parties who seek to obtain a fee-simple title, as a consideration for such change.

But it is insisted that these restrictions upon the power of alienation have been removed in two ways: First, by the death of Riley—upon the theory that these restrictions were *personal as to him*, and were removed by his death; and secondly, by the 8th article of the treaty of February 27th 1867, as amended by the senate. Our answer to the first proposition has been fully given already, namely, that Riley had only a *life estate* in the land; that his heirs took the same estate by purchase or grant; that the conditions and limitations on the power of alienation follow the land in the hands of Riley and his heirs and their heirs forever, until the estate is changed in the manner provided in the 3d article of the treaty of 1861; and if the *restrictions* imposed by the grant were personal to John Riley, they are personal in precisely the same manner

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and to the same extent to his heirs and their heirs perpetually, until removed in the manner already suggested. The answer to the second proposition is twofold: 1st, The restrictions imposed, and the nature of the estate granted, by the 2d article of the treaty of 1861, were not removed or changed in any respect by the 8th article of the treaty of 1867, as amended by the senate. 2d, The parties to that treaty never intended to do so, as a fair and careful examination of that article will clearly demonstrate. By art. 8, of the treaty of 1867, *as it was originally signed*, it is provided in substance that "if any dispute shall arise in regard to heirship to the property of any allottees under the treaty of 1862 [1861] who were then dead or might thereafter die, the business committee of the nation was authorized to decide such question." What question? *Only the question as to who were or are heirs*—nothing more; and in deciding that question they were to take "for their rule of action the laws of inheritance of the state of Kansas;" and in case there were orphan children left by allottees, guardians should be appointed for them by the same business committee, and such guardians were to give bonds to be approved by the agent of the nation or the superintendent, and the duty of the guardian, and the condition of the bond, was simply "*for the faithful management of the property of such orphans until their arrival at their majority.*" We submit that the whole effect of this article was, *first*, to authorize the business committee to determine who were heirs, in case of controversy on that point, such heirship to be determined according to the laws of Kansas; *second*, to authorize the business committee to appoint guardians for orphan children; *third*, the guardians so appointed were empowered to *manage the property of such orphans until their arrival at their majority.* And instead of conferring power on the guardians to sell the property of the orphans, it does just the opposite. The very language used, that is, "*for the faithful management of the property of such orphans until their arrival at their majority,*" excludes the idea of a power to sell the property. Nor is there a word to

be found in the article that tends in the least degree to intimate that the character of the original grant was to be changed or affected in any form or manner. Now the senate *struck out this article*, and inserted in lieu thereof article 8 as it now stands, which provides in substance that where allottees under the treaty of 1861 have died or shall thereafter die, they shall be regarded as citizens of the United States and of the state of Kansas for the *purpose* of a careful and *just settlement of their estates*; and the *courts of Kansas* are authorized to take *charge of the settlement of their estates* under all the forms and in accordance with the laws of Kansas, as in the case of other deceased citizens; and in cases where such allottees left orphan children, the probate courts were authorized to appoint guardians for such orphans for the proper care of the persons and estates of such orphans as provided by the laws of the state. We submit that this substituted article does substantially what the original article did, and no more, except it places the power to do the *same things* in the proper *courts of the state* instead of the *business committee of the nation*. It does not remove or pretend to remove the restrictions imposed by the treaty of 1861—nor does it change or purport to change the character of the grant made by that treaty; but upon the contrary, the 6th article of the treaty of 1867 expressly continues in force the 3d article of the treaty of 1861, and imposes additional burdens and restrictions upon the Indians.

Let us examine this 8th article carefully, and see just what it does do: It provides that for the *purpose* of a just and careful *settlement of the estates of deceased allottees* they shall be *regarded*, that is, treated as citizens of the United States and of the state of Kansas; that is, their estate shall be settled in accordance with the laws of Kansas; and for the purpose of making this *settlement*, the *courts* of the state shall have jurisdiction; but the rights of parties under the treaty are not changed, the restrictions upon the power of alienation are not removed. Not only is this true, *but this case* does not in any respect fall within the class of cases or contingencies provided

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for by this article. This is not a proceeding for the *settlement* of an estate, or for the protection or enforcement of any right growing out of the *settlement of an estate*. The courts have had nothing to do with the settlement of this estate; nor was the district court called upon to do anything of that kind; nor is this court. Therefore article 8 has no reference or relation to a controversy of this kind. The case of *Farrington v. Wilson*, 29 Wis. 383, is entirely different from the case now before this court. In the Wisconsin case the grant was to *Antoine Grignon*, with the restriction that *he* should not sell or lease the land to any person. The patent was to "*Antoine Grignon*, his heirs and assignees." The restriction in that case, was *confined* to Grignon, and was personal to him; and the court say that it was good as to him—but not against his *heirs*. The *restriction* was clearly repugnant to the grant to him and his *heirs* and *assigns*. In the case at bar the restrictions are expressly extended to *Riley* and *his heirs*; the restrictions are personal to *Riley* and *his heirs*; the estate granted is limited to *him* and to *his heirs* from generation to generation, until the restrictions are removed as contemplated by the 3d article of the treaty of 1861. It is insisted however, that if the conveyances made by Bostick and his wife prior to May 16th 1870, are void, that the conveyance made by them after that date to Forbes was also void. We think not, for the law presumes that Mrs. Bostick had complied with the provisions of art. 3 of the treaty of 1861, at the *date of the patent*, but not before. The patent is *prima facie* evidence at least, that all the conditions precedent to its issuance had been complied with by the heirs of John Riley at the date of the patent. This presumption arises with and commences to run from the *date of the patent*, but not before. Not only this, but the law presumes in favor of the regularity of the proceedings of the officers of the United States in issuing the patent. We think this a full and complete answer to the objection to the conveyance from Bostick and wife to Forbes.

The opinion of the court was delivered by

VALENTINE, J.: This was an action in the nature of ejectment, brought by Robert Forbes to recover from John J. Oliver and Emily L. Oliver a certain piece of land. Judgment was rendered in favor of the plaintiff, and the defendants now as plaintiffs in error bring the case to this court. The facts of the case as shown by the record are substantially as follows: The land in controversy was originally a part of the Pottawatomie Indian reservation. Under the provisions of article 2 of the Pottawatomie treaty of 1861, (12 U. S. Stat. at Large, 1192,) said land was allotted to John Riley, a Cherokee Indian by birth, but a Pottawatomie Indian by adoption, and the proper certificate for said land was duly issued to him by the commissioner of Indian affairs. Said article 2 provides among other things as follows:

“When such assignments shall have been completed, certificates shall be issued by the commissioner of Indian affairs for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned, respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs. Until otherwise provided by law, such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee or leased or otherwise disposed of only to the United States, or to persons then being members of the Pottawatomie tribe and of Indian blood, with the permission of the president, and under such regulations as the secretary of the interior shall provide, except as may be hereinafter provided.”

The last clause refers to the following provisions of article 3 of the treaty:

“At any time hereafter, when the president of the United States shall have become satisfied that any adults, being males and heads of families, who may be allottees under the provisions of the foregoing article, are sufficiently intelligent and prudent to control their affairs and interests, he may, at the requests of such persons, cause the lands severally held by them to be conveyed to them by patent in fee simple, with power of alienation.” “And on such patents being issued, * * * such competent persons shall cease to be members of said tribe, and

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shall become citizens of the United States; and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens; *Provided*, that, before making any such application to the president, they shall appear in open court, in the district court of the United States for the district of Kansas, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and shall also make proof to the satisfaction of said court that they are sufficiently intelligent and prudent to control their affairs and interests, that they have adopted the habits of civilized life, and have been able to support, for at least five years, themselves and families."

Now John Riley was a male, and a head of a family; but he was the head of a family only two years and four months, and not five years. He was married to Mary Beaubien, a Pottawatomie Indian woman, on May 1st 1862, and died September 1st 1864. It is not shown that he ever made any application to the president for a patent for said land, or that he ever made any such proof as is required by said article 3, or that he ever took said oath of allegiance, or that he ever did anything else for the purpose of removing restrictions and disabilities from himself, or of perfecting and completing his inchoate title to said land. It is not shown that he ever had the least desire to become a citizen of the United States, or to sell his said land, or to be able to sell the same. In 1864, when he died, he left a widow (said Mary Beaubien Riley) and two minor children, both girls, and daughters of himself and said Mary. Said widow and children are still living. In 1865 the widow married David Bostick, a white man, a citizen of the United States, and a resident of Kansas. By the provisions of the Pottawatomie treaty of 1866, the provisions of the third article of the treaty of 1861 were "extended to all adult persons of said tribe without distinction of sex, whether such persons are or shall be heads of families or otherwise, in the same manner, to the same extent, and upon the same terms, conditions, and stipulations as are contained in said third article of said treaty with reference to 'males and heads of families.'" (14 U. S. Stat. at Large, 768.) On July 27th 1867, said David and Mary

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Bostick executed a general warranty deed for an undivided-half of said land to Thomas J. Lazzelle and Julia Lazzelle his wife, Julia being a half-breed Pottawatomie Indian woman; and on the same day the Lazzelles executed the same kind of a deed for the same land to said John J. and Emily L. Oliver, the plaintiffs in error, defendants below. Article 6 of the Pottawatomie treaty of 1867, which took effect in August 1868, provides, that—

“The provisions of article third of the treaty of April 19th 1862, relative to Pottawatomies who desire to become citizens, shall continue in force, with the additional provision that, before patents shall issue to such persons, a certificate shall be necessary from the agent and business committee that the applicant is competent to manage his own affairs; * * * and where any member of the tribe shall become a citizen under the provisions of the said treaty of 1862, the families of said parties shall also be considered as citizens, and the head of the family shall be entitled to patents; * * * and women who are also heads of families, and single women of adult age, may become citizens in the same manner as males.” (15 U. S. Stat. at Large, 533.)

The said treaty of April 19th 1862, is the treaty that we have denominated the treaty of 1861. It was concluded November 15th 1861; consented to, with amendments, by the senate, April 15th 1862; again consented to by the Indians April 17th 1862, and affirmed and proclaimed by the president April 19th 1862. Article 8 of the treaty of 1867, which took effect in August 1868, provides that—

“Where allottees under the treaty of 1861 shall have died, or shall hereafter decease, such allottees shall be regarded, for the purpose of a careful and just settlement of their estates, as citizens of the United States, and of the state of Kansas; and it shall be competent for the proper courts to take charge of the settlement of their estates under all the forms and in accordance with the laws of the state, as in the case of other citizens deceased; and in cases where there are children of allottees, left orphans, guardians for such orphans may be appointed by the probate court of the county in which such orphans may reside, and such guardians shall give bonds, to be approved by the said court, for the proper care of the person

and estate of such orphans, as provided by law." (15 U. S. Stat. at Large, 536.)

The said treaty of 1861 is the same as the said treaty of April 19th 1862. (See above explanation.) On October 27th 1868, said David and Mary Bostick executed a general warranty deed for the undivided-half of said land to said John J. and Emily L. Oliver; and on April 10th 1869, the said Olivers took possession of said land, have continued to occupy the same ever since, and have made improvements thereon worth from \$1,250 to \$1,500. On the 16th of May 1870, the United States issued a patent for said land to the allottee, John Riley, and his heirs. Now the John Riley to whom this land was allotted had been dead for more than five and a half years when this patent was issued. On February 8d 1872, said David and Mary Bostick executed a general warranty deed for said land to Robert Forbes, defendant in error, plaintiff below. All the foregoing deeds were duly recorded in the order of their execution.

Did Forbes get any title to said land by virtue of said last-mentioned deed, as against the said Olivers? This is the only question in the case. Now in order to determine this question in the affirmative, it is necessary to hold that the Bosticks had no power to execute deeds for said land, or to bind themselves by covenants concerning the land at the times when they executed said deeds to the Lazzelles and to the Olivers, but that they had such power when they executed said deed to Forbes. Now why had they such power in the latter case, and no such power in the former cases? No sufficient reason can be given; and no reason at all can be given except the mere issuance of said patent. Now how can that be considered a sufficient reason? We cannot tell. Originally, the land in question belonged to John Riley; but he had no power to sell or to incumber the land, except in a certain manner, and except upon certain terms and conditions. He died, and it descended to his heirs, one-half to his widow, and the other half to his two children. Now if the restrictions upon the sale of said land were merely personal to John Riley, then of course his widow after his death

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could sell and convey her interest in the land, and in that case the deed she and her husband David Bostick executed to the Lazzelles would be considered good and valid. But suppose that said restrictions were not merely personal to John Riley, but that they followed the land to his heirs, to his widow and children: then, if, by a legal fiction, under article 8 of the treaty of 1867, John Riley because of his death was to be considered as a citizen of the United States, and his estate as that of a citizen, and if, by a like legal fiction, under article 6 of the same treaty, his family, his wife and children, were to be considered as citizens, then the deed executed in 1868 by his widow, Mary Bostick, to the Olivers, must be considered as valid and binding. But suppose that the said widow, the said Mary Bostick, is not to be considered as having become a citizen by virtue of the death of Riley, and the provisions of said treaty of 1867, and that the restrictions upon the sale of said land were still in force when she and her husband executed said deed to the Olivers, so that said deed is void: then what has happened since that time to remove said restrictions, and to give her such ample power to make a valid deed for said land that we must now consider the deed made by her and her husband to Forbes as a good and valid deed? We know of nothing. She has never made any application to become a citizen of the United States, or to have any said restrictions removed. She has never made the necessary proofs, nor obtained the necessary certificates, nor taken the necessary oath, for any such purpose. Then how could she make a valid deed in 1872, if she could not have done so in 1868? The only answer that can be given is, that said patent was issued in 1870. Said patent recites that "John Riley" was the allottee for said land, and then it grants the land to John Riley and to his heirs, "to have and to hold" the same "to said John Riley and to his heirs and assigns forever." Now, how can this patent give to Mary Bostick the power to convey said land? It does not purport to give her any such power. It does not purport to make her a citizen. It is not issued to her by name. Indeed, her name is not mentioned in the patent at all. And

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while she must take as an heir of John Riley, if she takes anything under the patent, yet she is not designated in the patent as an heir. The word "heirs," as used in a conveyance, is not a word of purchase, but is merely a word qualifying the title of the grantee mentioned in the conveyance. (*Hunter v. Watson*, 12 Cal. 363.) We should judge from recitals in said patent that it was issued because of the following provisions of said treaty of 1867, to-wit: "Where allottees under the treaty of 1861 shall have died or shall hereafter de cease, such allottees shall be regarded, for the purposes of a careful and just settlement of their estates, as citizens of the United States, and of the state of Kansas." (15 U. S. Stat. at Large, 536, art. 8.) "And where any member of the tribe shall become a citizen under the provisions of the said treaty of 1862 [1861] the families of said parties shall also be considered as citizens." (15 U. S. Stat. at Large, 533, art. 6.) And these provisions of said treaty were probably taken in connection with the act of congress of May 20th 1836, entitled "An act to give effect to patents for public lands issued in the names of deceased persons." Said act reads as follows:

"Be it enacted, That in 'all cases where patents for public lands have been or may hereafter be issued, in pursuance of any law of the United States, to a person who had died, or who shall hereafter die, before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assigns of such deceased patentee, as if the patent had been issued to the deceased person during life." (5 U. S. Stat. at Large, 81.)

Now whether this patent is valid or invalid, we hardly think it is necessary to determine; for we think we should reach the same final conclusion in either case. (With respect to patents issued after the death of the patentee, see *Galt v. Galloway*, 4 Peters, 333; *McDonald's Heirs v. Smalley*, 6 Peters, 261; *Galloway v. Finley*, 12 Peters, 264; *Landes v. Brant*, 10 How. 348; *Price v. Johnston*, 1 Ohio St. 390.) If the patent is valid, it is so merely because it is in confirmation of preëxisting rights, and not because it created any new rights. And every right existing at the time it was issued, existed at the time and

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before Mary Bostick and her husband executed said deed to the Olivers. From the time she executed said deed to the Olivers until said patent was issued, nothing transpired to give her any greater rights, powers, or privileges than she previously possessed. If said patent was rightfully and legally issued, then it should have been issued at the latest as early as August 1868, at the time when the treaty of 1867 took effect, which was before Mary Bostick executed said deed to the Olivers; and it is a general rule of law, that when a patent is issued it relates back to the earliest moment when it ought to have been issued. It must also be remembered that the said deed to the Olivers was a general warranty deed. Now, John Riley in his lifetime had the equitable title to said land; and his certificate of allotment was sufficient evidence thereof. When he died, his wife and children succeeded to his rights by inheritance, and not by purchase. But we do not see that it would make any material difference, so far as this case is concerned, whether we should consider that they succeeded to his rights by purchase or by inheritance. In either case, his widow was either restricted in the sale of said land; or she was not so restricted. If she was restricted, then her deed to Forbes was void. But if she was not restricted, then either her deed to the Lazzelles, or her deed to the Olivers, was valid, and in either case Forbes by his subsequent deed would get no title. In any case, therefore, the plaintiff Forbes must be defeated. If Mary Bostick was at any time free from all restrictions in the sale of said land, it was either because the restrictions imposed by the treaty of 1861 were merely personal to their original allottees, or because such restrictions were in the present case removed by the death of the allottee and by the provisions of the treaty of 1867. Nothing else ever transpired to remove them. We suppose that it will not be claimed that the patent changed the status or condition of John Riley, for he had been dead for several years before it was issued. And we hardly suppose it can be claimed that it changed the status or condition of his widow, Mary Bostick,

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for it does not purport to do so, even indirectly; and her name is not even mentioned therein.

The judgment of the court below will be reversed, and cause remanded for a new trial.

KINGMAN, C. J., concurring.

BREWER, J., not sitting in the case.

NANNIE O'KEEF *et. al.* v. OWEN E. SEIP.

1. JUDGMENT; *General Verdict; Practice.* Where all the issues in a case are presented to the jury and the jury find generally thereon in favor of the plaintiff, and against the defendant; and the court afterward renders a judgment in favor of the plaintiff and against the defendant, in accordance with the special facts as alleged in the plaintiff's petition, *held*, that the judgment is not erroneous, although such special facts are not specifically mentioned in the verdict of the jury. [*Carson v. Kerr*, 7-268; *Nichols v. Weaver*, 7-376; *R. R. v. Campbell*, 16-200; *R. R. v. Maher*, 23-163; *Partonier v. Prets*, 24-238; *R. R. v. Plunkett*, 25-188.]
2. ——— Several questions with respect to mechanics' liens, and in respect to the practice in courts, briefly referred to and decided.

Error from Atchison District Court.

ACTION by *Seip*, to recover from *Nannie O'Keef* and her husband \$265, and interest thereon, an alleged balance due upon a contract for building a dwelling-house upon certain lots in Atchison belonging to said *Nannie*. The plaintiff had judgment at the November Term 1874. Defendants bring the case here on error.

A. S. Everest, and *H. C. Solomon*, for plaintiffs in error:

The petition and exhibits in the case at bar do not state facts sufficient to constitute a cause of action under the mechanic's-lien laws; and if they do not, advantage thereof may be taken by plaintiffs in error at this time; Civil Code, § 90,

Gen. Stat. 648. The petition states that the contract was made with Daniel O'Keef. No authority is alleged for thus binding or encumbering the separate property of Mrs. O'Keef and the homestead of plaintiffs in error; 13 Ohio St. 131. Admitting that by § 9, art. 15 of the state constitution, and under § 1, ch. 38, Gen. Stat., p. 473, that for the payment of obligations contracted for erection of improvements thereon, the homestead is liable therefor, still it must appear that there was an *obligation* incurred or created by the owner of the same. Was Daniel O'Keef a general or special agent of his wife? We contend he could not create such an obligation without distinct and special written delegation and authority. It would seem that one of the main objects in protecting the homestead from alienation without the joint consent of husband and wife, is to guard her not only against the force, but against the blandishments of the husband; not only against his power, but against her own weakness. It is not alleged that any note or memorandum of the claimed contract was ever made, signed by Mrs. O'Keef, or by any other person thereunto, by her *lawfully* authorized. (Statute of Frauds, §§ 5 and 6, Gen. Stat. 505.) Is there any such contract set forth as would be binding on the land of Mrs. O'Keef? 13 Met. calf, 149; 3 Dutcher, 239. By § 7 of laws of 1872, p. 294, a person under contract with the owner of any tract of land, his agent or trustee, or with the husband or wife of such owner, who has performed labor or furnished material for erecting any building shall have a lien on the premises for the amount due therefor. By § 3 of said act, any person claiming such lien shall file in the office of the clerk of the district court of the county in which the land is situate, a statement setting forth the amount claimed and the items thereof, the *name of the owner*, the name of contractor, name of claimant, and a description of the property subject to the lien, verified by affidavit, and this statement *must* be filed within four months after the completion of the building. The clerk of said court shall *immediately* enter a minute of the same in a book for that purpose, to be called the "mechanic's lien book." It ap-

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pears by exhibit attached to petition that such statement was not filed within the time required by said § 8; 7 Abb. Pr. (N. S.) 72; 1 Cal. 188; 35 N. Y. 94; 2 Wis. 73, 224; 26 Wis. 661; 34 Mo. 150; 45 Mo. 312. Said statement and each item thereof is on an account and claim against *both* the plaintiffs in error, and contains no item or claim for interest. The affidavit states that the contract was made with Daniel O'Keef as *agent* for Nannie, to build a house on the lot in question, and that she was the owner. The petition alleges that "said *defendants* (plaintiffs in error) were to pay plaintiff (defendant in error) the sum of \$1,265" for building said house, and that "said *defendants* have paid upon said contract the sum of \$1,000, and that there is still due from said *defendants* under said contract the sum of \$265;" that "plaintiff duly filed notice of lien, specifying the defendants as the persons against whom the claim was made, and as the *owners* of said premises." The statement claimed to be filed was not sufficient; it merely shows the balance due; 45 Mo. 573; 53 Mo. 428. The petition does not allege that the contract was in writing; 33 N. J. (Law,) 202; 2 E. D. Smith, 662; 67 Penn. St. 453. If not averred to be in writing, how could *twelve* per cent. interest be claimed? The petition does not allege that the statement claimed to have been filed was "verified by affidavit." This defect is not cured by annexing to the petition as an exhibit a copy of the statement: 24 Wis. 568. And the pretended verification to said statement is wholly insufficient; 3 E. D. Smith, 662. Proceedings to impose and enforce mechanics' liens have no foundation in common law. Every fact essential to jurisdiction should appear upon the record, and want of such in petition would not be cured by admissions in the answer; 1 E. D. Smith, 661; 2 id. 556; 3 id. 632; 27 Mich. 456. The statute declares the conditions on which a lien will arise, and the appearance of those conditions is indispensable to an assertion of a lien. Such lien is exclusively a creature of the statute, deriving its existence only from positive enactment, and does not exist unless the party brings himself within its provisions and shows a substantial compliance with all its

requirements: 2 G. Greene, (Iowa) 508; 35 N. Y. 94; 43 Cal. 515. There is no allegation that the lien notice was ever entered by the clerk of the court in the "mechanic's lien book;" and if entered elsewhere it would be a nullity; 39 Ind. 201. This is necessary to allege and prove: 21 Ark. 186.

The court erred in setting said case for trial at the time it was set and under the circumstances disclosed by the record. The law provides that the clerk shall make out a trial docket at least twelve days before the first day of each term, and actions shall be set for particular days: Laws of 1870, § 8, ch. 87. If this had been done no injustice would have incurred. The clerk and not the court should set the cases before the term. It was also error to impanel the jury, and proceed with the trial, under the circumstances disclosed by the record.

The court erred in not permitting the attorney for the plaintiff in error to present and argue the case to the jury. The court evidently must have considered the trial as a judgment by default; but this was error. Answer had been filed and never withdrawn. Evidently the attorney for plaintiff in error had the right to address the jury upon the sufficiency and weight of evidence, the question of damages and all the matters and issues involved in the case. It is not the policy of our law to exclude a party from a hearing, especially in cases where a party has a right to trial by jury on *any* question. Can a court arbitrarily thus trammel a constitutional right? If in the case at bar, then in any case. It would seem that this right was recognized by subdivision 6 of § 1, ch. 162 of laws 1872, page 329; 25 Ga. 85; 2 Gra. & Wat. New Trials, ch. 9; 2 Bibb, (Ky.) 76; 11 Penn. St. 399.

The court erred in directing the jury to find a verdict against plaintiffs in error for the sum of \$299.60, and in directing one of the jurors to sign a prepared verdict as foreman. The answer of defendants stating that plaintiff had no lien on the premises, tendered an issue of fact requiring proof that notice of lien was made and filed within the time allowed.

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Said verdict and said judgment are inconsistent, not sustained by evidence, and contrary to law. There was no proof that any statement of the lien was ever made or filed within the time provided by law; 1 Daly (N. Y.) 61; no proof that the clerk ever entered a minute of the statement in the "mechanic's lien book;" 21 Ark. 186.

We contend that the facts and circumstances disclosed in the record established a case of excusable neglect; 29 Wis. 688; 18 Wis. 482; 15 Wis. 355; 19 Wis. 238; 41 Cal. 626; 31 Iowa, 284, 481. Does not the record disclose such "accident or surprise, which ordinary prudence could not have guarded against?"

The court erred in ordering and directing the clerk to enter any such judgment as the one disclosed by the record herein. The verdict as prepared and directed by the court was a general one for the sum of \$299.60 against both of the plaintiffs in error; and by what rule of law or theory of judicial surgery the court dissected or separated the same, and directed such a judgment, we are at a loss to comprehend. We have searched in vain for precedent, and can but say that the judgment is unwarranted, without precedent, and could not have possibly been entered upon a general verdict. How the *court* found, and not the *jury*, the issuable facts in the case at bar, is to us a matter of legal curiosity. The *court*, and not the *jury*, finding that "The proper proceedings were had to obtain the benefit of the mechanic's lien on the premises;" that the amount of the same was \$283; then subtracting this amount from the general verdict, calling the remainder extra work without any lien—severing the vital parts and still leaving life! It was irregular for the trial judge to find additional facts upon which, together with the general verdict of the jury, such a judgment could have been entered: 58 N. Y. 469.

How could the court below tell how much of the general verdict was a lien, and how much was not? 1 Cal. 188, 186.

The opinion of the court was delivered by

VALENTINE, J.: The plaintiffs in error make the following statement of the case, to-wit:

"Owen E. Seip, defendant in error, brought this action against the plaintiffs in error *jointly*, alleging in his petition that he entered into a contract on August 1st 1873 with said Daniel O'Keef as agent of said Nannie to furnish materials and construct a building for her on a certain lot in the city of Atchison, for which plaintiffs in error were to pay defendant in error the sum of \$1,265 upon completion of the same; that said building was completed on November 16th 1873; that there has been paid to defendant in error thereon the sum of \$1,000, and there is due the sum of \$265, with interest thereon from said November 16th 1873, at *twelve* per centum per annum; also describing the premises upon which said building was erected; and alleging that, at the time the contract was entered into and the building constructed and notice of lien filed, the premises were the property of said Nannie, and were occupied by plaintiffs in error as a homestead; that on 18th March 1874, said Seip filed with the clerk of the district court a notice of a lien on said premises for the said indebtedness, specifying plaintiffs in error as the persons against whom the claim was made, and that they were the owners of said premises. A copy of the notice of lien was attached to the petition *as a part thereof*. And as another cause of action, there is a claim in the petition for extra work and material made against plaintiffs in error to the amount of \$15, which it is alleged they promised to pay; but this amount, it is alleged, was by neglect of Seip not included in his notice of lien. In the petition, judgment is prayed against both of plaintiffs in error for \$280, with interest thereon at *twelve* per centum per annum from November 16th 1873, and that the sum of \$265 be declared a first lien on said premises, and that the same be sold to pay said lien and costs of action. To this petition answer was filed, stating in substance that the building was not completed within the time nor according to contract, and was not completed at the date of answer, and was not completed on November 16th 1873; that by the terms of the contract the price agreed upon for the construction of the building was \$1,250; the building was to be completed according to certain plans and specifications, and to the satisfaction of the architect, and was to be completed within sixty days from August 1st 1873;

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the payments were to be \$500 in advance, \$500 upon the completion of the work, and \$250 in eight months after the building was completed; that the first sum was paid in advance by said Nannie O'Keef, and that at the request of said Seip she also paid the further sum of \$527 before the completion of the building. The answer denies the claim for extra work, and also denies all indebtedness to Seip, and claims damages by reason of non-compliance with the terms of the building contract, in the sum of \$300. The answer prays that the pretended lien be declared of no force or effect, and as utterly void, and for judgment for interest on money paid before due, and for damages. To this answer a reply was filed, in effect a general denial of the answer.

"The case was at issue, and upon the trial-docket at November term 1874, of said district court; but up to December 1st had not been called or set for trial for any particular day; but about 4 o'clock P. M. of said last-named day, the case was peremptorily set for trial December 3d, at nine o'clock A. M. Before this time the court had been for some two weeks continually engaged in one case; and the court had announced publicly to the bar, and to suitors generally, at different times, that the next case to be called and tried after the one on trial would be an important criminal case which had before been tried in this court, and occupied about two weeks' time. This criminal case was by consent continued, and the case at bar was then called and set for trial *by the court*. On the morning of December 3d, when the case at bar was called for trial, the attorney for plaintiffs in error stated to the court that he was unable to go to trial, and that plaintiffs in error were unable to present their defense, owing to the fact that said case was set in their absence, and that they were then out of the county and state: that said attorney, on first receiving notice that the case at bar was set for trial had filed preceipe for witness in their behalf; that subpoenas had been issued, but not returned served, although placed in the hands of the proper officers for service; that said attorney had telegraphed to his clients, who were in St. Joseph, Mo., but no reply had been received up to such time; that witnesses for his clients had not appeared, and said attorney requested a short delay; but the court called said case and immediately impaneled a jury, and then waited about two hours. Seip introduced his testimony, which consisted in producing himself as a witness, and one Henry Luth. All the evidence is contained in the record. *After the evidence was closed*, said attorney again stated to the court that his

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clients had not yet arrived, but were expected; that the process which had been issued for their witnesses had not yet been returned, nor had such witnesses been in court, but were expected. The case was held open about two hours.

"When the said attorney got up to present and argue the case to the jury, the court stated that no argument *was necessary*, and refused to permit any argument whatever, but without any argument the court directed the jury to find a verdict in favor of the plaintiff (Seip) against both defendants for the sum of \$299.60, and directed the attorney for Seip to prepare a verdict to be signed by one of the jury, which was then written out by said attorney. Said verdict is in the record. The court then handed the same to one of said jury, and directed him to sign the same as foreman, which was done without the jury retiring. This verdict was signed and received by the court, and forms the basis of the judgment rendered herein. A motion for new trial was filed, and supported by affidavits. The affidavit of D. C. O'Keef showed, that at the time the case at bar was set for trial he was in the city of St. Joseph, Mo., where he had been called on urgent and important business; that the day he started away it was announced by the court that the case of *The State of Kansas v. Smith* would be tried, and he was informed by his attorney and the attorneys in said criminal case that the *Smith* case would certainly be tried, and would follow the case then on trial, and that the said criminal case would take at least one week in the trial thereof; that on these statements he left for St. Joseph, and was not in Atchison when the case at bar was set for trial; that he did not receive the telegram sent by his attorney; and he stated that there was a good and valid defense to whole of the said claim; that the affiant never incurred any obligation with said defendant in error. The affidavit of Nannie O'Keef, stated in substance, that she never held any conversation with Seip, (since he stopped work on the building in question) with regard to the contract, nor did she at any time acknowledge that she was indebted to him, and was never notified by him that the building was claimed to be finished until July 15th 1874; that Seip abandoned the contract about October 15th 1873; that after July 15th 1874, he did some work on the contract; that she never received said building as finished, and same has never been finished. The affidavit of Seip was also filed in opposition to the motion for new trial. The counter affidavit of D. C. O'Keef was also filed, stating in substance

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that he was not in the court-room when the case at bar was set for trial, but was in St. Joseph, Mo.; that he never at any time told defendant in error that he would consent to have the same taken up and tried on the day the same was tried, and denying particularly the affidavit of defendant in error; also showing that his absence was unavoidable.

"The motion for new trial was presented; and all of said affidavits read and used on the hearing thereof. The court overruled the motion for a new trial, and ordered judgment to be entered in favor of Seip, and directed the clerk of said court to enter in the record of said court, following the entry of said verdict, a statement of finding—

"That the court further finds that the proper proceedings were had to obtain the benefit of the mechanic's-lien law for the amount due under the contract sued on, and that the same was secured by a mechanic's lien on said lot 14 in block 93. * * *

"Thereupon it is considered and adjudged by the court here, that the plaintiff, Owen E. Seip, have and recover of and from the said Nannie O'Keef as well the said sum of \$283.50, and that the said lot 14, block 93, Old Atchison, in the county of Atchison, stand charged with the payment, as also his costs, and that he have execution hereof.

"And the court further finds that included in the amount found by the jury, to-wit, \$299.60, there is the sum of \$15 taken in consideration by said jury that was for extra work and materials furnished by said plaintiff to said defendants, which was not in said contract, and on which no mechanic's lien vested. It is therefore considered and adjudged by the court here, that the said plaintiff have and recover of and from the defendant Nannie O'Keef, as well the said sum of \$15 so as aforesaid found due, and deducted from the sum total of the verdict of the jury, and that he have hereby execution for the same.

"And the court further finds that this action is founded on a contract for the building of a certain brick dwelling-house situate on lot 14, in block 93 in the city and county of Atchison, state of Kansas, and that the amount due to plaintiffs from said *defendants* for the erection of said building is the sum of \$283.50, and the same is secured by mechanic's lien." [Here follows an order, that if said sum of \$283.50 remain unpaid for sixty days, an order issue for the sale of said premises.] "And it is further ordered and decreed that all equity of redemption of the said Nannie O'Keef and Daniel O'Keef, all right of dower of the said Nannie O'Keef of, in and to the aforesaid premises be and the same is hereby forever barred and foreclosed from and after said sale."

The foregoing is taken from the brief of counsel for plaintiff in error. All the issues in this case seem to have been submitted to the jury; and the jury seem to have found generally upon all such issues, in favor of the plaintiff below, and against the defendants below. Their verdict, is as follows: "We the jury duly impaneled, tried, and sworn in the above entitled cause, do, upon our oaths, find the issues for the plain-

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tiff, and assess his damages at two hundred and ninety-nine and 66-100 dollars." This \$299.66 is evidently the \$265.00 claimed by the plaintiff for labor and material under the contract, the \$15.00 claimed for extra work and material, and \$19.66 interest on said sums, at seven per cent. per annum for one year and a few days; for this is just what the plaintiff was entitled to recover under his petition if all the allegations thereof were true. Upon the foregoing verdict it was competent for the court below to render whatever judgment the petition would sustain. And we think the petition will sustain just such a judgment as was actually rendered. Where the jury by their general verdict find everything in favor of the plaintiff, and neither party has asked that they shall make any special findings, the court may properly render judgment on the verdict, in accordance with the special facts as alleged in the plaintiff's petition, although such special facts are not specifically mentioned in the verdict.

That the petition would sustain a personal judgment in favor of the plaintiff below and against Nannie O'Keef for the amount found by the jury, we think there is no room to question. Whether it would sustain a personal judgment in favor of the plaintiff below and against Daniel C. O'Keef for any amount, we need not determine, for no such judgment was rendered. Whether it will sustain the judgment for the sale of the house and lot, and for applying the proceeds thereof in payment of the money judgment, is perhaps the only question that we need to consider in this connection. The determination of this question depends wholly upon the sufficiency of the allegations of the petition concerning the mechanic's lien. The petition shows that the house was built upon contract with Daniel C. O'Keef, as agent for Nannie O'Keef, who owned the lot upon which the house was built; that the plaintiff was to receive for building said house \$1,265; that he did receive \$1,000 of that amount; that the balance thereof, to-wit, \$265, became due November 16th 1873, and still remains due and unpaid; that the house was completed November 16th 1873,

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and that the notice of lien was duly filed March 13th 1874. The notice of lien shows substantially the same things, except, that while the notice (or rather the statement) was sworn to before the clerk of the district court on March 13th 1874, the same appears from the copy brought to this court, to have been filed with the clerk on March 18th 1874. The objections made to the allegations of the petition concerning the lien, we think are not sufficient; and being made for the first time in this court we think they are wholly insufficient to authorize a reversal of the judgment.

In answer to the various objections made by plaintiff in error, and the various questions raised by them, we would reply briefly as follows: Whatever is done by an agent is done by the principal. It was not necessary that the contract should have been made in writing. "The items" of the plaintiff's claim are set forth both in the petition, and in the notice of lien, "as nearly as practicable." Interest is claimed both in the petition and in the notice of lien. The petition does state that said notice "was duly verified," and the notice itself shows that it was, even if the clerk had failed (without the fault of the party filing the notice of lien) to "enter a minute of the same" in the "mechanic's lien book." Such failure would not invalidate the lien as between the original parties. But still we do not think that this question is properly in the case. The plaintiff alleged the due filing of the notice of lien; the defendants did not deny the same, but, on the contrary, substantially by the statements in their answer admitted the same. The verdict of the jury was substantially the only verdict that they could have rendered under the pleadings and the evidence. They might have made special findings upon particular issues, but still their verdict would and should have been substantially the same as it was. There was therefore no substantial error in the court instructing the jury to find as it did. No argument of counsel could or should have changed the verdict in any substantial particular. The evidence was all in favor of the plaintiff, and was amply sufficient to prove every allegation

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of the petition put in issue by the answer. And therefore we do not think that the court erred in refusing to allow any argument to be made to the jury. The matter rested in the sound discretion of the court below; and we do not think that the court abused its discretion.

We do not think that the court erred or abused its discretion in setting the case for trial. The substantial portion of the judgment was against Nannie O'Keef alone, and there is nothing to show why she was not amply prepared for trial, or why she could not be personally present at the trial. And one of the affidavits read on the motion for a new trial states "that the said defendant D. C. O'Keef was in the court-room on the forenoon of the day upon which this cause was set for trial, and requested that said cause be set at the time at which it was set." There was no personal judgment for any amount rendered against Daniel C. O'Keef and he did not own the house or lot ordered to be sold.

The judgment of the court below will be affirmed.

All the Justices concurring.

WILLIAM CHAPIN V. HANNAH A. BROWN.

1. *JUSTICES COURTS; Change of Venue.* Where a defendant makes an application in a justice's court for a change of venue, but does not pay or offer to pay any costs, and does not confess or offer to confess a judgment for any costs, although his attention is called to the matter by the plaintiff, the justice may rightfully overrule the application.
2. ——— *Bill of Particulars; Party in Interest.* The plaintiff's bill of particulars in a justice's court commenced as follows: "Now comes the said plaintiff and *claims the said defendant is indebted to plaintiff* in the sum of \$124.30, as follows, to-wit;" and the bill of particulars then set forth a good cause of action in favor of the plaintiff's son and against the defendant for work and labor; but it did not state how or why the plaintiff, who is a woman, was entitled to her son's wages; and the bill of

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particulars was signed as follows: "H. A. B. by T. W. W. her agent." No objection was made to said bill of particulars in the justice's court, but the action was prosecuted *and defended* therein as though the bill of particulars was sufficient in every respect, and judgment was rendered for the plaintiff—and thereupon the defendant took the case on petition in error to the district court, where the judgment of the justice was affirmed: *Held*, Under the circumstances of this case, that the district court did not err in affirming the judgment of the justice of the peace. [*Kaub v. Mitchell*, 12-57; *R. R. v. Taylor*, 17-589.]

Error from Crawford District Court.

BROWN recovered a judgment against *Chapin* before a justice of the peace, and said judgment was affirmed by the district court at the September Term 1874. *Chapin* brings the case here on error.

John T. Voss, for plaintiff in error, contended, "1st, That plaintiff's petition was not signed by her, nor her attorney; (Gen. Statutes, page 650, § 107;) 2d, no cause of action was or is stated in the petition; 3d, the change of venue should have been granted; and 4th, as plaintiff's petition stands, without amendment, she has no right of recovery."

The opinion of the court was delivered by

VALENTINE, J.: This action was originally commenced before a justice of the peace. Hannah A. Brown was the plaintiff, and William Chapin was the defendant. Judgment was rendered in the justice's court in favor of the plaintiff, and the defendant then took the case to the district court on petition in error. The judgment of the justice's court was affirmed in the district court, and the defendant now brings the case to this court. Two principal questions are presented in this court. 1st, Did the justice err in refusing to grant the defendant a change of venue? 2d, Did the plaintiff's bill of particulars in the justice's court state facts sufficient to constitute a cause of action?

I. We think the justice did not err in refusing to grant the defendant a change of venue. Section 78 of the justices act

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provides that, "before any such change shall be allowed, the costs, as specified in the next following section, shall be paid by the party applying for such change, or he shall have confessed a judgment therefor before the justice granting the change." (Gen. Stat. 792.) And the next following section provides that when the change is granted "on the application of the defendant he shall be taxed with the costs which have accrued for issuing subpoenas to witnesses, and service thereon, witness fees, and costs of the justice for transferring the cause to the docket of the other justice." (Gen. Stat. 798, § 79.) Now the defendant in this case did not pay nor offer to pay said costs, nor any costs; and did not confess nor offer to confess a judgment for them, although his attention was called to the matter by the plaintiff.

II. The plaintiff's bill of particulars commences as follows: "Now comes the said plaintiff and *claims the said defendant is indebted to plaintiff* in the sum of \$124.30, as follows, to-wit." Then there is set forth in the bill of particulars a good cause of action in favor of the plaintiff's son, and against the defendant, for work and labor; but it is not stated how or why the plaintiff is entitled to her son's wages. The bill of particulars is then signed as follows: "Hannah A. Brown, by Thomas W. Wells her agent." No objection was made to the plaintiff's bill of particulars in the justice's court. No claim was there made that it did not state facts sufficient to constitute a cause of action, or that the plaintiff was not the real party in interest, or that there was a defect of parties plaintiff, or that the bill of particulars was not properly signed. On the contrary, the case was prosecuted and defended as though the bill of particulars was sufficient in every respect. The defendant first moved for a change of venue, and when that was overruled he then appeared at the trial and cross-examined the plaintiff's witnesses, and never once suggested to the justice that the plaintiff's bill of particulars was in any respect defective. Indeed, the claim that the bill of particulars was not properly signed is raised for the first time in this court by counsel's brief. About the only defect in the bill of particu-

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lars is, that it does not state why or how the plaintiff is entitled to her son's wages. But it does state that the plaintiff claims "the said defendant is indebted to plaintiff" for such wages. Under the circumstances of this case we do not think that the district court erred in affirming the judgment of the justice, and therefore the judgment of the district court will be affirmed.

All the Justices concurring.

KANSAS PACIFIC RAILWAY CO. V. JEROME KUNKEL.

1. **AMENDMENTS; Discretion of Court.** Granting leave to amend a petition is a matter largely within the discretion of the trial court, and it must appear that such discretion has been abused before a reversal will be ordered. [*Hunt. v. Pyffe, McC-75*; *Pemberton v. Hoosier, 1-108*; *Irwin v. Paulett, 1-418*; *Taylor v. Glendenning, 4-524*; *Fitzpatrick v. Gebhart, 7-35*; *R. v. Nichols et al., 9-235*; *Davis v. Wilson, 11-74*; *Kunz v. Grund, 12-547*; *R. R. v. Salmon, 14-512*; *Barkley v. State, 15-99*; *Hobson v. Executors, 16-388*; *Wright v. Bacheller, 16-259*; *Grandstaff v. Brown, 23-178*; *R. R. v. Dudgeon, 28-285*; *Wells et al. v. Danford, 28-490.*]
2. ——— **Allegation of Time; Limitation of Action.** Granting leave to change the date at which a matter is alleged to have taken place, shows no abuse of discretion, although by the former date the action was barred, and by the latter not. In this case it does not appear that under any pretense of amendment, a cause of action not barred was substituted for one barred; and the court may look at the whole record to determine that question.
3. **ACTION, NATURE OF—Whether Ex Contractu, or Ex Delicto.** A petition which alleges that the defendant is a common carrier, that it made a certain contract of carriage with the plaintiff, receiving its pay therefor, that plaintiff entered upon its cars in pursuance of such contract, and that defendant, in violation of its contract, did not stop at the place to which it had agreed to carry him, but carried him some distance beyond, and then by a sudden starting of its train threw him down and injured him while attempting to get off the train in obedience to its orders, states a cause of action arising *ex contractu*.
4. **CREDIBILITY OF WITNESS; Interest; Instructions.** While it is true that interest affects the credibility of a witness, and it is proper that the court in its charge should call the attention of the jury to that fact, yet where it has done so in its general charge, and has also at the instance of one party given a special instruction to the same effect, it is seldom error to refuse an additional instruction asked by the same party stating the law in stronger and more emphatic language. [*R. R. v. Young, 19-493.*]

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5. **VERDICTS**—*When Not Disturbed.* The oft-repeated rule of this court, that where there is clear and positive testimony sustaining every essential fact, and the verdict has received the approval of the trial court, this court will not disturb the verdict as against the evidence, although upon the record the evidence seems to greatly preponderate the other way, commented upon and reaffirmed. [*R. R. v. Keller*, 31-439; *Jarrett v. Apple*, 31-695; *Greer v. Greer*, 24-106; *R. R. v. Richardson*, 25-409; *Allison v. Ahlers*, 26-583; *Race v. Malony*, 21-54; *R. R. v. Young*, 21-532, 533; *Fanson v. Harris*, 21-784; *Cain v. Robinson*, 20-456; *George v. Myers*, 18-432; *R. R. v. Young*, 19-493; *Weir v. Ins. Co.*, 32-327; *Buck v. Panabaker*, 32-489; *post*, 169.]

Error from Jefferson District Court.

ACTION by *Kunkel*, to recover for personal injuries sustained in August 1869. The action was commenced in May 1872. The facts as claimed by *Kunkel*, are stated in the opinion, *infra*. The *Railway Company* pleaded the statute of limitations, and also controverted the facts alleged in the petition. A trial was had in May 1873, when a verdict was returned in favor of *Kunkel* for \$3,000 damages. On defendant's motion, the district court, at the same term, set aside the verdict, and granted a new trial. A second trial was had at the May Term 1874. The main defense, upon the merits, was, that the injury complained of by *Kunkel* was not caused as alleged by him, but had in fact existed many years, and witnesses were called to prove that *Kunkel* had been ruptured, and had worn a truss, since 1861. The jury returned a general verdict in favor of *Kunkel*, assessing his damages at \$2,500; and they also responded to special questions of fact, as follows:

"*Question*: Was *Kunkel* ruptured before the 18th day of August 1869? *Ans.*: He was not, where he now wears a truss; but had what he called ruptured veins in his leg.

"*Question*: Did *Kunkel* get off from the cars of defendant, and receive the injuries, if any, of which he complains, while the cars were in motion, and before they had come to a stop? *Ans.*: The train had stopped; by order of the conductor plaintiff attempted to alight, and in so doing, by a sudden motion of the train, plaintiff was thrown from the same, and received the injuries of which he complains.

"*Question*: Did the injury complained of occur upon a dark night, and was it so dark that plaintiff, when he left the train

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and sustained the alleged injury, could not see where to step or place his foot in safety? *Ans.*: It was dark, as stated.

"*Question*: Did the conductor tell plaintiff that the train could not stop at Medina? *Ans.*: Not when he collected the fare; but after the train had passed Grantville.

"*Question*: Did the conductor tell the plaintiff that he must get off at the water-tank when the train stopped? *Ans.*: No, but said he would run down to the tank; but stopping before he got there, he told him to get off.

"*Question*: Did the train stop at the tank? *Ans.*: It does not so appear in the evidence.

"*Question*: Was the train a freight train? *Ans.*: It was, with a passenger coach attached.

"*Question*: Did the plaintiff get off before the train stopped at the tank? *Ans.*: He did."

The *Railway Company*, on these findings, moved for judgment *non obstante*. Motion overruled, and judgment for plaintiff on the verdict. New trial refused, and the *Railway Company* brings the case here on error.

J. P. Usher, and *E. W. Dennis*, for plaintiff in error:

Kunkel filed a petition in May 1872, alleging a contract of carriage with the company of himself as a passenger *on the 20th March 1869*. He averred that he was to be carried from Topeka to Medina for the sum of *three* dollars paid to the company, and he alleged a breach of the contract, and injury. The summons was issued on 7th June 1872, and was duly served. By the code, § 20, the suit was commenced on said 7th of June. As the cause of action accrued on the 20th March 1869, the action was barred by the statute; (Code, § 18.) In November 1872, leave was granted Kunkel to amend his petition, which he did, alleging another and different contract of carriage between himself and the company, made on the 18th of August 1869, whereby he was to be carried from Topeka to Medina for the sum of *one* dollar, which was then paid. There is no allegation in the petition that the causes of action in the two petitions were identical, and so far as the petition shows the causes of action are other and different—one laid in March, and the other in August, in the same year, and for different considerations.

Did the court below err in allowing Kunkel to set up another contract than that upon which he had sued, and so have the benefit of his summons issued on a petition which was a nullity, and stated no cause of action? The petition being a nullity, no suit was in fact commenced. The summons performs the office of a subpoena in chancery, upon the bill being filed. If the bill states no cause of action, another cannot be filed and hold the defendant to answer under the subpoena. The summons in this case is dated within three years after the date of the alleged August contract 1869, but which contract was not sought to be enforced until more than three years thereafter, to-wit, in November 1872. It is to be decided, then, whether without allegation other than is contained in the two petitions, the second is an amendment of the first; and we submit that a fair test whether it was an amendment would be if Kunkel had in the first instance filed a petition setting up both causes of action in separate paragraphs, before the statute of limitations had run upon either cause of action, and the company had insisted at the trial that Kunkel could give in evidence only one contract and one injury, the company would fail in its objection; he could give in evidence as many causes of action as he had alleged. In this case there is no circumstance leading the mind to suppose that the alleged contracts were one and the same, except that they were between the same parties, and the carriage was to be over the same ground; while on the other hand, the compensation was different for the performance of each contract, and five months elapsed between them.

The company was a common carrier of passengers, operating its trains each day over its road between Topeka, and passing Medina east. Kunkel himself testified that he "had been carried by before," that is to say, past Medina; "they had carried me down to the tank frequently, before that." In his petition he does not state whether he was being carried by night or by day; and it was only upon the trial that he informs us it was by night, and during a violent storm of wind and rain. From his own testimony he had an indefinite

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range of time in which to designate the time of the injury complained of. It appears that he was often carried over the road, and it does not appear that any of the servants of the company or the company itself, heard or knew of his alleged injury until he sued. This is important, because he does not testify that he received but one personal injury, though he does testify that there were frequent breaches of contract before the time he received the injury complained of. If Kunkel testified truly, he had many causes of action for breach of contract in carrying him past Medina. The gist of the action, in both petitions, is, the carrying him by that station; all that he alleges about injuries goes to the increase of damages, and if injuries were not proved, he could still recover for the breach of contract at least nominal damages. Taking his testimony and first petition as true, and there was a breach of contract as early as March 20th 1869. If he had been carried only once by the company, and if upon such carriage his limbs had been broken, or had suffered the loss of any member of his body, and such fact had appeared, there would be more reason for calling the second petition an amendment of the first, if they had described the contract and injuries the same. In this case it is earnestly contended that there is no room to suppose that the second petition was for the identical cause of action as the first. It would be as fair and reasonable to hold that where suit is brought upon a note barred by the statute of limitations, on objection made, plaintiff might lawfully file a new petition on another note, not barred by the statute.

But we submit, whether it is legally true, as claimed by Kunkel, that the *gist* of the action is the "breach of the contract" in carrying him past the station? We suggest that reflection and examination will show that the gist of the action was *tort*. For, after alleging the contract of carriage to Medina, the petition states that defendant refused to stop its carriage at Medina, but carried Kunkel more than a mile past, and then ordered him to get down from the carriage, and while he was attempting to obey the order the defendant vio-

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lently and suddenly started the carriage with *great force, threw the plaintiff down from the carriage to the ground and wounded, bruised and beat him.* It is submitted to the better judgment of the court, whether this is not an action *ex delicto*, whether the gist of the action is not the *wanton throwing down to the ground, beating, bruising and wounding Kunkel.* The injuries complained of do not necessarily or naturally flow from the breach of contract in carrying Kunkel past Medina. The allegations of contract and breach were but inducements to the cause of action for the alleged assault and battery. There is no allegation that the contract of carriage was negligently or carelessly performed, as in *Howard v. Richie*, 9 Kas. 102, or in *Staley v. Jameson*, 46 Ind. 159.

2. The answer of the defendant, is, first, a general denial; second, an averment that the first petition in this cause, filed May 11th 1872, was for another and different cause of action than that complained of in the second petition. This paragraph tendered an issue as to whether there were two causes of action. Kunkel replies to this second defense, averring that the causes of action were the same in both petitions, and gives a reason why they are not described in the same way in both petitions, that his attorneys were ignorant of the date of the commission of injury. The question here is, upon whom was the burden of this issue? If upon inspection of the two petitions the legal conclusion is that they describe the same cause of action, and that a recovery upon one of the petitions could be pleaded in bar of the second, then the pleadings raise an immaterial issue. It is not believed that any such conclusion can be reached, and we proceed to discuss upon which party devolved the maintenance of the issue. If it had appeared by the petition, as it ought, that there never had been but one cause of action, and that the contract was made in August, instead of March, and if a petition containing such averments ought to have been received as an amendment (which is denied,) then, upon the general denial by defendant, the burden of issue would have been upon Kunkel. The paragraph in the answer alleging that the petitions were

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not for the same cause of action, concludes by an appeal to the records for the proof, all of which appears by the record in the cause. Not an issue tendered to the country, but to the court, to be adjudged by the record. The reply tenders an issue necessarily to be determined by other than record evidence. Upon that issue no proof whatever was offered other than Kunkel's own testimony that he had been carried by frequently before, so that if there was any evidence upon that issue it was against Kunkel. What then is the condition of the case? This court must determine that upon the face of the two petitions; they are for one and the same cause of action; if not, then that Kunkel failed to prove the issue by him made. In every phase of the case it appears and will appear that unless this court shall find as a question of law that the petitions were for one and the same cause of action, and that judgment upon one, for or against the company, would upon the record bar an action on the other, if pleaded, error was committed, and the judgment ought to be reversed.

3. If the foregoing objections are not well taken, it will become necessary to consider other alleged errors. Attention is called to the 7th instruction asked by defendant. The 6th instruction given by the court, and substantially repeated in its own instruction, is not an equivalent for the 7th instruction refused and excepted to. The 6th instruction simply affirmed the interest of Kunkel in the case, and that his credibility was in question, and that such witnesses may be more readily suspected of prevaricating or testifying falsely in their own behalf than witnesses who have no interest in the case. The 7th instruction was intended to carry the mind of the jury beyond the domain of the former instruction; it was to remind them of their duty to reconcile if possible the testimony of witnesses so as to make them all testify truly, and to direct their attention to the rule of law that if there was an irreconcilable conflict in the testimony of witnesses, and that Kunkel's testimony was in conflict with that of disinterested witnesses, the presumption of law was that he had been influenced by his interest to speak untruly, and that the disinterested witnesses were

entitled to the confidence of the jury. The law as laid down by this instruction has been at all times recognized before parties were made competent witnesses. (See Sharswood's *Starkie on Evidence*, p. 869; 35 Ind. 543.) The instruction supposed the case of irreconcilable conflict in the testimony of witnesses. In such case the jury are bound to decide the fact to be as testified by one or the other class of witnesses. In deciding that the one class has testified the truth they necessarily affirm that the other has testified falsely. When such a state of case exists, it becomes the duty of the court to instruct the jury thereon, and to give them in charge the rules of law applicable to such state of the case, which the court in this case, in any form or manner, refused to do; and we are now to see whether in fact the evidence was of such a character as to require the instruction: Kunkel in his testimony, and for the purpose of enhancing his damages, testified that in getting off the train he was ruptured; that he thought a peg was run clear through him; that he had worn a truss ever since; that he could not ride on horseback, because of the rupture. This was the only permanent injury of which he complained. *Whether he was ruptured or not, in getting off that train*, was in the highest degree material. Dr. Buckmaster, a physician and surgeon for thirty-eight years, a witness for the company, testified that himself and Kunkel were members of the state legislature, and roomed together in Topeka during the session of 1861. That one morning before Kunkel was dressed, and when he was sitting on the side of his bed, he said his "truss was out of order." The doctor was in the middle of the room, in a chair, putting on his boots, and looking around saw Kunkel arranging his truss; saw the truss, and saw him apply it where he had then just shown witness he applied his truss. Dr. G. W. Hogeboom testified that Kunkel said, in 1861 or 1862, at time the 11th Kansas Cavalry was mustered into service, that he (Kunkel) "was fearful he could not pass an examination on account of being ruptured." And Thomas Kirby testified that Kunkel told him, in a conversation about his being out of the army in 1864 or 1865, that he did not go with

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his regiment to the field because of "his *bad rupture*; that he could not ride horseback; that he had to leave after his regiment was mounted." Capt. Johnson testified that Kunkel told him that he had been ruptured, prior to 1869, and had to wear a truss on account of it. Kunkel, recalled in his own behalf, testified that he never had any such conversation with Dr. Buckmaster; that he had never worn a truss at that time, and never had one in his hand. And then he goes on to try and prove that Buckmaster was mad at him, and had threatened him for voting against Parrott for the senate, and this to induce the jury to believe that Buckmaster was a prejudiced and false witness. He admitted the conversation with Hogeboom, but said that he had reference to some ruptured veins on his leg, and then he exhibited his leg to the jury. As to Kirby, he admits the talk with him. He says he was hurt by being thrown forward on the saddle in 1868; that he then bought a truss, but as the injury did not prove to be a rupture, he never wore it; that he never wore a truss, and never had a rupture except the varicose veins on his legs, before 1869. He flatly denies and contradicts Capt. Johnson's testimony. Thus it is seen from the testimony, that upon this material question of rupture, which caused the jury to find the large damages against the company, there was a direct and irreconcilable conflict of testimony between Kunkel on his part, and *four disinterested witnesses* on the part of the company. If the 7th instruction had been given, which was the only instruction asked upon such conflicting testimony, it is incredible that the jury would have found as they did.

There is no question of the importance of the testimony of Kunkel upon the subject of his rupture; if he was not ruptured as he declared, his damages ought only to have been nominal. If he was simulating, and setting up his old rupture, and the jury had so believed, it is hard to suppose that they would have given him more than nominal damages; that they ought to have so believed and found, the testimony of the four witnesses fully establishes. And when the rule of law adopted

by this court is considered, viz., *that the court will not reverse the judgment of the court below, because the verdict is against the weight of evidence*, though they decide as in the Salmon case, that the court erred in not giving a new trial, the importance of the trial court giving every instruction asked, tending to lead the jury to a right conclusion, cannot be overestimated. Upon the irreconcilable conflict of the testimony, the company was entitled to that instruction. Considering the injustice of the verdict, if the company had asked no instruction thereon, it was fairly within the duty of the court in some form and manner to have called the attention of the jury to their duties, in determining to which class of witnesses credit should be given, whether to Kunkel, or the four witnesses against him. Kunkel's pretense that his varicose veins were a rupture, was a wicked subterfuge. He took upon himself on the trial the burden of swearing down four disinterested witnesses. When he assumed that task, and performed it as he best could, the company had the right to an instruction from the court, that if they could not reconcile his testimony with the four adverse witnesses, then, the presumption of law was, because of their disinterestedness, that Kunkel had testified falsely. And much more was the company entitled to some such instruction, when the conflict was between one interested and four disinterested witnesses.

4. In many well-considered cases in this court, it has been decided that where the evidence was conflicting, and there was not a great preponderance of evidence against the verdict, this court would not reverse the judgment of the court below for overruling a motion for a new trial, on the ground that the verdict was against the law and the evidence: *U. P. Rly. Co. v. Coldwell*, 5 Kas. 82; *Anthony v. Eddy*, 5 Kas. 127; *Abeles v. Cohen*, 8 Kas. 180; *Ruth v. Ford*, 9 Kas. 17. In *Hyde v. Bledsoe*, 9 Kas. 399, where the trial was by the court, it was said by VALENTINE, J., that the supreme court would not disturb the finding, unless clearly against the weight of evidence. It has always been held that a finding of facts by the court is equivalent to a ver-

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dict of a jury. So held in *Ruth v. Ford*, supra, citing *Walker v. Eagle Manf. Co.*, 8 Kas. 397. In the case in 8 Kansas, it is said, "It is possible to conceive of cases where the preponderance is so great that we should feel called upon to interfere." It has always been understood by the bar, that in a gross case where the verdict was clearly against the evidence, the judgment upon it would be reversed. Hence the inflexible rule, that the record must show that it contains *all the evidence* in order to bring the question before the court. But in Stanford's case, 12 Kansas, it is said that "as there was some evidence to sustain every material finding of the jury, the supreme court cannot, after it has been approved and sustained by the court below, set it aside"—at the same time affirming that it would have been proper for the district court to have set the verdict aside, because it was not sustained by sufficient evidence. While in the Salmon case (14 Kas. 528) this court goes a bowshot beyond, boxes the compass, and says: "This case was fairly tried in the court below, as far as the judge had anything to do with it, except possibly that he ought to have granted a new trial, because the verdict of the jury was not sustained by sufficient evidence. *The jury made the principal mistake that was made in the case, in finding a verdict for the plaintiff against the weight or preponderance of the evidence.* The verdict ought probably to have been set aside by the court below, and a new trial granted for this reason. But as the court below sustained the verdict, and rendered judgment thereon, thereby presumptively approving the verdict; and as there was evidence to sustain the verdict in every essential particular, we cannot now reverse the judgment merely *because the verdict does not seem to be sustained by sufficient evidence.*" These decisions were against railroad companies, but the rule of law cannot be varied because of that. Other parties must smart as well. The decisions in these cases, undisguised by words, in effect declare that in the opinion of the supreme court flagrant injustice was done; and if adhered to by this court, the result will be that unpopular suitors will be utterly deprived of the fair administration of justice,

as some evidence, false or true, may always be found in support of an unjust demand. If the trial court and jury are not responsible to this court for their decisions in respect to the evidence, there is an end of justice to railroad companies. It is as well known that railroad companies cannot obtain fair verdicts, as it is that the light of day proceeds from the sun; and if this court will not grant a new trial for the error now in discussion, their condition is hopeless. The district judge after a long trial, even if he is without prejudice, universally responds to a motion for a new trial, "The case is to be carried to the supreme court anyhow, and if any errors have intervened, the supreme court will correct them." It is rare that the court below grants a new trial because the verdict is not sustained by sufficient evidence. The decisions in effect make it a matter of discretion, not subject to review; and if the judge participates in the popular feeling, railroad companies are at the mercy of the trial court and jury. We are loth to believe that this court will, upon full consideration, concede that, by the law of the land, it is powerless to do justice in cases of this character. There ought to be some rule of law to prevent such judicial robbery.

If it be not too late, we would respectfully ask the court to abandon its ruling in question, in the Stanford and Salmon cases. We maintain that the court has gone clear outside of adjudicated law, and of the statutes of this state. Sec. 306 of the code provides that a new trial shall be granted when the verdict is not sustained by sufficient evidence, or is contrary to law. Sec. 542 provides that the supreme court may [shall] reverse a judgment of the district court for errors appearing on the record. The oath of the jury (§ 274) is, that they shall give a true verdict according to the law and the evidence. If their verdict is contrary to the evidence, they have failed to abide by the obligation of their oaths, and their verdict is contrary to law. It is hard to understand why a judgment should not be reversed rendered upon a verdict flagrantly against evidence, while it may be reversed for the admission of improper evi-

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dence, which may or may not have influenced the verdict. Courts are instituted for the purpose of attending and seeing that justice is done; and this court exists for no valuable purpose when it finds itself so cramped and hampered by its own rules and decisions, that it is powerless to correct the adjudged errors of inferior courts. And what case, it may be asked, can call for the more certain and positive action of an appellate court than one in which the court finds an unjust verdict has been rendered—an error which goes to the very pith and marrow of the rights of the parties, causing one unjustly to pay or lose money? All other errors are but collateral, and may or may not have led to an unjust judgment. If evidence is rejected which ought to have been admitted, no one can say that it would have changed the result; *e. g.*, if in this case the defendant had produced another witness, and offered to prove by him that Kunkel said he was ruptured before August 1869, and the trial court had upon objection ruled that the witness should not testify, who can say that if he had testified, as proposed, the verdict would have been different? And yet we suppose that the rejection of such evidence would be held an error. In practice, it is not uncommon for the trial court to rule that not more than a given number of witnesses shall be called to testify to a single point. And it may be that such ruling would still be held to be proper. If the allegation of the plaintiff is sustained by himself only, as in this case, and the defendant allowed to call a given number of witnesses to prove the contrary, if the jury arbitrarily find for the plaintiff, the defendant under the present ruling of the court is without remedy, because there was evidence to support the verdict. The failing party is without remedy in the hands of prejudiced court and jury. When the trial court limits the number of witnesses to be called to a single point, it is always supposed to be because the witnesses have established beyond contradiction the fact sought to be proved, and that it would be a waste of time to multiply witnesses upon that issue, and there is an implied obligation on the part of the court to set aside a

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verdict found against the testimony of such witnesses; but suppose the trial court does not set aside such verdict, according to the late ruling of this court, if there is one witness whose testimony alone would justify the verdict, this court will not interfere. It all comes to this: that if one witness is found whose testimony taken alone is sufficient to sustain the verdict, though he may be flatly contradicted by a thousand, the injured party is without remedy. We earnestly protest against this ruling. It does violence to the sense of justice of mankind. It is a dangerous innovation upon the former rules and decisions of this court, and of the courts of the other states, and contrary to a sound construction of the statute. By the statute a new trial shall be granted when the verdict is not sustained by sufficient evidence. The sufficient evidence referred to in the statute is not the evidence of the one or the other party, but *all the evidence touching the matter in issue*; and under the statute it can make no difference what party calls the witness. To illustrate: Suppose A charges B in a civil action with assaulting and beating him in the public market, and, upon the trial, testifies that he was so assaulted and beaten by B, and calls none of the witnesses present. But B calls a great number of the bystanders witnessing the transaction, who testify that A commenced the affray, beat B, who made no resistance, but was left prostrate and senseless by the blows of A. Plaintiff and the other witnesses would all be testifying to the same transaction, and it would be the duty of the court to say that the verdict, if in favor of A, would not be sufficient to overcome the testimony of the other witnesses to the same transaction. The meaning of the statute is not that the court below may refuse a new trial, if a witness has testified in such manner as that his testimony taken alone is sufficient to sustain the verdict, but that such testimony is to be taken in connection with all the testimony in the cause. And if the fact is otherwise overwhelmingly proved, no difference by whose or what witnesses or what evidence, the statute requires that the verdict be set aside; and if the trial court refuses to make such

order, the highest office of the appellate court would seem to be to correct the gross wrong.

In this case we contend that the finding of the jury upon the interrogatories are so flagrantly against the evidence with respect to the rupture, as to call for the interposition of this court. The jury found upon the testimony of Kunkel alone that he had not the rupture of which he complains before the 18th of August 1869. He was an interested witness; he told Johnson he was ruptured before that time, and he told Buckmaster and Hogeboom the same thing, and Buckmaster saw him with a truss in 1861, applying it to protect himself against the same rupture of which he on the trial complained. The finding in question is no more nor less than this: the jury, to give a verdict against the railroad company, concluded to hold that the four witnesses of defendant had perjured themselves. Something is due to witnesses who are compelled to testify. Neither of the defendant's witnesses had the slightest interest in the case, and they may justly complain that because they may know some facts important to a railroad company, and are forced to testify, that they are to be stigmatized by the verdict of a jury and held false witnesses upon the oath of a man who is swearing money into his own pocket. It is certain there could be no mistake. Either Kunkel, or they, testified falsely. Are we to believe that Johnson and Buckmaster, Hogeboom and Kirby perjured themselves, or that Kunkel for his own gain did so? All experience shows that neither court nor jury are disposed to give any credit to the testimony of railroad employes. That is exemplified in the Pointer and Salmon cases. It is hard to be made to feel and know that all witnesses testifying favorably to a railroad company are to be at once put under the same ban. Whether Kunkel was ruptured or not before 1869, we have already shown, was in the highest degree material. The record shows that it contains all the evidence, and it remains to be seen whether by the rules of law any interested witness may swear down four disinterested ones, though it be in a suit against a railroad company.

Clough & Wheat, and *D. H. Morse*, for defendant in error:

The amended petition alleged an injury accruing to Kunkel on the 18th of August 1869, which the evidence showed to be the true date—and the objection to the filing of the amended petition was not sustained because the original cause of action was not then and never had been barred by statute, the original petition in the case having been filed May 10th 1872, less than three years after the occurrence of the injury sought to be recovered for.

1. The first point, and about the *only* point, that plaintiff in error makes is, that the amended petition was for a new and different cause of action from that set out in the original petition. The only ground plaintiff in error can have for making any such statement is, that in the original petition the injury was alleged to have occurred on the 20th of March 1869, and in the amended petition the injury was alleged to have occurred on the 18th of August 1869. The statement of the real or precise time is not necessary, even in criminal cases, unless it constitutes a material part of the contract declared upon. 1 Chitty Pl. 257, 258; 8 Kas. 211.

2. The court did not err in allowing an amended petition to be filed. In 8 Kas. 211, the petition was amended as to the date of the note sued on. And see *Mo. Valley Rld. Co. v. Caldwell*, 8 Kas. 244; *Davis v. Wilson*, 11 Kas. 74; *Dewey v. McLain*, 7 Kas. 126; 3 Bosworth, 456; 1 Kernan, 368, 873; Code of 1868, §§ 133, 134 and 135, which are identical in language with the sections of the New York code, on which the above decision in 1 Kernan is based. Aside from the cases cited, a comparison of the wording of the two petitions will show they were both for the same cause of action—and that was, that the railroad company, after contracting to safely transport Kunkel from Topeka to Medina, carried him *beyond Medina* and then *forced him to get out* at a time, and place, and in such manner as that he was *greatly injured*. There is no pretense upon either side of the case that Kunkel was hurt *but once*, and that injury

is the cause of action upon which the suit was brought. The time at which the injury occurred had no connection whatever with the right of action in the case, except so far as the statute of limitations is concerned—and plaintiff in error at no time complained of being misled by the amended petition. On the contrary, plaintiff in error asked and obtained leave “for twenty days’ time in which to answer said amended petition.”

3. The amended petition takes the place of the original one, and relates back to the commencement of the action, and if the original action was brought in time, then the amended petition was filed in time; 21 How. Pr. 288; 89 Vt. 197; 29 Maine, 108; 33 Cal. 497; 28 Cal. 245. The right of action in this case was not barred until five years from the date of the injury, under the sixth clause of §18 of the code; and if we are correct in this, then even the amended petition filed November 20th 1872, was filed long before the statute of limitations was a bar to the action. But if we are wrong in this, then certainly the second clause of §18 of the code covers the case, as an action upon contract, not in writing, and the three-years limitation applies to this case; and the suit being commenced June 7th 1872, less than three years after the date of the injury, the statute cannot be a bar to this action.

4. The petition in error alleges error in refusing to give the 7th instruction asked by plaintiff in error. The instructions as given by the court, presented the case fairly to the jury, and covered fairly and properly all the questions of law in the case, and were quite as favorable for the company as the law would permit. In fact, the 6th instruction asked by plaintiff in error and given by the court, it seems to us goes far beyond what any court ought to say with reference to interested witnesses. It goes fully as far as the case of *Carver v. Louthain*, 38 Ind. 581, cited for plaintiff in error, which is based upon a statute of Indiana, and should be really no guide whatever to the court in this case. The 7th instruction was properly refused because it intimates that there was no testimony whatever to support the testimony of the defendant in error, which is en-

tirely untrue. And counsel for plaintiff in error, while gnashing their teeth at the jury, and shaking their gory locks at this court on account of decisions this court has heretofore made in similar cases, seem to entirely ignore the fact, that the jury, who were in this, as in every case, the exclusive judges of the evidence, of its weight, and of the credibility of the witnesses, believed the testimony of Kunkel, and of Elias Gibbs "who slept in the same bunk, and under the same blanket" with Kunkel for eighteen months, and their own inspection of his person rather than the testimony of Dr. Buckmaster, who was the only witness who pretended to swear that Kunkel was ruptured *before* the happening of the matters alleged in the petition. Although we understand that this court has so often decided that it will refuse to review the findings of fact of a jury where there is any evidence to sustain their verdict, yet we beg to call the attention of the court briefly to the evidence in the case: Kunkel swears positively that he was then and there ruptured—that he fell "on the end of a tie or on a peg." He says, "It struck me in the groin, and hurt me very much. * * When I was first hurt I thought a peg had run clear through me. It was very sore for several days. When the fever went down I found I was ruptured. I have worn a truss ever since. I have to wear it at all times, except when lying down." On cross-examination, he said, "*I am hurt here*—(standing up and showing the truss in position on his person.) "I received the injury that night, and have had to wear a truss ever since." Louis Lutt was with Kunkel at the time, and he testifies: "When I came up to Kunkel he was lying on the road. He lay there 5 or 10 minutes, then we started for my house. I went to my store and left him in bed," etc. Elias Gibbs was first-lieutenant of the company of which Kunkel was captain—they tented together for eighteen months—they slept in the same bunk—they slept under the same blanket. He testified, "I have seen him dress and undress many times; I have seen him naked, and wading in the water, but I never saw him with a truss on, and never knew of his

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having any. I remember particularly once in 1863, when we were about wading a stream. He was naked then except his shirt; he was on foot; it was in the day time." And this it must be recollected was in 1863, two years after Dr. Buckmaster saw (as he said) Kunkel adjusting a truss in his room at Topeka. That Kunkel was hurt in August 1869, at the time alleged in the petition, there is no dispute. *How* he was hurt, and the *extent to which* he was hurt, were the questions in controversy. Kunkel swore positively on these points. Louis Lutt corroborates Kunkel fully; he shows Kunkel was injured so much that he had to sit down several times before he got to Lutt's house—that when he arrived at Lutt's house he had to go to bed, although his own home was only a short distance from town. Gibbs shows that even if Kunkel was injured in 1861 as sworn to by Dr. Buckmaster, that he wore no truss in 1862–1863 and had no occasion for any, and Kunkel swears positively he never wore one before he was injured in 1869. Of the four witnesses whose testimony counsel for defense claim the jury entirely ignored, none of them swear or intimate that Kunkel was not injured in 1869 as alleged in his petition—nor that he ever received any injury previously—while on the contrary Kunkel explains fully to the jury, and evidently to their entire satisfaction, why he made the statements to Kirby and Hogeboom, as sworn to by them. But again, all the witnesses were before the jury in person—they saw them—they heard them testify—they were all fellow-citizens of the jurymen, living in the same county with them, and they found specially in answer to a special question, that Kunkel was not ruptured before the 18th of August 1869 where he now wears a truss; but he had what he called ruptured veins in his leg. There was not only *some* evidence upon which to base the verdict, but there was as we claim, and as we think, a great abundance of it. Not only this jury of twelve men found these facts, but a previous jury of like number of the citizens of Jefferson county, on a previous trial, found the same facts in the same way. The able judge who

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tried the case in the district court heard all the evidence twice—the first time he set aside the verdict and granted a new trial, because of his own motion he excluded certain testimony, as he afterward thought, improperly. At the second trial, the court rendered judgment upon the verdict, and refused to grant a new trial. The decisions of this court which counsel for plaintiff in error seek to attack, have been promulgated for some time, and have met with the entire approbation and concurrence of the bar, and are the admitted law of the land, and need no argument from us or from others to sustain them.

The opinion of the court was delivered by

BREWER, J.: This action was tried and judgment rendered in favor of the plaintiff upon a petition, of which the material allegations are as follows:

“The plaintiff, Jerome Kunkel, complains of the said Kansas Pacific Railway Company, the defendant herein, for that the said defendant was, on August 18th 1869, and from that time till now has been, a common carrier of, and in the business of carrying, passengers on its railroad, in the state of Kansas, in the county of Jefferson, for pay; that on said 18th of August 1869, the said defendant undertook and promised to carry this plaintiff from the city of Topeka, in the county of Shawnee, in said state of Kansas, to the town of Medina, in said Jefferson county, for the sum of one dollar, which said sum was then and there duly paid to the said defendant by this plaintiff, and this plaintiff went on board the car or carriage of the said defendant, on and under and by virtue of said agreement, and was conveyed in said carriage from the said city of Topeka eastwardly towards said town of Medina; but, in violation of its said contract and agreement, the said defendant refused to stop its said carriage for this plaintiff to get down at said town of Medina, but carried this plaintiff past the said town of Medina, and ordered and directed this plaintiff to get down from said carriage more than a mile from said town of Medina, where there was no regular stopping-place or station for passengers to get on or off the train, and no platform or other convenience to step on; and when this plaintiff attempted to dismount from the said carriage, in obedience to

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the said order and direction of the said defendant, the said defendant without notice to this plaintiff, violently and suddenly started their said carriage and with great force threw this plaintiff down from the said carriage to the ground, and wounded, bruised and beat him, this plaintiff, and greatly injured him by said wounds and bruises; of which injuries the plaintiff has not yet recovered, to the damage of this plaintiff in the sum of five thousand dollars."

Several questions are presented; and first, it is alleged that the court erred in permitting an amendment of the petition, and in not sustaining an objection of the defendant to the proposed amendment. The petition as originally filed was substantially and almost word for word identical with that we have quoted, except that the fare alleged to have been paid was three dollars, and the date of the transaction was given as "March 20th 1869." When the case was called for trial, objection was made to the introduction of any testimony, and

1. Amending
pleadings.

the cause of action stated in the petition being apparently barred by the statute of limitations, the objection was sustained. Leave was granted to amend, and the present petition was filed over the objection of the defendant. By this the injury was alleged to have been received at a date less than three years before the filing of the petition, and therefore it disclosed a cause of action not barred. Was this error? On the trial the plaintiff testified to receiving his injuries on the 17th or 18th of August 1869; and a witness who was with him at the same time testified to the matter as happening in August 1869; and each testified to paying one dollar, the usual fare from Topeka to Medina. Now the amendment of pleadings is largely within the discretion of the trial court, and there must be something to indicate that such discretion has been abused before a reversal will be ordered because of the granting of leave to amend; *Taylor v. Clendenning*, 4 Kas. 524; *Davis v. Wilson*, 11 Kas. 74. It is certainly no abuse of discretion to permit the correction of a date; *Wilson v. Phillips*, 8 Kas. 211. And this it seems is all that the amendment amounted to. Counsel labor

2. Time; limitation
of action.

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ingeniously to show that a cause of action not barred was, by the amendment, substituted for one barred; but we are not convinced by their reasoning. It is affirmatively shown that plaintiff was injured, as claimed, in August. It does not appear that he was ever so injured before; and there is surely no presumption that the defendant ever wronged the plaintiff twice in the same place, and under like circumstances. A second

2. Nature of
action

position of counsel is, that the cause of action is not one arising from contract, but is founded upon tort, and that therefore it was barred any way, even if August instead of March was the time of the injury. This claim cannot be sustained. While the distinction between actions on contract and those for tort is plain and broad, yet, as is well said in the case of *Staley v. Jameson*, 46 Ind. 159, on which counsel mainly rely, and in which is quite a full discussion of the question, it is not always easy to determine from the allegations of the petition in which class the action must be placed; for contracts are often alleged in actions which clearly sound in tort, and as often tortious acts and conduct of the defendant are averred in actions purely *ex contractu*. And often the plaintiff has his election upon the same state of facts, whether to bring an action *ex contractu*, or one *ex delicto*. Here the pleader alleges that the defendant was a common carrier, that it made a certain contract of carriage, and received its pay therefor, and then alleges that defendant broke said contract, and how it broke it. True, in showing how defendant broke the contract it discloses wrongful acts done by defendant; but still the manifest gist of the action is the breach of the contract, and the tortious acts are simply the manner of the breach. The case was tried in the district court upon the theory that it was an action *ex contractu*, and the first briefs of the learned counsel were prepared upon the same understanding; and this was correct.

A further complaint is, that the court refused to give this instruction:

"7. It is the duty of the jury to reconcile, if possible, the

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testimony of witnesses, so as to make them all testify truly; but if in this cause there is an irreconcilable conflict in the testimony of witnesses, and plaintiff is in conflict with the testimony of disinterested witnesses, the law rather presumes that the plaintiff has been influenced by his interests to speak untruly, and that the disinterested witnesses are entitled to the confidence of the jury. Disinterested witnesses are entitled to more credit than interested witnesses."

The court had at the instance of the defendant already given this instruction:

"6. The plaintiff is an interested witness in this cause. He is interested in the whole amount of any possible recovery, and in all the costs in the cause. His credibility is directly in question. Interested witnesses may be more readily suspected of prevaricating, or even testifying falsely in their own behalf, than witnesses who have no interest in the cause."

It had also in its general charge given the law in substantially the same language. In this we see no error. The court properly called attention to the plaintiff's interest, and the effect of such interest upon his credibility; and that was as far as it was under any obligation to go. It was not for it to say directly, or by manifest implication, that it was the duty of the jury to believe one witness rather than another. Matters affecting the credibility of a witness are proper testimony, and may properly be noticed—indeed, ought to be noticed by a court in its charge. But care must be taken that these matters are not laid down in the form of such imperative rules as to extort a verdict which is not in accord with the honest belief of the jury. Tell a juror that he ought to believe a disinterested rather than an interested witness, naming him, and he may return a verdict to say so, when in fact he honestly and sincerely believes the other way, and upon all the circumstances justly does so. It is the jury, and not the court, whose province it is to determine the credibility of a witness, to believe or disbelieve him; and it is the actual belief which is sought to be obtained. Hence, instructions which make it matter of law to disbelieve, are wrong. *Shelabarger v. Nafus*, 15 Kas. 547. So also, instructions whose ap-

4. Credibility
of witness;
instructions.

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parent purpose and tendency are to compel belief, or disbelief, are erroneous; and generally any unnecessary repetitions or specializations in instructions which seem to manifest an insisting by the court on the belief or disbelief of a witness should be avoided. We do not decide that the instruction refused is of itself too strong, or that it would in every case be error to give such an instruction. But we do hold that having given at the instance of defendant the law as stated in the 6th instruction, it was not error to refuse to repeat it in the strong and positive terms of instruction No. 7.

A final error complained of is, that the verdict is against the evidence. The case comes clearly within the rule so often declared by this court, that where there is clear and positive testimony sustaining every essential fact, and the verdict has received the approval of the trial court, s. Verdicts, when not disturbed. this court will not interfere, even though the testimony seems greatly to preponderate the other way. In other words, in cases brought here on error from a trial upon oral testimony, this court is not a trier of questions of fact. We might therefore simply rest this opinion upon the statement, that the plaintiff's testimony positively and clearly shows all the facts necessary to sustain the verdict; that it is in most of the principal matters positively corroborated by one who appears to be an entirely disinterested witness, and as to the matter in which it is chiefly contradicted receives strong support from another witness also apparently disinterested. But as counsel earnestly challenge the rule, we may be pardoned if we tarry a moment or two upon it. And first, we may remark, that it is a rule uniformly recognized from the first existence of this court down to the present time. In the very first volume of the Kansas Reports, in *Backus v. Clark*, p. 303, the court reversed a judgment because against the evidence, taking pains to say that it did so because there was a total failure of proof upon one essential fact, and that when there was such a total failure a question of law was presented calling for the action of the reviewing court. The implica-

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tion was very clear. The doctrine has been affirmatively announced time and again, since then, and in almost every volume of the reports. See among others: *Bayer v. Cockerill*, 3 Kas. 294; *Ermul v. Kullok*, 3 Kas. 499; *U. P. Rly. Co. v. Conners*, 4 Kas. 206; *Blair v. Fields*, 5 Kas. 58; *Rose v. Williams*, 5 Kas. 488; *Pacific Rld. Co. v. Nash*, 7 Kas. 280; *School District v. Griner*, 8 Kas. 224; *Ulrich v. Ulrich*, 8 Kas. 402; *Ruth v. Ford*, 9 Kas. 17; *Luke v. Johnscake*, 9 Kas. 519; *K. P. Rly. Co. v. Montelle*, 10 Kas. 126; *St. Jos. & D. C. Rld. Co. v. Chase*, 11 Kas. 47; *Brewster v. Hall*, 12 Kas. 161; *A. T. & S. F. Rld. Co. v. Stanford*, 12 Kas. 354; *Bridge Co. v. Murphy*, 13 Kas. 40; *K. P. Rly. Co. v. Salmon*, 14 Kas. 528. In the early case of *Ermul v. Kullok*, 3 Kas. 501, Chief Justice Crozier says: "It is a well-established rule of this court, that the verdict of a jury will not be disturbed if there is any testimony to sustain it." The rule has not at any time been stated in stronger language by any member of this court. Nor is this court the only or the first court to announce this doctrine. In *Rogers v. King*, 12 Ga. 283, the supreme court say: "If there was any evidence to justify the verdict, we would not disturb it." And the same proposition was sustained in *Alfred v. The State*, 6 Ga. 483; *Lewis v. Long*, 20 Ga. 568. The supreme court of Arkansas used this language: "There not being a total want or failure of evidence to sustain the verdict, this court affirms the judgment;" *Bennett v. The State*, 13 Ark. 694. And again, "Though the verdict of a jury be contrary to the judgment of the appellate court, it will not be set aside unless there is a total want of evidence to sustain it;" *McDaniel v. Parks*, 19 Ark. 671. See also *Mains v. The State*, 13 Ark. 285; *Lindsay v. Wayland*, 17 Ark. 385; *Hill v. Jayne*, 18 Ark. 396; *M. & St. F. Plank Road Co. v. Bauere*, 21 Ark. 806. In California, the supreme court thus lays down the rule: "The appellate court will not disturb the verdict when there is any evidence to support it;" *Escolle v. Merle*, 9 Cal. 94. In Illinois we find, "The court will rarely if ever disturb a verdict when there is anything in the record tending to support the

finding of the jury;" *Young v. Silkwood*, 11 Ill. 86; *Gallup v. Smith*, 24 Ill. 586. In Indiana, "A new trial will not be granted where the evidence is conflicting, if there is enough in the record taken by itself to sustain the verdict;" *Scobey v. Armington*, 5 Ind. 514. In Missouri, "When the verdict of a jury comes here endorsed by the refusal of the court which tried the case to grant a new trial, this court will not interfere on the ground that the evidence does not support the verdict. Jurors are the appropriate judges of the facts, as the courts are of the law;" *State v. Anderson*, 19 Mo. 246. And again, "The refusal of a court to grant a new trial where a motion is based on alleged absence of any testimony to warrant a verdict, is not error, unless the preponderance of evidence against the verdict is so strong as to raise a presumption of prejudice, corruption or gross ignorance on the part of the jury;" *Prie v. Evans*, 49 Mo. 396. In Kentucky, "This court will not reverse on the ground that the verdict sustained by the inferior court was contrary to evidence where there was any evidence conducing to maintain it;" *Bagby v. Lewis, Adm'r*, 2 T. B. Monroe, 76. In Tennessee, "The court of errors will not grant a new trial if there be any proof by which the verdict can be sustained;" *Dodge v. Brittain*, Meigs, 84. And again, "It is a well-settled rule of practice in the supreme court, that in civil cases a verdict will not be disturbed if there be *any evidence to support it*, however unsatisfactory that evidence may appear by the record;" *McKinney v. Craig*, 4 Sneed, 577. In New Hampshire, "Where there is evidence competent to be considered by a jury, and the court submit it for their decision, the verdict will not be set aside, although the court may be of opinion that the evidence was insufficient to prove the fact;" *Wendell v. Moulton*, 26 N. H. (6 Foster) 41. In Michigan, in a case taken by *certiorari* from a justice of the peace to the circuit court, "If there was evidence before the justice to prove every fact necessary to sustain the judgment the circuit court cannot reverse it, however much it may be dissatisfied with the conclusion of the justice or the

jury. All it can do is to inquire whether there was a total want of evidence before the justice to prove some fact that should have been proved to sustain the action;" *Walch v. Bogg*, 11 Mich. 48. In New York, "The verdict of a jury cannot be interfered with except when the evidence is wholly insufficient to sustain the verdict;" *Colt v. Road Co.*, 33 N. Y. Superior Ct. 189. In Iowa, "Always refusing to interfere when there is evidence upon which the verdict finds reasonable support, even when if sitting as jurors we would without hesitation have found the other way upon the evidence;" *Carlin v. Road Co.*, 37 Iowa, 823. But it is useless to multiply citations. Scores and scores of cases can be found in which similar language has been used by appellate courts. And it must be conceded it is also equally true, that there are multitudes of cases in which appellate courts have reversed the judgments of lower tribunals because contrary to the evidence, and in which they have said that while there is simply a conflict in the testimony, yet it is apparent that the verdict or finding was clearly against the weight of the evidence, and manifestly unjust, and therefore it was their duty to set it aside. All that we design by these citations, and it will be noticed that they are nearly all from the earlier reports of the several states, is to show, that in this rule of decision we have been guilty of no "innovation;" we have discovered no new thing, but are simply walking *super antiquas vias*. Into a discussion of the wisdom of the rule we do not care to enter. It has been commented on time and again in opinions filed by this court; and while it may sometimes result in injustice, yet we are confident a different rule would tend to far greater injustice and wrong. Testimony on paper is not like testimony from the lips; and when twelve jurymen who hear the living voice, and see the man who utters it, believe one witness and disbelieve four, and the judge who has the same opportunities of judgment declares that he thinks that they ought to have so believed and disbelieved, it seems very like trifling with the sacredness of jury trials for us who know nothing but the

written story of what was said and done, and that story too often imperfect and incomplete, to decide that all this is wrong, and that jury and judge ought to have believed and found the other way. But counsel contend that trial judges in this state imagine the same rule governs their action as ours. We do not positively know how this may be. Two of our number have had experience as trial judges, and never so understood the law; and we have yet to meet a district judge who has so expressed his understanding thereof. The functions of the two are widely dissimilar. The one has the same opportunity as the jury for forming a just estimate of the credence to be placed in the various witnesses, and if it appears to him that the jury have found against the weight of the evidence it is his imperative duty to set the verdict aside. [*Johnson v. Leggett*, 28 Kas. 607, 608; *Williams v. Townsend*, 15 Kas. 564, 570.] We do not mean that he is to substitute his own judgment in all cases for the judgment of the jury, for it is their province to settle questions of fact; and when the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions thereon, he has no right to disturb the findings of the jury, although his own judgment might incline him the other way. In other words, the finding of the jury is to be upheld by him as against any mere doubts of its correctness. But when *his judgment* tells him it is wrong, that whether from mistake, or prejudice, or other cause, the jury have erred, and found against the fair preponderance of the evidence, then no duty is more imperative than that of setting aside the verdict, and remanding the question to another jury. [*Johnson v. Leggett*, 28 Kas. 607, 608; *Williams v. Townsend*, 15 Kas. 564, 570.] It was a fear, in view of the meagreness of the testimony, that this duty had not been fully recognized, that drew from this court the expressions it used in the two cases which counsel especially criticize. Whenever on the other hand a case reaches this court upon the record, and it appears that the trial court has, by overruling a motion for a new trial, approved of the verdict, it is and must be taken as its certificate

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that the verdict is either fully in accord with its belief upon the testimony, or else that there was such a fair and reasonable doubt as to the weight of evidence, *pro* and *con*, that honest and intelligent minds might fairly differ in their conclusions, and that therefore the verdict of the jury should be accepted as just. We have therefore, not the witnesses, but the finding of the jury *prima facie* right, and also the approval of the only judge who has anything like full opportunities of knowing whether it was right. Under those circumstances it should be a very clear case before a reviewing court should interfere. The due administration of the law demands, and in the long run the most satisfactory and most complete justice will be secured by leaving the settlement of questions of fact to the tribunals which see and hear the witnesses.

The judgment will be affirmed.

All the Justices concurring.

ANDREW J. HOPKINS *et al.* v. JENNIE W. COTHMAN.

1. PLEADINGS, *Filed out of Time, and Without Leave, a Nullity.* An amended answer filed out of time, without leave of the court or judge, and without the consent of the plaintiff, may be treated as a nullity by the court and counsel. [*R. R. v. Wilson*, 10-112; *Davis v. Wilson*, 11-74; *Jeffs v. Flickenger*, 14-308; *Luke v. Johnmycake*, 9-11; *Neitzel v. Hunter*, 19-221; *Swerdsfeger v. State*, 21-475.]
2. ——— *Waiver of Reply.* In an action on a note and mortgage the issues were all made up and completed by the due filing of a petition, answer and reply. Afterward defendants, with leave of the court, filed an amended answer; but there was no record or entry made showing that the defendants had any such leave; and therefore, so far as the record of the case showed, the amended answer was filed without leave and was a nullity. This amended answer set forth matter not pleaded in any of the former pleadings, which new matter needed a reply to put it in issue. No such reply however was filed. Afterward the parties went to trial and tried the case as though said amended answer had been properly filed, and as though all the allegations thereof had been properly put in issue by a reply. The jury found in favor of the plain-

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tiff and against the defendants, and judgment was rendered accordingly. The defendants then brought the case to the supreme court on petition in error. Afterward the defendants procured an order of the district court making an entry *nunc pro tunc* showing that defendants had in fact leave to file said amended answer at the time it was filed. The defendants then asked leave of the supreme court to have the transcript which had been filed with the petition in error, amended, by incorporating into it said *nunc pro tunc* entry, and by making said *nunc pro tunc* entry a part of the transcript; and defendants then asked to have the judgment of the court below reversed because said amended answer was not replied to: *Held*, That the said amendment may be considered as made, but that the judgment of the court below will not be reversed because of a want of said reply; that under the circumstances of this case it will be considered that a reply to the amended answer was waived. [*Nelcott v. Porter*, 19-134; *Nooner v. Short*, 20-624.]

Error from Shawnee District Court.

FORECLOSURE of mortgage, brought by *Cothran* against *Hopkins* and wife. Amount of principal debt claimed, \$4,200. Defense, usury to amount of \$275. The answer was due and was filed 7th November 1873. Reply filed, 8th November. An amended answer was filed 6th January 1874. Trial, and judgment for plaintiff, at June Term 1874 of the district court. The case was brought here on error by defendants *Hopkins* and *Hopkins*. The subsequent proceedings in the district court, and in this court, are stated in the second opinion, *infra*. Two opinions were written and filed, both of which are printed herewith.

Guthrie & Brown, for plaintiffs in error.

Clemens & Rossington, for defendant in error.

FIRST OPINION.

The opinion of the court was delivered by

VALENTINE, J.: About the only thing complained of in this case is, that the court below did not give sufficient attention to the amended answer of the defendants below, plaintiffs in error. Now when this amended answer was filed the case stood upon petition, answer, and reply, and the time for filing an answer had long previously passed. The amended answer

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appears to have been filed out of time, without leave of the court or judge, and without the consent of the plaintiff. It was therefore proper for said court and judge to treat said amended answer as a nullity. (*Luke v. Johnnycake*, 9 Kas. 511.) We think no error was committed by the court below. Certainly none is shown by the record brought to this court.

The judgment of the court below is affirmed.

All the Justices concurring.

SECOND OPINION.

VALENTINE, J.: It seems that after this case had been brought to this court the plaintiffs in error discovered that the record of the proceedings of the court below (a copy of which they filed with their petition in error in this court,) did not show that they had any right or authority to file their said amended answer in the court below. They therefore applied to the court below, and on their motion obtained an order from that court directing an entry *nunc pro tunc* of an order showing that they had obtained leave of the court below to file said amended answer at the time they in fact did file it. They then brought a copy of said *nunc pro tunc* entry to this court, and moved this court for leave to amend their original transcript by incorporating this *nunc pro tunc* entry into it and making it a part thereof. This motion was taken under advisement by the court. The parties then submitted the entire case to the court for decision on its merits, and the court took the whole case under advisement. Afterward, when the court came to consider the case it entirely overlooked the motion of the plaintiffs in error to amend their original transcript, and considered the case without examining said *nunc pro tunc* entry. We shall now reconsider the case, and shall consider it as though said *nunc pro tunc* entry were in fact incorporated into the original transcript and constituted a part thereof. And therefore we shall consider the case as though the plaintiffs in error, defendants below, had full authority to file their said amended answer at the time they filed it. And taking this view of the case, did the court below commit any error? The petition showed that

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the note and mortgage were executed for the sum of \$4,200, with interest at the rate of 12 per cent. per annum, and a stipulation for \$400 as attorney-fees in case of foreclosure. The amended answer admitted the execution of the note and mortgage as alleged in the petition, but it alleged that \$275 of the said sum of \$4,200 was for usurious interest. This was the only new matter alleged in the amended answer, and therefore the only matter alleged therein that needed a reply to put it in issue. No reply was however filed to the amended answer. After said amended answer was filed the defendants below moved the court for judgment upon the pleadings; but upon what grounds this motion was made, is not shown. It could not have been made upon the ground however that no reply was filed to said amended answer; for, ignoring everything but the petition and amended answer, and upon these pleadings alone the defendants were not entitled to judgment, but on the contrary the plaintiff below was entitled to a judgment for \$3,925 principal, with interest, and \$400 attorney-fees, and costs, and for a sale of the mortgaged property, etc. It will be remembered that the original answer was replied to. Said motion was overruled, and no exception was taken thereto. The case was then submitted to a jury for trial. What the evidence was we cannot tell, for none of it seems to have been preserved, and no question seems to have been raised upon its introduction. From the instructions however, given and refused, and the defendants' motion for a new trial, we would infer that the sole question litigated before the jury was whether the defendants received \$3,925, or \$4,000, as the consideration for their said note and mortgage. The sole contest before the jury seems to have been whether \$75 of the amount included in said note and mortgage was for usurious interest or not. Now this question could be raised before the jury only by the said amended answer, and a supposed reply thereto. No other pleadings raised it. The amended answer set forth that \$275 of the amount included in the said note and mortgage was for usurious interest. But it would seem that on the trial plaintiff admitted that \$200 of that amount was for usurious interest,

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and therefore contested with the defendant only as to whether the other \$75 of that amount was for usurious interest. The court instructed the jury among other things as follows:

"The plaintiff claims the consideration to have been \$4,000. The defendants claim that it was \$3,925. The only question for you to decide is, how much did defendants receive as the consideration for said note? *When you decide that from the evidence, you will find your verdict for the plaintiff for that amount, with interest from the date of the note at the rate of 12 per cent. per annum, to which you will add the sum of \$400 as attorney-fees, and find that the plaintiff has a lien on the land for that amount.*"

No exception was taken to this instruction, nor indeed to any instruction given by the court. And the record does not affirmatively show that all the instructions given have been brought to this court. The defendants asked to have certain instructions given. These instructions show beyond all question that the defendants considered that all the allegations of their amended answer were in issue. These instructions were refused, and the defendants excepted. This is the first exception taken by the defendants below, plaintiffs in error. Whether these instructions should have been given or not, we can hardly tell. We are inclined to think that the substance of them, as far as they stated the law of the case, was embodied in the instructions already given. But further than this: none of the evidence in the case is brought to this court. (*Ed. Assoc. v. Hitchcock*, 4 Kas. 36; *Auld v. Kimberlin*, 7 Kas. 601; *Leroy v. McConnell*, 8 Kas. 273; *The State v. Herold*, 9 Kas. 200.) And we are not informed affirmatively that all the instructions given are contained in the record. So far as we have the means of determining, we should think that the court below did not err in refusing said instructions.

The jury found a verdict in favor of the plaintiff and against the defendants for \$5,026.66. This sum is composed of \$4,000 received by the defendants as the consideration for said note and mortgage, \$626.66 interest thereon, and \$400 attorney-fees. This sum is just \$75, with interest thereon, more than

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the defendants virtually admitted to be due to the plaintiff by their pleadings. The defendants then moved the court for a new trial upon the following grounds, to-wit: "1st, The refusal of the court to render judgment for the defendants on the pleadings; 2d, Error in giving instructions; 3d, Error in refusing instructions; 4th, The jury erred in finding for the plaintiff; 5th, The verdict of the jury is excessive." We have already considered the first, second, and third of the above-named grounds, and find no error. The fourth and fifth grounds yet remain to be considered. These go to the finding of the jury. Now whether the jury erred or not in their findings, we cannot tell, for we do not know what the evidence was. The court below overruled the motion for a new trial, and the defendants excepted. This is the second and last exception taken by defendants below. We do not think that the court erred in overruling said motion for a new trial. The court below then rendered judgment upon the verdict of the jury, and in accordance with the verdict. We do not think the court erred in this. The only ground upon which plaintiffs in error can make the slightest claim of error is that the verdict and judgment were for \$75 and for interest thereon greater than they ought to have been, but the question whether the defendants received that \$75, and whether they should pay the same back to the plaintiff with interest, was fairly submitted to the jury, and the jury found against them. The only answer to this that plaintiffs in error could make is, that this question should not have been submitted to the jury; that the defendants' amended answer alleged that said \$75 (along with with \$200 more for which verdict and judgment were not rendered) was never received by defendants, but was merely usurious interest, and that said amended answer was not replied to. Now it is true that said amended answer was not replied to, but still the case was tried in every respect the same as it would have been tried if a reply had been filed to the amended answer; and therefore we think the defendants waived a reply. (*Wilson v. Fuller*, 9 Kas. 177, 189, 190; *Clem-*

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ent v. Hayden, 4 Penn. St. 138; *Hubbert v. Collier*, 6 Ala. 269; *Clark v. Stoddard*, 3 Ala. 866; *Tyson v. Richard*, 3 Harris & J. 109.) The attention of the court below was at no time specifically called to the fact that no reply had been filed to the amended answer. And there is nothing in the whole case that shows that the plaintiff ever knew, until said *nunc pro tunc* entry was made, that said amended answer was filed with leave of the court, or that it had any force or validity as against the will or wishes of the plaintiff. At the time of the trial the amended answer appeared, so far as the record shows, to have been a nullity. And possibly the plaintiff may have thought by going to trial as though the amended answer was not a nullity she herself was doing all the waiving of rights that was done in the case. And now under all the circumstances of this case, would it be fair to say that the plaintiff was bound to know that said amended answer had force and validity, although from the record it appeared to be a nullity, and that she was bound to reply to the same or be treated by the supreme court as in default when she was not treated so in the district court either by the court or the defendants? And would it be fair, after the defendants have taken the chances of a trial upon the truth of the allegations of their said amended answer, that they should now be allowed to raise the question for the first time in the supreme court that no reply had been filed to such answer? As the court below allowed the defendants to file an amended answer out of time, without any showing, and without any terms being imposed, the court would undoubtedly have allowed the plaintiff at any time to file a reply thereto upon a bare suggestion of its necessity to put the allegations of the amended answer in issue. If it be claimed however that this suggestion should have come from the plaintiff, then it may be answered that there is nothing in the record that shows that the plaintiff ever knew that said amended answer had any validity until said *nunc pro tunc* entry was made long after trial and judgment. We think under all the circumstances that the suggestion of a necessity for

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a reply should have come from the defendants; and as it did not, that the defendants waived the reply.

The judgment of the court below will therefore be affirmed.

All the Justices concurring.

GEORGE CLARK V. PENELOPE WHITE.

Costs—Taxable Against Losing Party. An action was taken on appeal from a justice's court to the district court. In the district court the plaintiff, without leave of the court, or consent of the defendant, filed a demurrer to the second defense set forth in the defendant's bill of particulars, and then subpoenaed witnesses in the case. Afterward, with leave of the court the plaintiff withdrew said demurrer, receiving no benefit therefrom, and the defendant losing nothing thereby. Nothing was at any time done to abridge the right of the court or the defendant to treat said demurrer as a nullity; and judgment was afterward rendered in favor of the plaintiff and against the defendant for the full amount of the plaintiff's claim: *Held*, That the court did not err in ordering that the costs of plaintiff's witnesses be taxed against the defendant.

Error from Neosho District Court.

MOTION to retax costs, heard and decided at the April Term 1874. The motion was granted, and *Clark*, defendant, brings the case here.

Stillwell & Bayliss, for plaintiff in error.

C. F. Hutchings, and *John Hall*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: The only question involved in this case is one of costs. The question was raised in the court below on a

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motion to retax costs. The motion was submitted to the court below upon the following agreed statement of facts, to-wit:

"In the matter of the motion of plaintiff Penelope White, to retax the costs in this cause, it is agreed that the following are the facts which shall be considered by the court in passing upon said motion. On the 18th of May 1872, plaintiff brought her action before a justice of the peace of Neosho county to recover the sum of \$13.50 of said defendant. She filed her bill of particulars, and the defendant filed his bill of particulars. Plaintiff obtained judgment for the full amount of her claim, and defendant appealed to the district court, and all the original papers in said cause, and the transcript of the justice, were filed in the clerk's office on the 18th of June 1872. No new pleadings were filed in the district court until the 11th of December 1872, when plaintiff filed a motion to dismiss the appeal, which motion was overruled by the court. On the 20th of December 1872, the plaintiff, without the consent of the defendant, or leave of the court, filed by her counsel a general demurrer to the second defense in the defendant's bill of particulars, assigning as the grounds of said demurrer that the facts stated in the second defense constituted no defense to plaintiff's action. Defendant Clark knew of said demurrer being filed, and subpoenaed no witnesses in his behalf in said cause from the time said demurrer was filed until it was finally disposed of, when he duly subpoenaed his witnesses who afterward testified in his behalf on the trial. After the filing of said demurrer, and before the same was disposed of, the plaintiff caused various witnesses to be subpoenaed in her behalf. On the 12th of April 1873, during the regular April Term of said district court, the plaintiff asked and obtained leave of the court to withdraw said demurrer. The case was afterward tried, and plaintiff obtained judgment for the whole amount of her claim in the action. The clerk in taxing up the costs in the cause refused to tax up the costs of the witnesses subpoenaed by plaintiff during the pendency of the above-mentioned demurrer, and plaintiff now moves the court that the clerk be required to tax up in favor of plaintiff and include in the judgment against defendant the costs of the above-named witnesses, the gross amount of said costs being \$113.80."

Upon the foregoing agreed statement of facts the court below made the following decision and order, to-wit:

"And thereupon, at the April Term 1874 of said Neosho

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county district court, the said motion of plaintiff named in the foregoing agreed statement of facts came on for hearing before said court, and was submitted, heard and determined on the said agreed statement, which was all the evidence that was introduced on the hearing of said motion; and in consideration of the same, the court sustained the motion of plaintiff, and ordered and adjudged that the clerk of the Neosho county district court retax the costs in said cause by assessing against defendant and in favor of plaintiff the costs of the witnesses mentioned and referred to in said agreed statement, the same to be included in plaintiff's judgment against defendant. To which order, ruling, judgment, and determination of the court the defendant at the time duly excepted."

The code of civil procedure provides, (§ 262,) that "An issue of law arises upon a demurrer to the petition, answer, or reply, or to some part thereof." (Gen. Stat. 679.) And in § 313, as amended, "No witnesses shall be subpoenaed in any case while the cause stands upon issue of law." (Laws of 1871, p. 277, § 3.) And we suppose upon general principles, that a party would not be allowed to recover for costs which were clearly and manifestly unnecessarily made. (*Wolfley v. Rising*, 12 Kas. 585, 538, 539.) We suppose it is claimed that "the cause" in this case stood "upon an issue of law" while said demurrer was pending against the *second defense* stated in the defendant's bill of particulars. But whether it is claimed that the witnesses of the plaintiff were subpoenaed to disprove said second defense, or to prove the plaintiff's bill of particulars, (which was put in issue by the first defense stated in defendant's bill of particulars, if a bill of particulars in a justice's court needs anything to put it in issue,) we hardly know. And whether the testimony of said witnesses was used or was competent for either of said purposes, we can hardly tell. We think however that under all the facts of this case, as shown by the record, it is fair to infer that the only question for us now to determine is whether said demurrer was wholly a nullity or not. A portion of the record not heretofore given reads as follows:

"The clerk of said court taxed the costs in said cause, but refused to tax any costs for witnesses subpoenaed between the 20th of December 1872 and the 12th of April 1873, because

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of the filing of said demurrer; and thereupon said plaintiff duly filed in said court her written motion, asking said court to order said clerk to retax said costs, for that the ground or reason assigned by the clerk for refusing to tax up said costs was not a sufficient or legal reason."

The plaintiff in error, defendant below, inserts among other things the following statement and argument in his brief, to-wit:

"The court below based its decision solely on the theory that, the cause having been commenced in a justice's court, (wherein as was claimed, a demurrer was not known,) and coming to the district court on appeal, was to be tried there in the absence of new or amended pleadings filed by leave of court, upon the original papers on which the cause was tried before the justice; that said original papers were the bills of particulars of the respective parties; and the demurrer of White, having been filed without leave of the court, was therefore to be treated as a nullity. And by taking this view of the matter, the court was enabled to hold that the filing of the demurrer raised no issue of law, and that the defendant in error properly subpoenaed witnesses during its pendency, and was entitled to have the costs of suit, witnesses included, inserted in the judgment against plaintiff in error. Conceding that the plaintiff below filed her demurrer without the leave of the court, does it follow that she can take advantage of that fact herself? Can a party put a pleading on file, suffer it to remain there for months, treat it as a valid plea by asking and taking leave of the court to withdraw it, by his action induce the adverse party to regard the case as at issue upon an issue of law, and consequently refrain from subpoenaing his witnesses, and after all this, when it is sought to charge such party with the lawful consequences of his act, does it then lie in his mouth to inform the court that his proceedings in the premises were a mere farce, that he has been trifling with the court, and deceiving the opposite party on purpose? Such certainly cannot be the law. We submit that the only one who could have taken advantage of the improper filing of this demurrer, was the plaintiff in error himself, and so long as he did not complain, it was to be, and should be, treated and regarded the same as if it had been filed in strict accordance with law, and the defendant in error is estopped from asserting the contrary."

We are inclined to think that the court below decided correctly. The demurrer was undoubtedly a nullity at the time it was filed, because it was filed out of time, without leave of the court, and without the consent of the defendant. Or at least, the court and the defendant had a right to treat it as a nullity. (*Hopkins v. Cothran*, just decided by this court, *ante*, p. 173.) And so far as we can see from the record, the court and the defendant continued to possess that right until the case was brought to this court. Neither ever did anything so far as the record shows to waive or abridge that right; and the plaintiff had no power by her own act to take it from them. Neither is there anything in the record that shows that the plaintiff ever gained anything, or that the defendant ever lost anything, by reason of the filing of said demurrer. And there is nothing in the record that tends to show that any party or person ever acted in any different manner because of the filing of said demurrer than he would have acted if it had not been filed, except the following clause from the agreed statement of facts: "Said defendant Clark knew of said demurrer being filed, and subpoenaed no witnesses in his behalf in said cause from the time said demurrer was filed until it was finally disposed of, when he duly subpoenaed his witnesses who afterward testified on his behalf on the trial." Now this hardly shows that the defendant did not subpoena his witnesses because said demurrer was filed. But even if it be considered that it does, still, it would not show that the defendant lost anything by reason of the filing of the demurrer, or that he at any time waived his right to treat the demurrer as a nullity. And if he failed to subpoena his witnesses because of the filing of said demurrer, then the demurrer operated as a positive benefit to him, for it lessened the amount of costs which he would have had to pay to such witnesses. The plaintiff herself seems to have considered the demurrer as of little value, for she continued to subpoena witnesses after it was filed, and afterwards withdrew it. Under the circumstances of this case we think the demurrer was a nullity at the time it was filed.

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There was nothing afterward done to give it any life, and there was nothing done to estop the party filing it from afterward treating it as a nullity.

The judgment of the court below is affirmed.

All the Justices concurring.

LIFE ASSOCIATION OF AMERICA V. WILLIAM DALE *et al.*

ATTORNEY-FEE, Stipulated in Mortgage to be Paid, is Recoverable. An action was commenced on a note and mortgage. The mortgage contained the following among other stipulations, to-wit: "*In any action that may be brought*" on the note and mortgage, the plaintiff "*shall be entitled to, and may have, recover and receive, of and from*" the defendant "ten per cent. upon the amount due and recoverable at the time *payment shall be made* or judgment rendered as and for liquidated fees and compensation of the attorney or attorneys of the" plaintiff. The defendant was in default for want of an answer, and the plaintiff moved for judgment on his petition. The defendant then appeared in court and tendered all that was due on said note and mortgage except said attorney-fees, and also tendered costs. The court then ordered that the amount so tendered be paid to the clerk subject to the plaintiff's order, and the same was so paid; and then the court overruled the plaintiff's motion for judgment. The defendant then moved the court to dismiss the plaintiff's action, which motion the court sustained, and dismissed said action: *Held*, That the court below erred in refusing to allow the plaintiff any attorney-fee, and dismissing the plaintiff's action. [*Jennings v. McKay*, 19-122; *Stover v. Johnnyake*, 9-387; *Coburn v. Weed*, 12-182; *Foot v. Sprague*, 13-155; *Dorman v. Crozier*, 14-224; *Shellabarger v. Thayer*, 15-619; post, 592. See Comp. Laws 1881, 3244.]

Error from Franklin District Court.

THE question in this case is as to the right of a mortgagee to recover attorney-fees stipulated in the mortgage to be paid by the mortgagor. The district court, at the August Term 1874, held that such stipulated fees were not recoverable where the whole debt, interest, and other costs were paid before judg-

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ment; and from such decision the plaintiff appeals, and brings the case here on error.

Burnes & Dill, for plaintiff.

Meigs & Littlefield, for defendants.

The opinion of the court was delivered by

VALENTINE, J.: This was an action on a note and mortgage. The mortgage contains among others the following stipulations, to-wit:

"And said parties of the first part" (William Dale and Elizabeth Dale, his wife,) "hereby promise and agree to and with said party of the second part" (The Life Association of America,) "that in any action that may be brought for any amount that may be due and unpaid upon said note, or interest notes, or by virtue of any of the provisions of this mortgage, or to enforce the same, the party of the second part or its successors or assigns shall be entitled to and may have, recover, and receive, of and from said parties of the first part ten per cent. upon the amount due and recoverable at the time payment shall be made or judgment rendered, as and for liquidated fees and compensation of the attorney or attorneys of the parties of the second part, or its assigns, for services in such action; and such amount shall be an additional lien upon the property hereby mortgaged, and shall be included in any judgment rendered in any action as aforesaid, and collected and the lien thereof enforced, in the same manner as the principal debt hereby secured."

This stipulation was duly set forth in the plaintiff's petition, and the plaintiff duly prayed for judgment in accordance therewith and with the other allegations of the petition. The defendants did not answer, but made default. The plaintiff then moved the court for judgment in accordance with its said petition; and while this motion was pending the defendant came into court and tendered everything that was due on said note and mortgage except said attorney-fees, and also tendered the costs of suit; whereupon the court ordered that the sum so tendered be paid to the clerk subject to the plaintiff's order, and the same was so paid; and thereupon the court overruled the plaintiff's motion for judgment. The defendants then

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moved the court to dismiss the plaintiff's action, which motion the court sustained and dismissed said action. It will be seen from this that the court below refused to allow the plaintiff's any attorney-fee; and this ruling the plaintiffs now assign for error.

The note and mortgage in this case were executed April 5th 1871, for \$500, due in two years from date, with twelve per cent. interest. This suit was commenced May 8th 1874; and the action was dismissed August 3d 1874. At the time the action was dismissed the amount due on the note and mortgage for principal, interest, and taxes paid, as agreed by the parties and found by the court, was \$568.28. This amount, together with \$11.50 costs, is the amount that was tendered and paid to the clerk as above stated. The plaintiff now claims that the defendants should have tendered \$56.82 more, as and for attorney-fees; and as he did not tender the same, the court below erred in refusing to render judgment for that amount, and in dismissing the plaintiff's action. We are inclined to think that the plaintiff is correct, and that the court below did err. At least, we think a judgment should have been rendered for the plaintiff for some amount as attorney-fees, and *prima facie* \$56.82 was the proper amount; and there is nothing in the record showing that it should have been any other amount. It has already been decided in this court that such a stipulation as the one contained in the foregoing mortgage, is legal and valid. And therefore the only question for us now to consider is, whether the tender of the amount due on the note and mortgage, and just before judgment was rendered thereon, is sufficient to entirely relieve the mortgagor from all obligation to pay an attorney-fee in the case. The mortgage in this case stipulates, that "*in any action that may be brought,*" etc., the plaintiff "*shall be entitled to, and may have, recover, and receive of and from*" the defendants "*ten per cent., upon the amount due and recoverable at the time payment shall be made, or judgment rendered, as and for liquidated fees and compensation of the attorney or attorneys of*" the plaintiff. And there is no stipulation in the mortgage that said attorney-fee should not be allowed if pay-

ment of the amount of the note and mortgage be made while the suit is pending, so that no judgment can be rendered for that amount. Said stipulation evidently contemplated the payment of an attorney-fee if suit were brought on the note and mortgage, even if nothing more were done before the payment of the amount due thereon than merely to commence such suit. But it also contemplated that the said amount of ten per cent. on the amount paid or recovered should be full compensation for the entire services of an attorney for the plaintiff from the commencement of the action until its final conclusion. Hence, if the defendants at any time after suit was brought, and before its final termination, stopped all further proceedings in the case by the full payment of everything due therein, he would be entitled to an equitable abatement of said ten per cent. attorney-fees in proportion as the value of the services which the plaintiff's attorney was relieved from performing would have been to the value of the whole of the services of the plaintiff's attorney if the case had been allowed to proceed to its final determination without any payment being made therein.

The judgment and order of the court below must be reversed, and cause remanded for further proceedings in accordance with this opinion.

All the Justices concurring.

THOMAS CASEY *et al.* v. THE CITY OF LEAVENWORTH.

1. **EXAMINATION OF WITNESS; Testimony on Cross-Examination.** Where a city engineer is introduced as a witness by the plaintiff for the purpose of proving that an apportionment of a special tax made by his predecessor is incorrect; and it is shown on his examination-in-chief that he made another and subsequent apportionment of the same tax, it is not substantial error for the court to permit the defendant on cross-examination of such witness to introduce said second apportionment in evidence where the most that the defendant could want of it would be to show that it was in fact made. [*Sumner v. Blair*, 9-521; *Comm'rs v. Craft*, 6-145; *Schuster v. Stout*, 30-529; *Maier v. Randolph*, 33-340.]
2. **CONTRACT WITH CITY; Grading Streets; Terms of Contract; Rights of Contractor.** In 1873 a street was graded in a city of the first class under a certain contract whereby the city agreed to pay for said grading by levying "a special tax" for the cost thereof "upon the lots and parcels of ground adjoining said work," and the plaintiffs who were the contractors agreed on their part to "look exclusively to said special tax for their pay. The grading was done, and the said special tax was levied; but the city engineer in making the apportionment thereof made a mistake, and the mistake was not discovered until about a year thereafter, when the city engineer rectified the same by making a new and correct apportionment; and everything except said apportionment was done according to law, and according to said contract, and everything was done to the entire satisfaction of all the parties up to the discovery of said mistake, when the plaintiffs became dissatisfied. Said special tax is now being collected according to law. *Held*, That under the circumstances of this case the contractors cannot maintain an action against the city for the cost of said grading, or for negligence in the collection of said special tax; but they must in accordance with their contract "look exclusively to the said special tax for their pay." And it would make no difference whether in making the first apportionment the work was done by the city engineer himself, or by his assistant. [*Leavenworth v. Mills*, 6-285.]

Error from Leavenworth District Court.

ACTION by Casey and another to recover damages for alleged negligence of the city in failing to collect the sum of \$12,976.84 claimed by plaintiffs as due them upon a contract for grading a public street. Trial at May Term 1875. Demurrer to plaintiff's evidence sustained, and judgment in favor of the city for costs. Plaintiffs bring the case here on error.

F. P. Fitzwilliam, and Lucien Baker, for plaintiffs.

H. Miles Moore, and E. Stillings, for defendant.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by Thomas Casey and Patrick McCristal against the city of Leavenworth, to recover damages for alleged negligence on the part of the city in failing to collect \$12,976.84 claimed to be due the plaintiffs for grading Lawrence Avenue, a public street in said city. The grading was done under a contract between the plaintiffs and the defendant, by which contract the defendant agreed on its part to pay for said grading by levying "a special tax upon the lots and parcels of ground adjoining said work" for the cost of said grading; and the plaintiffs on their part agreed, that they would "look exclusively to the said special tax for their pay." Everything seems to have been done to the entire satisfaction of both parties, in exact accordance with the contract, except that about a year after the work was completed it was discovered that the city engineer had made a mistake in making the apportionment of the said special tax. The cost of the grading amounted to \$12,976.84; and the city, by an ordinance, levied a "special tax" for that amount "upon the lots and parcels of ground adjoining said work." The city engineer then apportioned said special tax, as he believed, in accordance with the statute. (Gen. Stat. 137, § 26.) All necessary and proper proceedings for the collection of said tax then followed in supposed conformity to law; and so far as anything is shown by the record of this case, everything from first to last was done to the entire satisfaction of all the parties, and everything was done correctly, and in exact accordance with law and with said contract, except the said mistake made in said apportionment; and as soon as said mistake was discovered the city engineer corrected the same by making a new and a correct and legal apportionment. Said work was completed October 20th 1873. Said second apportionment was made March 2d 1875. And

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this suit was commenced March 22d 1875. On the trial of this case in the court below the plaintiff introduced as a witness, G. W. Vaughn, who was then city engineer of said city. He was also the city engineer who made the second apportionment, and was the successor of the city engineer who made the first apportionment. He was introduced for the purpose among other things of proving that said mistake had been made in making the first apportionment. During his examination-in-chief the following among other evidence was elicited, to-wit:

"Question.—Can you tell what mistake there is in that [the first] apportionment of the city engineer? Answer.—I could not undertake to say what mistakes there are, without comparing it.

"Question.—You subsequently made another? Answer.—Yes, sir."

The witness then testified in detail with reference to said supposed mistakes, made in the first apportionment. Then on cross-examination of the witness the following additional evidence was elicited, to-wit:

"Question.—Is this the apportionment you made? Answer.—I made this.

"Question.—When did you make it? Answer.—This is dated March 2d 1875."

The defendant then with the permission of the court, but over the objections and exceptions of the plaintiffs, introduced this last apportionment in evidence, and this the plaintiffs now assign for error. They claim, *first*, that a second apportionment could not legally be made, and therefore that said second apportionment could not be competent evidence at any time in the case; and *second*, that even if said second apportionment could be legally made, and was competent evidence in the case, that still it was not proper to introduce it in evidence on cross-examination of the plaintiffs' witness, but that it should have been reserved and introduced by the defendant after it opened its case. Now that said second apportionment could be legally made, and was competent evidence in the case, we think there can scarcely be any room to doubt, and we shall

hereafter give our reasons for so thinking. But could it properly be introduced in evidence on cross-examination of the plaintiffs' witness? We are inclined to think that it could, in the discretion of the court below. The plaintiffs themselves showed that it had been made, and it itself showed just where the witness believed mistakes had been made in the original apportionment. It was really the witness himself, explaining his own testimony with regard to said mistakes. But without deciding this question definitely, we would say, that no harm could have been done to the plaintiffs by its introduction, and therefore no substantial error was committed. The plaintiffs had already proved that said second apportionment had been made, and without any showing to the contrary it would be presumed that the same was a correct apportionment. And this is as much as the defendant could have wanted to prove by the introduction of the same in evidence.

When the plaintiffs rested in the introduction of their evidence, the defendant demurred to the plaintiffs' evidence on the ground that it did not prove any cause of action against the defendant; and the court below sustained the demurrer. And this the plaintiff also assigns for error. We are inclined to think that the court below did not err in this ruling. The evidence did not, as we think, prove any cause of action against the defendant. No wrong or laches is imputed to the city except said mistake of the city engineer. And such a mistake we hardly think is a sufficient foundation for a cause of action against the city. The city merely agreed to levy said special tax, and this the city did; and the plaintiffs agreed to "look exclusively to said special tax for their pay." Now, under the circumstances of this case we would think that when the city levied said special tax it was as much the duty of the plaintiffs to see that the same was properly apportioned, as it was that of the city; and the plaintiffs had vastly more interest in the matter than the city had. And therefore it would seem, that if the plaintiffs did not use due diligence in endeavoring to have a proper apportionment made, their negligence would be greater than that of the city. The law prescribes how the ap-

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portionment should be made, and who should make it. (Gen. Stat. 187, § 26.) And the city has nothing whatever to do with it, unless it can be said that what is done by the city engineer is done by the city. Aside from the acts of the city engineer the city has done all that it could possibly do for the collection of said special tax; and in this respect this case differs widely from the case of *Leavenworth City v. Mills*, 6 Kas. 288. In that case the city after levying a special tax wholly neglected to provide any means for its collection, and at that time there was no law or ordinance under which the tax could be collected without further action by the city itself. In this case, if the city had prevented the collection of said special tax, or if it had diverted the same to some other use, it would of course have made itself liable to the plaintiffs. But the city has not done any such thing. On the contrary, it has done all that it could do to assist the plaintiffs in getting the benefit of said special tax.

It is claimed however that the city engineer is the agent of the city; that an assistant engineer is still more the agent of the city; and therefore, that the city is responsible for the acts or omissions of the city engineer and his assistant. It is also claimed that said incorrect apportionment was in fact made by the assistant engineer, and not by the engineer himself. Now this is not sufficiently shown; but if it were shown we suppose it would make no difference. The apportionment purports to have been made by the engineer himself, and in law it is his, even if the assistant did do the work on it. It is probably true, that in some cases the city engineer acts as the agent of the city; but in many cases he does not. In many of his official acts the city has no possible interest whatever, and is not responsible for them. In this particular case he may have acted as the agent of both of the parties, and if so, then the mistake made in the apportionment was the mutual mistake of all the parties, and no particular one should be held responsible for it. All parties supposed that the apportionment was correct; and the plaintiffs, who were more interested in its correctness than any of the other parties, accepted it, acquiesced

in it, and adopted it as correct. We therefore hardly think that they are the proper parties to now complain of it. Besides, the city engineer corrected the mistake as soon as he discovered it, and therefore the only injury that resulted from such mistake was a little delay.

But it is claimed that the city engineer had no power to correct said mistake. We think he had. Sec. 30 of the act of 1868 relating to cities of the first class, as it originally stood, (Gen. Stat. 138,) and as it was afterward amended in 1870, (Laws of 1870, p. 122,) and as it was again amended in 1871, (Laws of 1871, p. 167,) and § 24 of the act of 1874 relating to cities of the first class as it now stands on the statute book, (Laws of 1874, p. 67,) provide for just such a thing being done. Section 30 as amended in 1871 we think has never been repealed. But even if it has been repealed, it has been so repealed impliedly only by the said act of 1874. And that act provides that "all proceedings relating to the levy and collection of general and special taxes, and the sale and conveyance of land for the nonpayment thereof, shall remain in full force and be completed under existing laws." (Laws of 1874, p. 56, § 1.) This we think is a sufficient saving-clause. Said special tax is now in process of collection, and some of it has been collected; and we think the plaintiffs in accordance with their contract should be left to "look exclusively to the said special tax for their pay."

Entertaining these views, we think the judgment of the court below must be affirmed.

All the Justices concurring.

GEORGE W. YANDLE V. JOSEPH J. KINGSBURY.

1. **SUMMONS IN REPLEVIN; Indorsement by Clerk.** In an action of replevin a petition was filed, and a summons and order of delivery were issued at the same time. The summons was regular on its face, but the clerk indorsed thereon that "the plaintiff claims \$200, and interest thereon." At the first term of court thereafter, this indorsement was stricken from the summons as irregular and unauthorized, on plaintiff's motion, who thereupon obtained leave for a new summons to issue. At this stage of the proceedings a motion to set aside the order of delivery was made by the defendant, and refused by the court. *Held*, That the first summons was good, and that the court did not err in refusing to set aside said order of delivery.
2. **MEASURE OF DAMAGES, in Replevin.** In an action in replevin, where the property in controversy has a usable value, the value of the use of such property during the time of its wrongful detention may be recovered as proper damages. [*Arthur v. Wallace*, 8-287; *Ladd v. Brewer*, post, 204; *Bell v. Campbell*, post, 211; *Palmer v. Meiners*, post, 479; *Garrett v. Wood*, 3-235; *McCarty v. Quimby*, 12-494; *Griffiths v. Wheeler*, 31-17.]

Error from Bourbon District Court.

REPLEVIN, brought by *Kingsbury*, to recover the possession of a span of horses, a colt, and a set of harness, alleged to have been wrongfully taken and wrongfully detained by *Yandle*. The action was commenced in Labette county district court in May 1872, where certain proceedings were had which are noticed in the opinion of the court, *infra*. A trial was had in March 1873, resulting in a verdict for the plaintiff, which verdict was set aside by the court, and a new trial awarded. The action was then removed, on motion and application of *Yandle*, to the district court of Bourbon county, where it was tried at the September Term 1873, C. W. B., judge *pro tem.*, presiding. Verdict and judgment for *Kingsbury*, plaintiff, for a recovery of the possession of the property, or for its value, assessed at the sum of \$200, and for \$500 damages for the wrongful taking and detention of the property. New trial refused, and judgment on the verdict. The material facts are stated in the opinion of the court, and the dissenting opinion, *infra*. *Yandle* brings the case here on error. (No briefs on file.)

Hulett & McCleverty, for plaintiff in error.

McComas & McKeighan, for defendant in error.

The opinion of the court was delivered by

KINGMAN, C. J.: This was an action of replevin, brought by defendant in error. The defendant (plaintiff in error) gave the required undertaking, and retained possession of the property. Two errors are alleged. The first is, that the court erred in refusing to set aside the order of delivery, because no action was commenced or pending at the time the motion to set aside the order was made. The condition of the case at the time was this: The petition was filed, and a summons and order of delivery were issued at the time. The summons was regular on its face, but the clerk indorsed thereon that the plaintiff claimed \$200, and interest thereon. At the first term of court this indorsement was stricken from the summons, as irregular and unauthorized, on plaintiff's motion, who thereupon obtained leave for a new summons to issue. At this stage of the proceedings the motion to set aside the order of delivery was made, and refused—and we think correctly refused. The first summons was good. It was all that was necessary to bring the defendant into court. How far the indorsement thereon might have affected the extent of plaintiff's right of recovery, had the defendant remained in default, we need not inquire. The indorsement, when stricken out, did not invalidate the summons; nor did the issue of a new summons change the status of the case. The action was pending, because a petition had been filed, and a summons issued thereon.

The other question raised in the case is as to the measure of damages. The action was replevin. The defendant gave bond under § 182 of the code, and retained possession of the property. The property consisted of a mule, a mare, a colt, and a set of harness. The jury found for the plaintiff, and found the mule worth \$90, the mare \$80, the colt \$15, and the harness \$15, (total, \$200.) The colt had strayed away and

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come into the possession of the plaintiff soon after the suit was instituted. The court instructed the jury that the plaintiff, if entitled to a verdict, was entitled to recover as damages, "the actual worth of the use of the property, above the expense of keeping the same, from the time it was wrongfully detained by defendant." The jury returned a verdict for five hundred dollars damages for the detention of the property. The large disproportion between the value of the property, as found by the jury, and the damages they returned, naturally raises the question as to whether the rule laid down by the district court is correct. The plaintiff in error claims that the only damages recoverable are, interest on the value of the property for the time it was wrongfully detained. It may be stated as a general rule in replevin, that such is the measure of damages; but though this is a general rule, it is by no means a universal one; and one of the most generally recognized exceptions is, where the property in controversy has a usable value. In such case, the owner's damages are the loss of the use of the property for the time it is detained, and nothing less than this is a compensation for his injuries. In the case of *Allen v. Fox*, 51 N. Y. 562, the learned judge delivering the opinion of the court has suggested a number of supposable cases where interest would be a grossly inadequate compensation; but in none of the cases that occurred to him would interest only as damages be such a mockery of the term as is presented in this case. From the record we learn that the mare and mule made a team, and the only one owned by defendant in error, and used by him for carrying on his farm; that on the 21st of May they were seized by the plaintiff in error without a pretext of ownership, and retained for sixteen months and seven days, until the final trial, plaintiff in error avowing that his object was to prevent the owner from making a crop, and thereby breaking him up, and compelling him to leave the neighborhood, saying to more than one witness that he would only have to pay interest on the value of the property seized. For this loss the plaintiff in error thinks that \$18.96 (the interest at seven per cent. per annum on \$200 for sixteen months and

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seven days,) would be an adequate compensation, as the defendant in error could have readily bought another team, as it was a species of property common in the country, and there was no difficulty in the defendant in error buying another team at a reasonable price; and had he have done so, the only damage he would have sustained would have been the use of the money for the time. It might be an answer to this reasoning to say, that on the plaintiff in error's own declaration, the owner could not buy another team as he was not able to do so, a condition of things not uncommon in a new country. While this answer ought to be conclusive, so far as this plaintiff in error is concerned, it is not such an one as should be laid down as the basis of a rule; and a better one is at hand. The object of the plaintiff in replevin is the possession of his property. If he succeeds in his suit, he is compelled to take the property, if the defendant so wills. Then the plaintiff has (if he has bought in the meantime) two teams, when he wants but one, while the defendant has had the use of one of them, by merely paying interest on the value of the property. This would not be compensation, which is the real object in damages, wherever damages are allowable at all. It is true, that general rules will not in all cases give adequate damages; but it is the object of the law to do so whenever such a result does not break down some settled rule of law.

The judgment of the court below will be affirmed.

VALENTINE, J., concurring.

BREWER, J.: I am unable to concur with my brethren in this case, and will state briefly my views thereon. This was an action of replevin brought by defendant in error to recover the possession of a mare, a colt, a mule, and a set of double harness. The defendant gave a bond and retained the property under § 182 of the code. Subsequently the plaintiff obtained possession of the colt, while the defendant retained the mare, the mule, and the harness. The jury found for the plaintiff, and valued the mare at \$80, the colt at \$15, the mule

Dissenting Opinion.

at \$90, and the harness at \$15. They also assessed the plaintiff's damages for the detention at \$500. This action was commenced immediately after the defendant had taken possession of the property, but the case was not tried and the verdict returned until about sixteen months thereafter, and during all this time defendant had possession of the mule, the mare, and the harness. So far as any actual damage is concerned, the only testimony was that of plaintiff, that he was a farmer, and lived on his farm; that he used this team to carry on his farm, and that the use of it was worth two dollars a day. Other witnesses also testified that the use of a team was worth from two to three dollars a day. Upon this the court charged, that the measure of the plaintiff's damages was "the actual worth of the use of the property, above the expenses of keeping the same, for the time it was wrongfully detained by defendant." It is evident at a moment's glance that there is something wrong about this verdict. The property actually detained by Yandle is only worth \$185. It is a kind of property abundant in the community, and easily obtained. There is nothing in the property, or the use to which it was put, peculiar, or that would give it a value over other similar property. Yet the use for a year and a third is found to be worth nearly three times the value of the property. Surely this cannot be so. The apparent injustice of this verdict has led me to examine the question with care, and notwithstanding some confusion in the authorities I have come to the conclusion that the rule laid down by my learned associates is not correct, and that interest on the value is, in this case, the full extent of the damages properly recoverable.

Where the action is for the conversion of the property and in the nature of trover, it is unquestioned that the measure of damages is, ordinarily, the value at the time of the conversion and interest. Sedgwick on Measure of Dam. ch. 19, p. 474, and cases cited in notes; *McDonald v. North*, 47 Barb. 530; *Forsythe v. Wells*, 41 Penn. St. 291; *Suydam v. Jenkins*, 3 Sand. 614; *Single v. Schneider*, 30 Wis. 572. And I think the same principle is applicable where the action is replevin, and for the

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recovery of specific property, at least in those cases in which the successful party's claim is based upon a full title. It must be noticed that this question of damages may arise under three distinct forms in this action. In the first place, the plaintiff may obtain possession of the property at the outset of the action, and by the final judgment be held entitled to such possession. In such a case, the possession having been obtained at the commencement, no damages can be awarded for anything transpiring subsequently thereto. Only such damages can be given as resulted from a prior wrongful detention. Such an action was that of *Arthur v. Wallace*, 8 Kas. 267; and it was in reference to such a state of facts that the language quoted by counsel from the opinion in that case was used. If demand was necessary to make the detention wrongful, as in that case, the time of inquiry would be limited to the period between the demand and the obtaining of possession. And indeed it may be said to be a general rule, that only such damages can be awarded as accrued during a wrongful detention. Again, the question may arise when, though the property is seized by the officer, yet the defendant gives bond and retains the property, and thereafter is by the judgment found entitled to such possession. Here, as the possession of the party entitled thereto has not been except temporarily disturbed, only nominal damages would be proper, except in such rare cases as show that the temporary interference with defendant's possession has wrought special injury. And the rule is general, that where wrong is done, and special injury is wrought thereby, damages may be recovered therefor. A third class embraces those cases in which the plaintiff having obtained possession at the commencement of the action, a return is awarded by the judgment to the defendant, and those like the present, in which the defendant having given bond and retained the property, or without bond concealed and retained the property, the judgment awards the possession to the plaintiff. In these cases the action is more like trover, for the judgment does not recognize and confirm a possession at the time rightfully existing, but declares the possession then exist-

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ing wrongful, and decrees a change, and, for fear such actual change may be impossible, fixes the value to be paid in case the change is not made. It is therefore often in its results nothing but a recovery of damages for the wrongful conversion of property. Indeed, the wrongful seizure by the plaintiff under the writ in the first instance, and the retaining of the property by the defendant by giving bond, or concealment in the last two instances, is almost tantamount to a conversion. Now in order to make the principle of the rule of damages in trover fully applicable in replevin, one other fact must be noticed, that is, that personal property through lapse of time and use is changing its value, and this change must be taken into account in the estimate of damages. For surely, if personal property worth \$100 at the time it is wrongfully taken deteriorates fifty per cent. in value during the continuance of the wrongful detention, the owner is not compensated by a simple return of the property and legal interest, and the wrongdoer has profited by his wrong. If however, the decrease in value be added to the interest, the owner is properly compensated, and the wrongdoer properly punished. It may be remarked here, that our statute, as well as kindred statutes in other states, requires that the jury fix the value of the property, and that the judgment be for the recovery or return of the property, or the value thereof in case a recovery or return cannot be had. At what period is this value to be estimated? Obviously the value at the time of the trial. The value is to be an equivalent to the property, and a value at any other time would scarcely ever be such. Nothing in the statute forbids such a construction, and it is in consonance with the spirit thereof, and secures justice between the parties. Of course, it would not be proper to estimate the interest upon this value, for there might have been a great depreciation in value pending the detention. It should be based upon the value at the time the wrongful detention commences. I conclude therefore, that outside of cases of special and exemplary damages the rule of damages in cases of replevin, with the exception

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heretofore indicated, is the decrease in value, if any, during the wrongful detention, and interest for the same length of time on the full value at the time the wrongful detention commenced. If the change in the value during the detention has been an increase, this increase is secured to the party entitled to the possession, by the return of the property or the payment of the value fixed by the jury, which value includes the increase. See upon the questions here considered, Sedgwick on Measure of Damages, p. 499, and cases cited in notes; *Single v. Schniede*, 30 Wis. 572; *Page v. Fowler*, 39 Cal. 412; *Brizsee v. Maybee*, 21 Wend. 144; *Suydam v. Jenkins*, 3 Sandf. 614; *Rowley v. Gibbs*, 14 Johns. 385; *Young v. Willett*, 8 Bosworth, 486; *Twinnam v. Swart*, 3 Lansing, 263. The case of *Allen v. Fox*, 51 N. Y. 562, while it partially supports the views herein expressed, attempts to draw a distinction based upon the character of the articles replevied. It seems to concede that the rule is correct as to such articles as grain, hay, wood, etc., ordinary articles of merchandise, but claims that it is not as to horses, wagons, boats and such things as have what it terms a "usable value." As to these, it claims that the "value of the use" is, as charged by the district court here, the measure of damages. It seems to me this distinction is not well founded, and that the rule is generally, and for all articles of property, as I have stated. There can be little difficulty in applying this rule to the different classes of cases heretofore noticed. In the first, where the plaintiff obtains the property at the commencement of the action, it is unnecessary for the jury to assess any value. The property is already in the possession of the party entitled to it. The damages would be the decrease in value, if any, from the time the wrongful detention commenced, till the restoration of the property, and interest on the value at the time such wrongful detention commenced. In the second class, the detention is temporary, and the decrease and interest can only be trifling. In this also it is unnecessary to assess any value. In the third, the value should be assessed, and as of the date of the trial. The damages

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here may become a considerable element in the full and just compensation to which a party is entitled, but are to be reached in the manner above indicated.

I have confined myself in the consideration of this question to those cases in which the successful party bases his claim upon a full title. Where there is only a special and limited ownership, other considerations may affect and modify this rule. The opinion of the Chief Justice places some stress on the poverty of the plaintiff, his inability in consequence of that poverty to purchase another team, and the apparent malice of the defendant. But surely these matters are entirely extrinsic. True, where special damages are alleged, they may be recovered. Where malice is alleged, exemplary damages may be recovered. But here, neither is alleged; and the rule laid down must apply to a case exactly the reverse, and where the plaintiff is wealthy, or has many teams, and the only malice apparent is in his own conduct. It must be the universal rule in all cases where the property has what is called a "usable value," no matter what the circumstances or conduct of either party. If the defendant had killed the animals instead of taking possession of them, there can be no question but that the value and interest would have been the measure of damages. Has the plaintiff suffered any more injury by the defendant's taking possession of them? It seems to me that the rule laid down by my brethren will result in just such outrages as in my judgment is the verdict in this case.* Surely, no better speculation could the plaintiff make than in having his property wrongfully taken by his neighbors.

[*THE rule laid down by the majority of the court, determining the measure of damages in replevin, is adhered to in the subsequent cases of *Ladd v. Brewer*, post, pp. 204, 209, and *Bell v. Campbell*, post, pp. 211, 212.]

GEORGE LADD *et al.* v. FREDERICK BREWER.

1. **VERDICTS—When not Disturbed.** The well-settled doctrine, that where there is clear, positive and direct testimony to sustain every essential fact, this court will not set aside a verdict of a jury sustained by the district court, because of a seeming preponderance of testimony against it, is applicable to this case, and prevents a general reversal of the judgment. [See cases cited, *ante*, 145.]
2. **MEASURE OF DAMAGES, in Replevin.** Where the value of the use of property in an action of replevin is the proper basis for the assessment of damages for the detention, and no special use is suggested, and only the ordinary value of the use of such property claimed, *held*, that the loss of such value was the natural and necessary result of the detention, and that such value might be proved and recovered under a general allegation of damages, and without any averments of special damages. [*Arthur v. Wallace*, 8-287; *Yandle v. Kingsbury*, 17-195; *Bell v. Campbell*, 17-211; *Palmer v. Meiners*, 17-479; *Garrett v. Wood*, 3-235; *McCarthy v. Quimby*, 12-494; *Griffiths v. Wheeler*, 31-17; *Moses v. Morris*, 20-213.]
3. **FRAUDULENT SALES; Title of Purchaser.** While it is true that a *bona fide* purchaser from a fraudulent vendee will sometimes acquire a good title, yet that implies a sale with transfer of title to such vendee, even though it be a voidable sale, and one that the original owner may by proper proceedings set aside, and has no application to a case where the transaction under which the pretended vendee claims is absolutely void and which passes no title away from the original owner. [*Diefendorf v. Oliver*, 8-365; *Wilson v. Fuller*, 9-176; *Baughman v. Penn*, 33-504; *Scheble v. Jordan*, 30-353.]
4. ——— Thus, where B. is the owner of certain chattels, and J., claiming to be a partner or agent with authority to sell, sells and delivers such chattels to L., and it appears that J. was not a partner of B.'s, and had no authority to sell said chattels, and that B. was not estopped by his words and conduct from showing the truth, and had never ratified the attempted sale, *held*, that L. obtained no title, and could transfer none to a purchaser, *bona fide* or otherwise.
5. **JUDGMENT, in Replevin; When Error.** A judgment for the return of certain personal property, and damages for its detention, cannot be sustained against one who is shown by the testimony neither to have possession nor to claim any right to the possession. [*Mills v. Lumber Co.*, 26-576; *Sumner v. Cook*, 12-162; *Armistead v. Layton*, 33-41.]

Error from Bourbon District Court.

REPLEVIN, for four head of horses, brought by *Brewer*, as plaintiff, against *George Ladd*, *J. E. Trent*, and *G. E. Routt*, as defendants. The plaintiff claimed the horses as general owner.

Brief of Plaintiffs in Error.

They were found in possession of defendant *Trent*, who held them for *Routt*, the latter claiming to own them. *Trent* and *Routt* answered jointly, and gave a bond to retain possession. *Ladd* filed a separate answer. Trial at the December Term 1878, C. O. F., judge *pro tem.*, presiding. *Brewer* having given testimony tending to establish his ownership and right of possession, the defendants introduced evidence tending to show that the horses never belonged to *Brewer* individually, but to the firm of "Brewer & Jackson," and that Jackson had sold them to *Ladd*, who had sold them to *Routt*. There was also some evidence tending to show an agency on the part of Jackson to sell the horses. Verdict and judgment for *Brewer* for a return of the horses, and for \$118 damages for detention. Defendants bring the case here on error.

McComas & McKeighan, for plaintiffs in error:

1. The verdict of the jury was not sustained by sufficient evidence, and the court should have granted a new trial. It is admitted that Jackson sold and delivered the horses to Ladd, and that Ladd sold and delivered them to Routt, before the suit. Whether Ladd acquired a title, depends upon the existence of one of two facts—a partnership between Brewer and Jackson, or an agency, with power to sell, on the part of Jackson. It seems to us that the evidence is overwhelming against the verdict on the partnership proposition. But whether so or not, upon the question of the agency alone, the evidence of Brewer himself shows that Jackson had power to sell the horses. Again, there is no evidence of a joint detention by Routt and Ladd, and the testimony is uncontradicted that Ladd had sold and delivered the horses to Routt before suit brought, hence the verdict should not have been against Ladd, even if good against the others.

2. The court erred in admitting testimony upon the value of the use of the property. Under the issues made by the pleadings, the only damages which plaintiff was entitled to were the damages implied by law. If he sought to recover

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special damages, it was necessary for him to make the proper averments in the petition, so that an issue might be joined on them. No such issue was made. *Moak & Van Sant*. Pl. 244 to 248; *Sedg. on Damages*, 683; 28 Cal. 103; 5 Wis. 219; 4 Sandf. 263. The plaintiff had only been kept out of the horses from October 18th 1873, to the day of trial in December of the same year. According to the cases cited under the issue joined, damages implied by law could only be given. The court gave no instructions on the subject of damages, and they were only authorized to find 7 per cent.

The court erred in excluding questions and answers in Parsons' testimony. It was proper and competent to show anything which showed bias of the witness, either against Jackson, an important witness for plaintiffs in error, and who was responsible to Ladd in case of failure of title, or his bias toward the cause being tried; 6 N. Y. 345; 31 Geo. 688; 14 Gray, 31; 24 Ill. 444. The question was not objected to; the answer had been given. A party cannot sit by and speculate as to the probabilities of an answer being in his favor, and when it is against him, have it excluded; 41 N. Y. 342.

3. The court erred in its instructions to the jury. The jury were instructed that if Jackson, as partner of Brewer, or agent, had the right to sell the horses, and Ladd purchased in good faith, that then Brewer could not recover. This was no doubt true; but it was defective in statement, and calculated to mislead. The good faith of Ladd was not a subject of inquiry, until bad faith, and an intention to defraud by Jackson, were first charged and proven. If Jackson was Brewer's partner, the sale was good, unless it was a fraudulent sale by Jackson, participated in by Ladd; 1 Pars. 184. This instruction, and the entire instructions, ignored Routt, although the evidence showed that he was the second vendee for a valuable consideration, and no attempt was made to connect him with any pretended fraud on the part of Ladd and Jackson. A *bona fide* purchaser from a fraudulent vendee acquires a good title; 19 Wis. 659; 42 Ill. 18; 48 Ill. 507.

Hulett & McCleverty, for defendant in error:

It would seem to be purely a question of fact upon which the court is asked to reverse this case; but we understand it to be the uniform practice of this court, and of all courts of last resort, never to disturb the verdict of a jury where there has been any evidence to sustain it, unless in very exceptional cases. But the verdict here is fully sustained by the evidence. One theory of the plaintiff was, that no partnership in fact existed between him and Jackson, who claimed to have sold the horses to Ladd, and that Ladd had full notice that Jackson had no power to sell or dispose of any of the property in the livery stable, except with Brewer's express consent. Another theory was, that the alleged sale by Jackson to Ladd, and Ladd to Routt, was a "put-up job" by them to swindle Brewer out of his horses. Of course fraud usually can only be proven by circumstances, and very frequently the only way the jury can determine that fact is by the manner and conduct of the parties and witnesses upon the stand. Evidence has its chief weight from the manner in which it is given; and it is not an impossible thing for a jury to believe one witness and disbelieve another, though each may be equally positive in his statement; but a flush of countenance—an uneasiness in the chair—an intonation of the voice—may stamp one as truthful, and the other untruthful; hence, the ruling of courts of last resort not to disturb the verdict of a jury, since the jury have the opportunity of judging not only the weight of the testimony but the credibility of the witnesses; 11 Kas. 47. In the case at bar the jury doubtless believed Brewer, and disbelieved defendant's witnesses.

The verdict is also sustained upon the measure of damages, since it is now the well-settled rule that where the chief value of property is its use, as of horses, then the value of such use is the proper measure of damages; 16 Wis. 80; 51 N. Y. 562. And under our statute no special plea is needed, and at most this court would, upon this point, do no more than modify the judgment, reducing the damages for the detention.

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If Jackson had no right to sell, then Ladd got no title, and could give none, especially in view of the suspicious circumstances attending the transaction from the first step taken.

The opinion of the court was delivered by

BREWER, J.: This was an action by defendant in error in the district court of Bourbon county to recover the possession of certain horses claimed to have been unlawfully taken and detained by the plaintiffs in error, defendants below. The principal point made by the learned counsel for plaintiffs in error is, that the verdict was not sustained by sufficient evidence. It appears that Brewer had a livery stable, and that one Jackson was in charge of it, Brewer's time being principally employed in a restaurant which he also owned. Jackson sold and delivered the property in question to Ladd, one of the defendants, who the next day sold and delivered it to Routt, another defendant. The defendants claimed that Jackson was a partner of Brewer's, or, if not, an agent with power to sell. To this point then, the relation of Jackson to Brewer, the principal part of the testimony is directed. Brewer's testimony was clear against any partnership or any authority to sell. True, he did not use the very words, "there was no partnership," but he says it was his livery stable, that hired men took charge of it for him, that Jackson was tending stable for him as a "hired man," stated the terms of arrangement between them, which showed Jackson an employé simply, and denied ever giving him authority to sell. Jackson testified that there was a partnership. Other testimony went to the statements, admissions, and conduct of these two parties. The jury found that there was no partnership or authority to sell. We cannot say that they erred. True, several witnesses testify to statements from Brewer indicating a partnership—some even to his speaking of Jackson as his partner. Still, we cannot say that this testimony compelled a different verdict. Some of the witnesses were mixed up with this purchase; others, from the record apparently disinterested, may have so conducted

themselves on the witness-stand as to carry little conviction of their truthfulness. At any rate, the case comes clearly within the rule, that where there is clear, positive and direct testimony to sustain every essential fact, this court should not disturb the verdict because of seeming preponderance of testimony against it.

A second important question is, in the kind of testimony offered to prove the damages for the detention, and the basis upon which the jury assessed the damages. Evidence was admitted of the value of the use of the property from the time it was taken, down to the time of the verdict—the property having been retained by the defendants under a redelivery bond—and the jury evidently returned such value as the damages for the detention. This, in the judgment of the writer of this opinion, is not the true rule; but a majority of the court hold otherwise. See the opinion in *Yandle v. Kingsbury*, recently filed, (ante, p. 196.) Counsel contended that such damages are special damages, and must be alleged in the petition, or proof thereof is inadmissible. We do not think so. By the detention the party is deprived of the use of his property; and whatever is the value of such use, the ordinary value of the use of such property, is the natural and necessary result of the detention. No special use was suggested, and the only proof was as to the ordinary value of the use of such property.

Several errors are alleged in the admission and rejection of testimony. Without noticing them in detail, it is enough to say that most of the rulings of the trial judge in this matter were unquestionably correct; that while some of them perhaps were technically wrong, yet that these were in minor matters, and whether right or wrong are not in our judgment of sufficient materiality to justify us in sending the case back for a new trial.

Some fifteen special instructions were asked by plaintiffs in error, all of which were refused; and the only instructions given were embodied in a general charge prepared by the court. Most of the propositions embraced in these special in-

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structions were given in the general charge, and of course the court was under no obligations to repeat them. One proposition however advanced by counsel, which the court refused to give, is made a special ground of criticism, and authorities cited in support of it. The proposition advanced is, that a *bona fide* purchaser from a fraudulent vendee acquires a good title; and it is insisted that, though the sale might have been avoided as to Ladd, the purchaser from Jackson, yet, not having been avoided while the property was in Ladd's possession, and Routt having purchased in good faith, he at least acquired a good title. The error lies in this: that doctrine applies only to cases of voidable sales, and never to those absolutely void. In a voidable sale, the title passes subject to the right of the vendor to proceed to set the whole transaction aside on account of the fraud practiced upon him; in a void sale, no title passes. Where the title passes, the fraudulent vendee may in some cases transfer a good title to a *bona fide* purchaser from him; but where no title passes the pretended vendee can transfer no title to a third party under any circumstances. Here, if Jackson was a partner, or an agent with authority to sell, a good title passed; or, if not being a partner, and not having authority to sell, Brewer so held him out to the world as to induce third parties to believe he was either a partner or had authority to sell; or, if without any authority he made the sale, and Brewer afterward ratified it, then also a good title passed. But on the other hand, if none of these things existed, then the pretended sale from Jackson to Ladd passed no title, was absolutely void; and Ladd, having nothing, could transfer nothing. To this effect were the instructions given, and they were correct. To have gone beyond, and added what the counsel claimed, would, we think, have been apt to mislead the jury, and suggested that as having support in the testimony which really we think had none.

Thus far we have noticed no error of sufficient moment to justify a reversal of the judgment. As to one of the plaintiffs in error, George Ladd, however, we think the judgment can-

not be sustained. He purchased the horses from Jackson, sold them to Routt, who put them in Trent's possession. Routt and Trent filed a joint answer denying the allegations in the petition. Ladd filed a separate denial. The motion also for a new trial was a joint and several motion. Ladd it appears neither had possession, nor claimed any right to the possession. We think therefore it was error to render judgment against him for the return of the property, and damages. True, he signed the redelivery bond with the other defendants, and one John Lawrence, and he may ultimately be made liable upon that bond for the amount of the judgment; but the execution of that bond gives no right to render a judgment in the present action against the obligors thereon. The judgment therefore against him must be reversed, and the case remanded for a new trial. As to the other plaintiffs in error, it will be affirmed.

One-half of the costs of this court will be taxed against the defendant in error, and one-half against the two plaintiffs in error against whom the judgment is affirmed.

All the Justices concurring.

S. M. BELL *et al.* v. P. B. CAMPBELL.

MEASURE OF DAMAGES, In Actions of Replevin. In an action of replevin for a horse, buggy and harness, where the defendant gave bond and retained the possession of the property pending the action, it was not error for the court at the trial to give the jury the following instructions, to-wit: "If you find for the plaintiff in said cause you will assess his damages at the value of the use of the property taken by the defendant from the time of the taking of the same up to the present time." [See cases cited, *ante*, 204.]

Error from Chase District Court.

REPLEVIN, to recover property alleged to have been wrongfully taken and wrongfully detained. The facts are sufficiently stated in the opinion. The plaintiff had judgment at the October Term 1874. Defendants *Bell* and *Sutton* bring the case here on error.

Ruggles & Sterry, for plaintiffs in error.

Almerin Gillett, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action of replevin for a horse, buggy, and harness. The defendants (now plaintiffs in error) gave a bond under § 182 of the civil code, and retained possession of the property pending the action. At the trial of the case the court below gave to the jury the following among other instructions, to-wit:

“If you find for the plaintiff in said cause, you will assess his damages at the value of the use of the property taken by the defendants from the time of the taking of the same up to the present time.”

The jury did find in favor of the plaintiff and against the defendants, and assessed the value of the property in controversy at \$475. They also, in accordance with said instruction, assessed the plaintiff's damages for the unlawful detention of the property at \$210. Seven per cent. interest on the value of the property for the time it was unlawfully detained would have amounted to \$87.27. The plaintiff then remitted all the damages in excess of \$87.27, and the court below then rendered judgment in favor of the plaintiff (now defendant in error) and against the defendants for a recovery of the property in controversy, or in case the property could not be obtained then for the value thereof, to-wit, \$475, and for said \$87.27 damages, and also for costs of suit.

The plaintiffs below urge that the court below erred as to the measure of damages. They claim that the true rule for

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the measure of damages in such cases as this is the interest on the value of the property while wrongfully detained, and is never the value of the use of such property. We think however the court below did not err in this respect. We have just decided two cases in which we have substantially sustained the ruling of the court below in this particular. (*Yandle v. Kingsbury*, ante, 195, and *Ladd v. Brewer*, ante, 204.) It is true, that interest on the value of the property wrongfully detained is sometimes, in replevin cases, considered as the proper measure of damages. But it never was considered as the only damages which might be allowed in replevin cases. And in the nature of things it should not be. In some cases deterioration of the property from injury, neglect, etc., while wrongfully detained, must be considered as an element in the allowance of damages. In other cases, the decrease in the market value of the property must be taken into consideration. In other cases, perhaps few, gross malice, fraud, and oppression may be taken into consideration for the purpose of giving exemplary damages. (*Herdick v. Young*, 55 Penn. Stat. 176; *Cable v. Dakin*, 20 Wend. 172.) In other cases, the value of the use of the property must be taken into consideration for the purpose of giving compensatory damages. *Allen v. Fox*, 51 N. Y. 562; *Morgan v. Reynolds*, 1 Montana, 163; *Butler v. Mehrling*, 15 Ill. 488; *Robbins v. Walters*, 2 Tex. 130; *Dorsey v. Gassaway*, 2 Har. & Johns, 408, 413; *Gibbs v. Cruikshank*, 8 C. P. 454; *Williams v. Phelps*, 16 Wis. 81; *Glascock v. Hays*, 4 Dana (Ky.) 58; *Hall v. Edrington*, 8 B. Mon. 47, 48; *Hubson v. Young*, 25 Ala. 376. The last three relate to detinue, the others to replevin. And still in other cases other damages than those above mentioned are sometimes allowed in actions of replevin. In *Massachusetts*, in an action of replevin, where part of a manufacturer's machinery was taken and wrongfully detained, it was said by the court that the damages "would be made up of, 1st, interest on the money-value; 2d, the general inconvenience and loss resulting from the interruption of his possession; and 3d, the expense, trouble and delay attending the operation of re-

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placing everything, and restoring the establishment to its original condition." (*Stevens v. Truite*, 104 Mass. 328, 335.) Indeed, in every action of replevin the plaintiff or the defendant, as the case may be, should be allowed to recover all the damages, not too remote, which he has actually sustained by reason of the wrongful detention of the property, in whatever way such damages may have resulted. Exact compensation for his loss is the true rule. In a late case in England, decided in 1873, Bret, J., says: "Replevin is the common-law action for the taking of goods. By the course of procedure in that action the goods are returned in the course of the action. It was argued by Mr. Foard that the action was for the mere purpose of recovering back the goods. I do not think that can be so, for if so the plaintiff could never have recovered what in every action of replevin he does recover, the expenses of the bond. It seems to me that whenever, in a common-law action, the plaintiff can recover damages, *he must be entitled to recover all the legal damages he has sustained.*" (*Gibbs v. Cruikshank*, 8 L. R., C. P. 463.) And in the same case, Bovil, C. J., says: "When the goods were not redelivered by the sheriff, according to the books it would appear that the plaintiff could recover *the full amount of the damages that he has sustained* by the taking of the goods. *I am not aware of any authority to the contrary*, and I see no reason in principle why there should be any limitation as to the amount of the damages recoverable in such a case. I do not know of any ground in law for confining the damages to the amount of the expenses of the replevin bond. In practice these expenses are all that are recovered, merely because there is generally no other damage. The form of the declaration in replevin states that a wrongful act has been committed by taking the goods, and claims for the damages that have accrued to the plaintiff by reason of such wrongful taking. *It appears to me that whatever damages have been actually sustained may be recovered.*" (Same case, pp. 459, 460.) The decision of this last-mentioned case was in accordance with the opinions of the above-named judges. In a late case in New York, decided in 1873, Earl, C., who delivered the opinion of

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the court, says: "I have found no case, unless it be the case in 4 Lansing, where it has been held that the value of the use may not be recovered as damages for the detention in case the property has (what I have for brevity called) a 'usable value.'" (*Allen v. Fox*, 51 N. Y. 567.)

The plaintiffs in error claim that in trover the plaintiff can recover only for the value of the property taken, and interest thereon; that replevin is governed by the same rules as trover, and therefore, that the plaintiff can recover in replevin merely the property taken or the value thereof and interest on such value. Now admitting, for the purposes of this case, that the plaintiffs in error are correct so far as trover is concerned, still they are certainly mistaken with respect to replevin. The two actions are very dissimilar. In trover the plaintiff elects to consider the property taken (if the property is still in existence,) as having become the property of the defendant, and he himself is owner of nothing but the mere value of such property, which value he seeks to recover. While in replevin the plaintiff continues to be the absolute owner of the property itself, (if he was the owner previously,) and he cannot elect in such action to take the value of the property instead of the property itself. (*Wilson v. Fuller*, 9 Kas. 193; *Hall v. Jenness*, 6 Kas. 365.) In trover the defendant detains nothing from the plaintiff but the value of the property, that is, money; while in replevin he detains the property itself. In either action the plaintiff is entitled to recover for the use of the exact thing which the defendant detains from him; but the great difference is in the thing detained. In trover, it is substantially money. In replevin, it is not money, but is some kind of property different from money. Now the law fixes the value of the use of money, but it does not fix the value of the use of any other kind of property. Therefore, in trover it would be proper to give the plaintiff seven per cent. interest on the value which he recovers, for that is the legal value of the use of money; but in replevin, the value of the use of the property cannot be known except by evidence. In trover, a plaintiff should not be allowed to recover for the use of the property

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taken, for the property by his own election does not belong to him, but belongs to the defendant. In trover, he should be allowed to recover merely for the value of the property, and the use of such value. But in replevin it is different. There the plaintiff owns the property itself, and therefore should be entitled to recover for the use of the property, and not merely for the use of the value thereof. In trover the plaintiff never expects to recover the property back again, for it has already become the property of the defendant, and that by the plaintiff's own election, if the property is still in existence. And therefore, in trover it may fairly be inferred that the plaintiff does not need the property, or that he could go into the market without inconvenience and purchase like property. But this is not so in replevin. In replevin the plaintiff expects to recover his original property back again; and hence it is fair to infer that he needs the property, and that he could not without great inconvenience (if he could at all) go into the market and purchase other property like it. But even if he could purchase other property like it, he should not be required to do so, for afterward when he recovers his own he would have duplicates of the same property, and might therefore be subject to further and additional inconvenience and loss. Very few persons would want to own two reapers, two pianos, two fine carriages, or two fine stallions, at the same time, even if they were able to do so. Besides, interest on the value of such property would generally be very inadequate compensation for the loss of the use of the property. The services of a fine stallion for a single month might be worth one or two hundred dollars, while interest on his value for the same length of time might not be five dollars. The same with reference to a reaper, or mower, and probably several other kinds of property. The services of even a farm-horse worth one hundred dollars, for the months of April, May and June, would probably be worth fifty dollars, while the interest on his value for the same time would be only one dollar and seventy-five cents. Who ever heard of a livery stable keeper hiring a horse out for the interest on his value? The interest on a horse worth two hundred

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dollars, would be less than four cents per day. The interest on a carriage worth five hundred dollars, would be less than ten cents per day. The interest on a farm-wagon worth one hundred dollars, would be less than two cents per day. Would such rates be adequate compensation for the loss of the use of property? Would the aggrieved party who should receive as compensation such rates feel that he had been amply paid for the *wrong* inflicted upon him? Would damages at such rates be sufficient to discourage wrongdoing of this kind? Would not such damages rather encourage such wrongdoing? It would be a very cheap way to get the use of property if it could be got at such rates.

But even if we should concede that the plaintiffs in error are correct, and that interest merely on the value of the property should be allowed as damages, still we do not see how they expect to have the judgment in this case reversed. The judgment was rendered in the court below precisely in accordance with their views of what is the correct measure of damages. Therefore, taking any view of the case, the judgment of the court below must be affirmed.

KINGMAN, C. J., concurring.

BREWER, J.: I concur in the judgment, but only upon the ground last mentioned in the opinion.

D. B. POWERS v. W. M. CLARKSON.

GROWING GRASS, Not Personal Property. Wild grass growing on wild, unoccupied, uncultivated land, is a part of the realty, and an attempted transfer of such grass by parol agreement is void, as a conveyance of the grass, under the statute of frauds; and where such grass was destroyed by the cattle of a third person, the owner of the land only, and not the person to whom such grass was attempted to be transferred, can maintain an action for the destruction of the grass. [*Hesley v. Baker*, 19-11; *Baldwin v. Squier*, 31-283; *R. R. v. Hotham*, 22-47.]

Error from Saline District Court.

TRESPASS, brought by *Clarkson*, to recover damages for injuries committed by *Powers'* cattle to growing grass on unoccupied land. The case was here on a former appeal, at the January Term 1873; (11 Kas. 101.) On being remanded to the district court, a second trial was had at the October Term 1878 of said court, C. A. H., judge *pro tem.*, presiding. Verdict and judgment for *Clarkson*, and defendant *Powers* brings the case here on error.

John G. Spivey, for plaintiff in error.

J. G. Mohler, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by *Clarkson* against *Powers* for injuries claimed to have been done by *Powers'* cattle grazing on certain lands claimed by *Clarkson*. The land consisted of 800 acres in Lincoln county, 160 of which belonged to *Clarkson*, 320 to his wife, and 320 to his sister, *Mrs. Bean*. *Clarkson* purchased said land for himself, wife, and sister, from one *Hoenick*, who sold it as agent of the *Kansas Pacific Railway Company*. Said land was at that time, and continued to be until the time of the injuries complained of, wild, unoccupied, uncultivated prairie and timbered land. *Clarkson* testified on the trial: "I took possession of the land when I purchased it, and retained possession. I rode over the land, and told *Hoenick* I would take it. This is what

I mean by possession." And the jury that tried the case found that Clarkson did not have the actual possession of the land. The land was purchased by Clarkson about the 24th of July 1871, and the injuries complained of were done from that time until sometime in August (probably about the 28th) of the same year. The injuries were done to the whole of the said 800 acres of land, and the verdict of the jury was for Clarkson for the gross amount of \$325 damages. There is no way now of ascertaining how much of said \$325 damages was for injuries done on the plaintiff's land, and how much of it was for injuries done on Mrs. Clarkson's land, or how much of the same was for injuries done on Mrs. Bean's land. The record is silent upon the subject. Now we shall assume that the plaintiff Clarkson could recover for the injuries done on his own land. And for the purposes of this case we shall also assume that he could recover for the injuries done on Mrs. Bean's land, for Clarkson testifies that he had a power of attorney and agreement (which we suppose was in writing) from Mrs. Bean, giving him the use of her land, although Clarkson did not introduce this power of attorney and agreement in evidence. But the question still remains, could Clarkson recover for the injuries done on Mrs. Clarkson's land? When this case was formerly here we decided that he could not recover for the injuries done on his wife's land; (*Powers v. Clarkson*, 11 Kas. 101, 108.) And we see no good reason for changing our opinion. But the facts of the case are slightly different from what they were when the case was formerly here. In the present case the plaintiff, Clarkson, testifies: "I had the right to the use of the land of Mrs. Clarkson, for taking charge of it, protecting the timber from fire, and paying taxes on it. I was acting as agent of my wife in purchasing of this land. The particulars of the contract between me and Mrs. Clarkson were, that I was to protect timber from being cut out and burned, and also pay what accruing expenses there were, for the use of the land." While in the other case Clarkson testified as to his right to use his wife's land merely as follows: "By what right I claimed the

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grass on my wife's land, I don't know that I can tell you better than you know how a man can manage his wife's property." It must be remembered that the injuries for which Clarkson brought this action were done within about a month after Clarkson purchased said land for his wife, and within about a month after he "told Hoenick that I [he] would take it," and that there is no evidence that Clarkson ever saw the land after he purchased it until after all the injuries complained of were committed. The only question then, as now presented in this case, is, whether Clarkson could by a parol agreement with his wife, obtain such an interest in her land, or in the grass growing thereon, that he could recover damages in his own name for injuries done to the land, or to the grass growing thereon. We suppose it will be admitted that wild grasses growing upon wild, uncultivated land are in all cases a part of the realty. And if so, it would seem that they could not be transferred from the owner to some other person except by an instrument in writing. (Gen. Stat. 505, §§ 5, 6.) And a person having no interest in a thing cannot recover for its destruction. If Clarkson had had the actual possession of the land, probably he could have recovered for the destruction of the grass. For a person in possession of land is in possession of everything growing thereon. And if he had brought an action in the nature of trespass *quare clausum fregit*, which is purely an action for injuries to the possession, he could have recovered for the entire injuries to his possession, which in this case would have included the value of the grass. But Clarkson had no possession of said land. He did not have the actual possession, as was found by the jury; and he did not have the constructive possession, for the constructive possession of unoccupied land always follows the title. Therefore, Clarkson had no interest in the grass of any kind or character whatever. Mrs. Clarkson owned the land, and therefore owned the grass, and constructively she had the possession of the land and of the grass, and therefore she alone can sue for any injury thereto or destruction thereof. Her supposed agreement transferring the grass to her husband, being merely by parol, was

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void for that purpose under the statute of frauds. It could at most operate only as a license to him to convert the grass to his own use, and to protect him from any action brought by her to recover from him for the grass, or for trespassing upon her land. But in law, until he should convert the grass to his own use, it would belong to his wife.

The judgment of the court below will be reversed, and cause remanded for a new trial.

All the Justices concurring.

THE CITY OF BURLINGTON V. REUBEN JAMES.

APPEAL FROM POLICE COURT; When Error to File New Complaint. Where a defendant is tried, convicted and sentenced before a police judge for the violation of a city ordinance, and the defendant then appeals to the district court, and there the original complaint is quashed, it is error for the district court then to permit a new and amended complaint to be filed in the district court and to allow the defendant to be tried, convicted and sentenced on this new complaint, against his objections.

Error from Coffey District Court.

A FULL statement of the facts and proceedings will be found in the opinion. *James*, the defendant, was convicted in the district court, at the May Term 1874, of an alleged violation of an ordinance of *The City of Burlington*; and from such conviction and judgment he appeals to this court.

Silas Fearl, and *Ruggles & Sterry*, for appellant.

Wm. L. McConnell, for The City of Burlington.

The opinion of the court was delivered by

VALENTINE, J.: The defendant, Reuben James, was charged before the police judge of the city of Burlington with violating a certain ordinance of said city prohibiting the keeping of billiard tables. He was tried, found guilty, and sentenced before said police judge, and then he appealed to the district court. In the district court he moved to quash the complaint, because, as he claimed, the same did "not set forth facts sufficient to constitute a public offense against the ordinance of the city of Burlington." The court sustained the motion, to which the plaintiff excepted. The plaintiff then asked "leave of the court to file an amended complaint," which leave was granted, and an amended complaint was accordingly filed, to all of which the defendant excepted. This amended complaint stated several facts not contained in the original complaint. The defendant was then tried, convicted, and sentenced upon this amended complaint, to all which he duly objected and excepted. The defendant then brought the case to this court on appeal. The plaintiff moved in this court to dismiss the appeal, but the motion was overruled. It has been the practice to bring this class of cases to this court on appeal, and the supreme court has sustained such practice. (*Neitzel v. City of Concordia*, 14 Kas. 446, 448, and cases there cited; *City of Olathe v. Adams*, 15 Kas. 391, 394; *City of Leavenworth v. Booth*, 15 Kas. 627; *City of Salina v. Seitz*, 16 Kas. 143.) There is therefore nothing for this court now to do but to determine whether the district court committed any substantial error in any of its proceedings or not.

The first question arising in the case is, whether the court below erred in permitting the defendant to be tried, convicted and sentenced on an amended complaint, after the original complaint had been quashed for insufficiency. We know of no authority in the statutes or elsewhere permitting such a proceeding. In criminal cases brought by appeal from a justice's court to the district court, new complaints may some-

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times be filed. (Gen. Stat. 883, § 22.) But that is done by the express terms of a statute which does not cover this case even by implication. Criminal informations filed by the county attorney in the district court may sometimes be amended. (Gen. Stat. 882, § 72.) But this also is done by the express terms of a statute which does not come anywhere near reaching this case. And generally, in criminal cases as well as in civil cases, where the court has original jurisdiction of the subject-matter of the proceedings, the old proceedings may be dismissed and new ones instituted in the same court. But that is not this case. The district court has no original jurisdiction of this class of cases. This case is of course a criminal prosecution, or *quasi* criminal prosecution, (see cases above cited,) and is therefore governed by all of those general provisions of law which are applicable to all criminal cases. But it is not governed by any special provisions of law which are applicable only to particular cases, unless this is one of those particular cases. This class of cases is prosecuted in the name of the city, and not in the name of the state, as other criminal prosecutions are. It is prosecuted for the violation of a city ordinance, and not for the violation of any of the general laws of the state, as other criminal prosecutions are. And no court except that of the police judge has any original jurisdiction of the prosecution, while in other criminal cases the prosecutions are commenced either in a justice's court or in the district court. This kind of prosecution can be instituted nowhere except before the police judge; and if it be taken from him to the district court on appeal, the district court can get nothing except what the police judge had before him. There is no provision of law, statutory or otherwise, for enlarging or diminishing the prosecution on appeal. And there is no provision of law for changing or modifying it in such a case in the slightest respect whatever. The proceedings must be prosecuted upon the complaint filed with the police judge, or not at all. If the city has made a mistake in its prosecution, the only remedy is to dismiss its action, and commence anew in its own court.

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The judgment of the court below will be reversed and the cause remanded for further proceedings.

All the Justices concurring.

KANSAS PACIFIC RAILWAY V. WM. MIHLMAN.

1. **TRESPASS UPON LAND; When Action Accrues; Completed Trespass.** Where A. enters upon the land of B. and digs a ditch thereon, there is a direct invasion of the rights of B., a completed trespass, and the cause of action for all injuries resulting therefrom commences to run at the time of the trespass. And the fact that A. does not reënter B.'s land, and fill up the ditch, does not make him a continuous wrongdoer and liable to repeated actions as long as the ditch remains unfilled.
2. ——— **Continuing Trespass.** A party may be responsible as a continuing wrongdoer, as for permitting a nuisance to remain upon his lands; but no one can be charged as such continuing wrongdoer who has not the right and is not under the duty of terminating that which causes the injury.
3. ——— **When Reëntry is a New Trespass.** A party who enters another's land and commits a trespass by digging a ditch does not thereby acquire a right to reënter and fill up the ditch. He would be liable as a trespasser if he did so reënter.
4. ——— **Completed Trespass; Damages.** Though from a completed wrong there afterward results new and unforeseen injury, there does not arise a new cause of action; and if a recovery has been had for the wrong prior to the occurrence of the new injury, no recovery can be had for such injury.
5. ——— **Duty of Injured Party.** After a wrong has been committed, it is the duty of the injured party to make reasonable efforts to prevent an increase or extension of the injury, and if he fails to do so, he cannot recover for such increased injury.
6. **PRACTICE, in Supreme Court.** As a general rule the supreme court will notice no question not distinctly raised in the trial courts and presented first to such courts for their decision. [*Bliss v. Burnes*, McC.-91; *Small v. Douthitt*, 1-335; *Brown v. App*, McC.-174; *Garvey v. Schollkopf*, McC.-179; *Brenner v. Weaver*, 1-488; *McBride v. Hartwell*, 2-416; *Grandstaff v. Scoffin*, 5-165; *Lalonde v. Collins*, 5-361; *Sleeper v. Bullen*, 6-309; *Crowther v. Elliott*, 7-235; *Lyons v. Bodenhamer*, 7-455; *Wilson v. Fuller*, 9-176; *Moore v. Wade*, 8-380; *Hawley v. Histed*, 10-266; *Lee v. Loveridge*, 11-487; *Furrow v. Chapin*, 13-107; *Nicklissson v. Holman*, ante, 22; *R. R. v. Wilder*, post, 239; *Waterson v. Devoe*, 18-224; *Atchison v. Byrnes*, 22-68; *Seip v. Tilghman*, 23-290; *Bashor v. Nerdye*, 25-224; *Edmondson v. Beals*, 27-656; *Decker v. House*, 30-614.]

Error from Riley District Court.

TRESPASS, brought by *Mihlman*, to recover for injuries to his lands and crops. His petition was filed 20th May 1874; and after the formal parts, and the allegation that the lands overflowed "for a long time prior thereto had been cultivated for and as a farm," said petition averred—

"That prior to the — day of ——— 1871, the defendant company made a culvert and ditch adjacent to and partly on plaintiff's aforesaid premises, which said culvert and ditch the defendant has since maintained, and by means of such culvert and ditch the defendant has diverted the waters which were accustomed to flow there from their natural channel and course onto the pasture and cultivated lands of the plaintiff, being the aforementioned premises, and by means of overflow caused by such diversion of the waters by means of the culvert and ditch aforesaid, the pasture of the plaintiff has been wholly destroyed, and the same has grown up to weeds, and and has become foul, noxious and unfit for use for two years last past; and by means of such overflow, caused as aforesaid by the defendant, of the aforesaid lands of plaintiff for the two years last past, and for each of said years, the plaintiff's growing crops on said lands have been destroyed, and the said lands by reason of such overflow for the two years last past, have been rendered unfit for cultivation; and the plaintiff has been deprived by reason thereof of the use, benefit and profit of said lands. And the plaintiff says that by reason of such overflow, caused as aforesaid, and the committing the wrongs and the trespasses as aforesaid described on the part of the defendant to and upon the plaintiff's said premises, the plaintiff has suffered damages in the sum of two thousand dollars. Wherefore," etc.

The answer alleged that in 1866 the defendant acquired title in fee from plaintiff of a strip of land 100 feet wide through the plaintiff's said farm as and for the right-of-way for its railroad, and that defendant's "said railroad was then skillfully, prudently and properly constructed on said strip of land, and has ever since been kept in the same order and condition as so constructed." The answer then denied the title of plaintiff to said strip of land, "or to any easement, servitude, or right of

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any description affecting the said land or its use thereof," and denied that "it is in possession of or has ever entered upon any other land in plaintiff's petition mentioned." Trial at the September Term 1874 of the district court. It was shown that the ditches cut on plaintiff's land were cut prior to 1868, and when defendant was constructing its railroad. Verdict and judgment for *Muhlman* for \$1,000 damages. The *Railway Company* brings the case here on error.

E. W. Dennis and *J. P. Usher*, for plaintiff in error.

McClure & Humphrey, and *Green & Hessin*, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: Muhlman was the owner of a tract of land in Riley county. In December 1866, he deeded the right-of-way through said land to the railway company, plaintiff in error, for its railroad. Prior to 1868 the road was constructed over this right-of-way. It is not claimed that the road was not built on the tract deeded, nor that it was unskillfully built. The road crossed at right angles a ravine which seems to have drained quite an extent of territory, and through which ran after a heavy rain a large volume of surface-water. It does not appear to have been technically a watercourse, or that anything but surface-water ran through it. At or near this ravine the company built two culverts. Leading to and from these culverts, it, according to Muhlman's testimony, dug two or three ditches, partly on the right-of-way and partly on Muhlman's land. In 1872 and 1873, from these ditches, or in consequence of the culverts being unable to carry off all the surface-water, the land of Muhlman was flooded, and his crops destroyed; and for this damage he brought this action. It does not appear that the company entered upon Muhlman's land, or did any work thereon, at any time within five years prior to the commencement of this action. In reference to this, counsel for defendant in error say:

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"The *gravamen* of the charge contained in the plaintiff's petition is, that the defendant company having by unlawfully digging ditches on the plaintiff's land created and continued to maintain a nuisance thereon, from which the plaintiff in the years 1872 and 1873 suffered the damages complained of."

And again:

"We do not charge that the company did not build its railroad on its own land, nor that it unskillfully built its road; and since we make no charge of that kind, nor make any claim predicated upon such a state of facts, it is irrelevant to state in the answer, conversely, that the road was built skillfully and on the company's own land. If the company had confined its operations to its own land, no harm would have resulted, and it would not now be called upon to respond in damages for the continuance of a nuisance to the land of Muhlman."

And still again:

"The question is, rather, had the company the right to enter and occupy the lands of Muhlman for the purpose of digging and maintaining ditches to drain the waters from their railroad at that point, without Muhlman's consent? And is it not answerable for the damages occasioned by such acts?"

It is evident from these quotations that the operations on Muhlman's land, and not those on the right-of-way, are considered the basis of the cause of action. The first matter to

^{1. Trespass; statute of limitations.} which our attention is called, and which we shall notice, is, that of the statute of limitations. Actions of trespass upon real property are barred in two years. (Gen. Stat. 633, § 18, clause 3.) If the cause of action dates from the time the defendant entered upon the plaintiff's land and dug the ditches, and was simply for the trespass, it was barred; if from the time the injury to Muhlman's crops occurred, it would probably not be. So far as the company had acted, its action was finished when it had dug the ditches. (We are now considering the question with reference solely to what it did off its own land, and upon that of Muhlman.) It had invaded Muhlman's rights; it had committed a trespass on his lands. It was then responsible in an action for the injury it had done by that trespass. Such action might have been brought im-

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mediately, and in such action could have been recovered all damages done to Muhlman by the trespass, and which might have included the cost of restoring the ground to the condition it was before the digging of the ditches. What new act has the company since done? What wrong has it done to Muhlman's property? Nothing. Its hands have been still. It has made no new invasion of his rights. Suppose an action had been brought, and damages recovered, for the trespass immediately after it occurred: what new act of the company could now be alleged as the basis of recovery?

When right of
action accrues.
Completed
trespass.

True, the trespass has now resulted in greater loss than was then foreseen or estimated in assessment of damages; but an increase in the damages resulting, adds no new cause of action. A. commits an assault and battery on B. Action is brought, and damages recovered. That ends the matter. And though B.'s sufferings are prolonged, and his injuries prove to be permanent, and of a far more serious character than was thought at the time of the recovery of damages, there can be no new action, and no further recovery. *Fetter v. Beale*, 1 Salk. 11. "We think this action is for an injury to a right; and consequently there was a complete cause of action when the wrong was done, and not a new cause of action when damage was sustained by reason of the original wrong."—Baron Parke, in *Nicklin v. Williams*, 10 Ex. 259. See also, *Northrup v. Hill*, 57 N. Y. 351. So, for the trespass, the cause of action is complete at the time, and an increase in the resulting damages gives no new cause of action. There are cases, it is true, in which the cause of action is based upon the actual occurrence of damage, and dates therefrom, and not upon or from the prior act which resulted in the damage; but these are all cases in which the prior act is itself lawful, and furnishes no cause of action, or where it is considered as a continuing act; as, where one excavates on his own land, and thereby withdraws the lateral support to his neighbor's soil and buildings, the act is itself lawful, and only becomes the basis of a cause of action for damages when it actually results in injury; and the cause of action dates, not from the time of the excavation, but from

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the time of the subsidence. *Bonomi v. Backhouse*, 96 En. Com. L. 653. Here no trespass is committed. The party is simply using his own property, and using it lawfully; and it is only when he conflicts with the rule *sic utere tuo, ut alienum non ledas*, that his neighbor has any cause of complaint. If after the excavation he builds on his own ground a wall which continues the support of his neighbor's soil and buildings, that neighbor has no action. The excavation therefore is not the foundation of the action, but the damage consequential upon the excavation; and no cause of action exists until the damage occurs. In reference to this class of cases, Baron Parke says, in *Nicklin v. Williams*, *supra*, "But on examining those cases they do not appear to be for injuries to rights, which this is, but solely for consequential damages where the original act itself was no wrong, and only became so by reason of those damages, and therefore they do not apply." It is true, that in this case the court of Exchequer considered the excavation on one's own land, whereby the lateral support of the neighbor's soil and buildings was taken away, a direct invasion of that neighbor's rights, and therefore itself the basis of the cause of action, as did also the Queen's Bench in the case just cited of *Bonomi v. Backhouse*, and in this respect both courts were overruled by the Exchequer Chamber. But the principle enunciated was the same all the way through, and the only difference was in the application. In delivering the opinion of the Ex. Chamber, Mr. Justice Willes says: "There is no doubt that for an injury to a right, an action lies; but the question is, what is the plaintiff's right? Is it that his land should remain in its natural state, unaffected by any act done in the neighboring land, or is it that nothing should be done in the neighboring land from which a jury would find that damage might possibly accrue?" See also the case of *Roberts v. Reed*, 16 East, 215, in which it appeared that the surveyors of a highway, by excavations in it, took away the support of the plaintiff's wall, and it was held that no action lay until damage resulted to the wall. In *Whitehouse v. Fellowes*, 100 Eng. C. L.

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(or 10 Common Bench) n. s. 765, the trustees of a turnpike had converted an open ditch at the side of their road into a covered drain. In heavy storms this drain was inadequate to the carrying off of the water, and in consequence the plaintiff's lands were overflowed; and it was held that the cause of action dated from the damage. There was here no trespass, no invasion upon the plaintiff's lands, or his rights, until the actual overflow and injury. Other cases might be cited, but enough have been to show the principle which underlies them, namely, that where the original act itself is no invasion of the plaintiff's rights, then there is no cause of action until such act has caused damage, and the right of action dates from that time. On the other hand, as we have already stated, where the original act is unlawful, and an invasion of the plaintiff's rights, the cause of action dates from that act, and a new cause does not arise from new damage resulting therefrom. The case of *Lord Oakley v. The Kensington Canal Co.*, 5 Barn. & Ad. 188, is strongly in point. The canal company entered upon plaintiff's land and dug it away for the purpose of sloping the banks of their canal, in consequence of which the land was overflowed at every high tide. It was held, that the injury was complete when the trespass was committed, and that no new cause of action arose with every overflow. So, in the case of *Clegg v. Dearden*, 64 Eng. C. L. (or 12 Ad. & Ellis) n.s. 575, the defendant made an excavation into the mine of plaintiff, through which water flowed into the mine. It was held that the cause of action was complete at the time the excavation was made. Lord Denman in giving the opinion of the court says: "The gist of the action, as stated in the declaration, is the keeping open and unfilled up an aperture and excavation made by the defendant into the plaintiff's mine. By the custom, the defendant was entitled to excavate up to the boundary of his mine, without having any barrier, and the cause of action therefore is, the not filling up the excavation made by him on the plaintiff's side of the boundary and within their mine. It is not, as in the case of *Holmes v. Wilson*, 10 A. & E. 508, a continuing of something wrongfully placed by the defendant

2. Continuing trespass.

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upon the premises of the plaintiff; nor is it a continuing of something placed upon the land of a third person to the nuisance of the plaintiff, as in the case of *Thompson v. Gibson*, 7 M. & W. 456. There is a legal obligation to discontinue a trespass, or remove a nuisance; but no such obligation upon a trespasser to replace what he has pulled down or destroyed upon the land of another, though he is liable in an action of trespass to compensate in damages for the loss sustained. The defendant having made an excavation and aperture in the plaintiff's land was liable to an action of trespass; but no cause of action arises from his omitting to reënter the plaintiff's land and fill up the excavation. Such an omission is neither a continuation of a trespass, nor of a nuisance; nor is it a breach of any legal duty." Language could not be more apt than this for the case at bar. Counsel here would make the gist of the action the continuance of the ditch, as there the continuance of the excavation; but the fact is, the wrong was done when the ditch was dug, and an omission to reënter and fill up the ditch was a breach of no legal duty. There are cases in which the original act is considered as a continuing act, and daily giving rise to a new cause of action. Where one creates a nuisance, and permits it to remain, so long as it remains it is treated as a continuing wrong, and giving rise, over and over again, to causes of action. But the principle upon which one is charged as a continuing wrongdoer is, that he has a legal right, and is under a legal duty, to terminate the cause of the injury. As to anything upon his own land, a party has a right to control and remove it, and if it is so much of an injury to his neighbor's rights as to amount to a nuisance, is under a legal obligation to do so; but as to that upon his neighbor's land, he has no such right, and is under no such duty. Hence the distinction between nuisance and trespass. As is said by Angell, (*Watercourses*, p. 556,) "The distinction between nuisance and trespass is, that nuisance is only a consequence or result of what is not directly or immediately injurious, but its effect is injurious, while trespass is a direct and

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immediate invasion of property." So an eminent English text-writer defines a private nuisance as "Anything done to the hurt or annoyance of the lands, tenements and hereditaments of another, and not amounting to a trespass." 8 Stephen's Comm. p. 89. And Hilliard, (1 Torts, 550,) "One of the characteristics of nuisance, as distinguished from trespass or conversion is, that it consists in a use of one's own property, which involves injury to the property or other rights or interests of his neighbor." So, if a party who has created a nuisance upon his own land, parts with that land he ceases to be responsible for the nuisance, except perhaps in cases where he continues to receive some benefit therefrom. *Hanse v. Cowing*, 1 Lans. 288. It is true, the books speak of such a thing as a continuing trespass. In 1 Add. on Torts, 382, it is said, that "If a man throws a heap of stones, or builds a wall, or plants posts or rails on his neighbor's land, and there leaves them, an action will lie against him for the trespass, and the right to sue will continue from day to day until the incumbrance is removed." And in the case of *Holmes v. Wilson*, 37 Eng. C. L. 273, (or 10 A. & E. 503,) it appeared that the trustees of a turnpike to support it built buttresses on the plaintiff's land. He brought an action, and recovered for the trespass. He then notified them to remove the buttresses. Failing to do so, he sued again, and it was held that the action would lie. It seems to us very doubtful whether this ruling can be sustained upon principle. As suggested by the reporter, suppose plaintiff had recovered as a part of his damages in the first action, as he properly might, the expense of removing these buttresses, and this fact had appeared in the second suit: could the action have been maintained? And what difference, we ask, does it make, whether he did actually recover for such expense? It was a proper matter of damages; it was a part of the amount necessary to place the land as it was before the trespass; he was entitled to recover it, if he proved it; and if he failed to prove it, or if after proving it the court refused to allow it, neither the failure nor the error laid the foundation for a second action.

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¹ Re-entry, a new trespass.

And what right does the first trespass give the trespasser to reënter and commit a second trespass? True, in this case, the plaintiff had requested the trustees to remove the buttresses, and that might be considered a license to enter, and a waiver of the trespass. But where there is no such request, as in the case before us, how is it? If the railway company had entered to fill up the ditches, could not Muhlman have maintained his action for that as a trespass? Was he not at liberty to appropriate the benefit of the company's work in digging the ditches, and prevent any person from interfering therewith, and recover damages from any one that did interfere? It seems so to us, unquestionably. And it seems that the rule would be the same in case of such a trespass as suggested in Addison, of the building of a wall, or the heaping up of a pile of stones. Hence we doubt the doctrine as stated by him, and as decided in *Holmes v. Wilson*. At any rate, we do not think it can be extended beyond the character of trespasses there named, that is, those in which something is carried to and placed upon the land. Take this illustration: A. trespasses upon B.'s land, and digs a well. And that is a trespass very like that of digging a ditch. A. never enters upon the land again. The well is never filled up, but is permitted to remain. Twenty years thereafter, in a wet season, the water from the well soaks through the soil into a cellar, floods it, and causes damage. Is A. responsible for the damage? or does the statute bar an action? Was the digging of the well a single act, and a completed wrong? or does its existence make A. a continuous trespasser, and liable for every recurring damage? But without pursuing the discussion further, we hold that in digging the ditches on Muhlman's land the company was a trespasser; that the cause of action for that wrong was then complete, and then commenced to run; that the failure to enter and fill up the ditches, did not render the company guilty of continuing a nuisance, nor make it in any legal sense a continuous wrongdoer, and that therefore, as to any injury resulting therefrom, as shown in the record, the statute of limitations was a bar.

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Another question presented is, as to the measure of damages. Here the company dug some ditches four or five years before the injuries now complained of. The ditches were all dug in one day, were of no great length, and could have been filled without much expense. Instead of immediately complaining of the trespass, filling up the ditches, and recovering his damages therefor, Muhlman permits them to remain for years, and then recovers \$1,000 for damages just done to his crops. And if the theory of the learned counsel for defendant in error were correct, he could go on suing, year by year, for every injury his crops received in consequence of these ditches, whereas the expenditure of a few dollars in filling the ditches would have averted all loss. Will the law tolerate this? We think not.

s. Duty of injured party. The proposition is sound, that while a wrongdoer should compensate for all the injury naturally and fairly resulting from his wrong, yet the party upon whom the wrong is done should take reasonable care of his property, and make reasonable effort to prevent any extension of the injury. If a party can with reasonable effort prevent an injury from spreading, he ought to do it. It is no more than simple justice to the party who has caused the injury, especially if that party has acted without malice, and without a thought of causing injury. In *Loker v. Damon*, 17 Pick. 284, defendant had wrongfully pulled down a fence in November, which plaintiff did not repair till the following May; cattle got in and ate the grass, for the loss of which he claimed. The court below ruled that plaintiff could only recover enough to remunerate him for replacing the fences. The learned Chief Justice SHAW said: "The direction respecting damages was right. In assessing damages, the direct and immediate consequences of the injurious act are to be regarded, and not remote, speculative and contingent consequences, which the party injured might easily have avoided by his own act. Suppose a man should enter his neighbor's field unlawfully, and leave the gate open; if, before the owner knows it, cattle enter and destroy the crop, the trespasser is responsible. But if the owner sees the gate open, and passes it frequently, and willfully and obstinately, or

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through gross negligence, leaves it open all summer, and cattle get in, it is his own folly. So, if one throw a stone and break a window, the cost of repairing the window is the ordinary measure of damage. But if the owner suffers the window to remain without repairing a great length of time after notice of the fact, and his furniture or pictures, or other valuable articles, sustain damage, or the rain beats in and rots the window, this damage would be too remote. We think the jury were rightly instructed, that as the trespass consisted in removing a few rods of fence, the proper measure of damage was the cost of repairing it, and not the loss of a subsequent year's crop, arising from the want of such fence." In *Chase v. N. Y. Central Rld. Co.*, 24 Barb. 273, in an action brought to recover damages for injuries done to plaintiff's house and grounds by water, alleged to have been turned onto the plaintiff's land by defendant in constructing a railroad, it was held that the owner of the house under such circumstances is bound to use reasonable care, skill and diligence, adapted to the occasion, to save his house from being injured by the water, notwithstanding it came upon his premises by the fault or negligence of the defendant, or suffer the loss himself. In *Lawson v. Price*, 2 Law & Eq. Rep. 426, the court of appeals of Maryland say, that, "After a wrong has been committed, it is the duty of the injured party to make reasonable efforts to prevent its increase." Now in this case, the jury not only heard the testimony, but made a personal examination of the premises, and the question ought to have been submitted to them whether Muhlman could not, with reasonable effort, and small expense, have filled up the ditches, repaired the wrong done by the company, and prevented any destruction of his crops, or depreciation of the value of his real estate; and they should have been instructed that if this were so, the measure of damages would not be the value of the crops destroyed, but the costs of filling the ditches, and placing the land in the condition it was before the trespass, together with the value of the direct injury done by the trespass.

The questions we have discussed are in the case. It is fair

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to state however, that they were not both presented to the attention of the court below; and as a general rule, ^{a. Practice in supreme court.} where the question is not presented in that court, it will not be noticed in this court. We notice a growing disposition on the part of some counsel to regard the trial courts as simply instrumentalities for the collection of evidence, and upon the evidence so collected to raise questions of law for the first time in this court. Such a practice is unjust to both the trial court, and this court. Every question that is in a case should be presented to that court, and its ruling had directly thereon. The reasons for this have been often given, and we need not repeat them here. We desire simply to call attention to the matter. One at least of the questions we have considered was called to the attention of the district court; and as, for its error in respect to that, the judgment had to be reversed, we deemed it right to notice the other.

The judgment will be reversed, and the case remanded with instructions to grant a new trial.

All the Justices concurring.

Adams v. Ruggles.

J. MCGREGOR ADAMS V. R. M. RUGGLES, *as Assignee, &c.*

PARTNERSHIP NOTE; Presumption. Where a promissory note is executed by a member of a partnership firm, in the name of the firm, and with the firm signature, and there is nothing to show that the note was not executed by the firm, except a want of knowledge on the part of a book-keeper of the firm of the due execution of the note and of the consideration therefor, and nothing to show under what circumstances or upon what consideration the holder of the note received it, it will be presumed that the note was duly executed by the firm. [*Fuller v. Scott*, 8-25; *Theilen v. Hann*, 27-778; *Lindh v. Crowley*, 29-756; *Deits v. Regnier*, 27-94.]

Error from Marion District Court.

THIS action arose on a claim presented by *Adams* to defendant in error, for allowance by him as the assignee of the estate of *Davenport Bros.*, an insolvent partnership. The claim was in the form of a promissory note for the sum of \$500, and was disallowed by the assignee, and claimant appealed to the district court of Marion county. Trial at the November Term 1874. Judgment was given to the defendant. *Adams* brings the case to this court by proceedings in error.

Frank Doster, for plaintiff.

R. M. Ruggles, defendant, for himself.

The opinion of the court was delivered by

VALENTINE, J.: This was an action on a promissory note. It seems that in 1871 the Davenport Brothers commenced business in Peabody, Kansas. Whether they ever did business anywhere else, is not shown. In May 1873, W. H. Prescott was employed by them as a bookkeeper, and he continued in their employ until February 28th 1873. On August 27th 1872, F. C. Davenport, a member of the firm of "Davenport Brothers," executed and indorsed the following promissory note, to-wit:

"\$500.00.

CHICAGO, AUGUST 27, 1872.

"On or before ninety days after date, we promise to pay to the order of Mr. F. C. Davenport, five hundred dollars, value received, with interest at ten per cent.

"DAVENPORT BROTHERS."

Which note was indorsed on the back, "F. C. DAVENPORT."

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Said W. H. Prescott was a witness on the trial of the case, and stated among other things that he was "acquainted with the signature of Davenport Brothers, and with that of F. C. Davenport;" and that "the signature of the maker is that of Davenport Brothers, written by F. C. Davenport, and that of the indorser that of F. C. Davenport," and that "F. C. Davenport was a member of the firm of Davenport Brothers at the time of making and indorsing of the same." But it also appears from Prescott's evidence, that he knows nothing about the execution of the note, or the consideration therefor, and the books kept by him at Peabody do not show anything concerning the note, or the consideration therefor. Prescott does not know of any indebtedness from the Davenport Brothers to the plaintiff, or of any dealings having taken place between them prior to the execution of said note, and said books do not show any such indebtedness, or such dealings; and he does not know of the firm being indebted to any person in Chicago; and he thinks he ought to know all about these matters, if in fact they took place. How long the Davenport Brothers continued to do business in Peabody, or when they made their assignment to defendant Ruggles, is not shown. Now, does all this *want of knowledge* on the part of Prescott prove that said note was not executed by the Davenport Brothers, or was not authorized by them, or was not executed in and about their business? It must prove all of these things in order to release the defendant. Presumptively, as it was executed in the name of the firm, by one of the firm, and the firm signature attached thereto, it is the note of the firm; and Prescott's want of knowledge we think is hardly sufficient to overcome that presumption. The note may have been given for an old debt, or to raise money to pay an old debt, or for a new debt contracted in purchasing goods for the firm to take to Peabody, or somewhere else, or to raise money to pay such new debt; and as this was all done at Chicago, and Prescott was at Peabody, he may have been entirely ignorant of the whole transaction. He could know but little concerning the transactions of the firm at other places than Peabody, except

as the members of the firm told him. And as they possibly in advance contemplated making the assignment which they afterward did make, they may have chosen not to tell Prescott anything about their business, or to let their books show the same. There was no evidence tending to show when, or where, or from whom, or by whom, the Davenport Brothers purchased their goods. And from anything appearing in the record, this note may have been given on a *bona fide* purchase of goods by and for the firm, and we presume it was.

The judgment of the court below will be reversed, and cause remanded for a new trial.

All the Justices concurring.

ST. LOUIS, LAWRENCE & DENVER RAILROAD Co. v. A. M. WILDER.

1. PRACTICE IN SUPREME COURT; *Questions, to be Considered, should be First Raised in Trial Court.* In a condemnation proceeding by a railroad company to procure a right-of-way, the owner of the land took an appeal from the assessment of the commissioners to the district court by executing within proper time, and with one good surety, an undertaking which undertaking was approved by the county clerk within proper time, but was not marked filed within proper time. The case was afterward tried in the district court, the railroad company appearing and contesting the appeal on certain grounds, and contesting the damages, but not raising the question that the appeal bond had not been filed in proper time; and no such question is raised in the supreme court by the petition in error, but is raised for the first time by the brief of counsel in the supreme court. *Held*, That the supreme court will not consider the question. [See cases cited, *ante*, 224.]
2. UNDERTAKING ON APPEAL; *Sureties; Error without Prejudice.* Where a motion is made by the appellee in the district court to dismiss an appeal because the surety did not justify, but no question is raised as to the sufficiency of the surety, and the district court overruled the motion, and afterward on a proper trial renders judgment against the appellee for over \$2,000 and costs, *held*, that no error was committed in overruling the motion; that a failure of the officer in such a case to require the surety to justify does not of itself and alone invalidate the undertaking, or the appeal. [*Haas v. Lees*, 18-449; *Bond v. White*, 24-47.]

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3. **APPEAL; When Complete; Neglect of Officer.** Where an appeal is taken to the district court, a failure on the part of the officer to deliver or transmit to the clerk of the district court a certified copy of the proceedings within twenty days after the final determination of such proceedings, does not invalidate the appeal. It is the fault of the officer, and not the fault of the appellant. The appeal should not be dismissed if such copy be afterward transmitted to the clerk. [*Tarleton v. Briley*, 3-433; *Coleman v. Newby*, 7-82; *Copeland v. Majors*, 9-104; *German v. Kluchie*, 9-106; *Bernstein v. Smith*, 10-68; *Donnel v. Clark*, 12-154; *Albinson v. Roberts*, 13-162; *Bd. of Ed. v. Campbell*, post, 537; *Stanley v. Bank*, post, 592; *Stuttle v. Bowers*, 31-432; *Haas v. Lees*, 18-449; *Dowell v. Caruthers*, 26-720.]
4. ——— And if the officer, in such a case, fail entirely to transmit a copy of some unimportant paper, such failure will not invalidate the appeal.
5. **PLEADINGS IN APPEAL CASES; Irrelevant Matter.** Where new pleadings are filed on an appeal in the district court, and some irrelevant matters are inserted in such pleadings, such irrelevant matters will not be construed by the supreme court to vitiate the appeal, where it can be seen from the record that the whole proceedings in the district court were intended to be prosecuted under the appeal. [*Wooster v. McKinley*, 1-317; *Teberg v. Swenson*, 32-224; *R. R. v. Piper*, 26-58; *Reed v. Cooper*, 30-574.]
6. **LAND-OWNER; Who Entitled to Damages for Land Taken for Railroad Purposes.** Where a railroad by condemnation proceedings procures a strip of land for railroad purposes, and the person who is in possession of the land and who claims to be the owner thereof has no deed therefor, but only a title bond from the person who holds the legal title to the land, and the person in possession owes the person who holds the legal title \$2,000 for the land, and is not to receive a deed for the land until said \$2,000 is paid, and is then to receive the deed, said person in possession must be regarded as the real owner of the land, and is entitled to the full damages to the same caused by the railroad company. [*Kuhn v. Freeman*, 15-423, 426; *Rosa v. R. R.*, 18-124; *R. R. v. Allen*, 24-34.]
7. **CONDEMNATION PROCEEDINGS; Nature of Judgment for Damages.** On an appeal in the district court, in condemnation proceedings, it is error for the court to render an ordinary personal judgment against the railroad company for the damages assessed to be collected by execution. The judgment for damages in such a case should be in the nature of an award of damages, such as is made by the condemnation commissioners. [*R. R. v. Callender*, 13-396; *Blackshire v. R. R.*, 13-515; *R. R. v. Moore*, 24-328; *R. R. v. Merrill*, 25-424.]

Error from Douglas District Court.

THE proceedings in the district court were had upon an appeal taken by the *Railroad Company* from an award for damages made to *Wilder* by commissioners appointed in April 1872 to

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lay off a route for said company's railroad, etc., and to ascertain the proper description and quantity of land necessary for such purpose out of each tract or parcel of land, etc., and to appraise the value of any such tract, and to assess the damages thereto, etc. *Wilder* was dissatisfied with the appraisement and assessment made by said commissioners, and appealed to the district court, where a trial was had at the June Term 1874. Judgment in favor of *Wilder* for \$2,234.75, and costs, and the *Railroad Company* brings the case here for review. All necessary facts and proceedings are stated in the opinion.

J. P. Usher, and *C. E. Bretherton*, for plaintiff in error.

Geo. J. Barker, and *Thacher & Stephens*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was a proceeding for the condemnation of a certain strip of land for railroad purposes. It seems that formerly A. G. DaLee owned the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 1, township 13, range 19, in Douglas county. The tract contained forty acres. DaLee sold said land to A. M. Wilder for \$2,400, receiving \$400 down, and was to receive \$2,000 more on long time. No deed has yet been executed for the land, but DaLee gave to Wilder a title bond for a deed. Said \$2,000 has not yet been paid, nor any part thereof, nor is it yet due. The land is fenced, but has no residence upon it, and it is not used for any purpose. After the sale from DaLee to Wilder, the St. Louis, Lawrence & Denver Railroad Company procured by condemnation proceedings a strip of said land for railroad purposes. Said strip contains three-fourths of an acre of said land, and so divides the forty acres as to leave 3.56 acres on one side, and 35.69 acres on the other side. The commissioners who assessed the damages in the condemnation proceedings assessed the total damages to the owner or owners of this forty-acre tract of land at \$246.25. Wilder then appealed, or attempted to appeal, to the district court. We shall say more concerning this appeal hereafter. The case was tried in

the district court by the court, (a jury having been waived,) and the court gave to Wilder \$2,500 as damages. The court then deducted the \$246.25 allowed by the commissioners and then rendered a formal judgment in favor of Wilder and against the railroad company for \$2,234.75, and that execution might issue therefor. (It will be noticed that \$19 of the said \$2,500 is not accounted for in this judgment.) The railroad company then brought the case to this court by petition in error. The railroad company as plaintiff in error now says in its brief:

"The errors relied on as grounds of reversal are these: 1st, Overruling the motion to dismiss the appeal. 2d, Overruling the demurrer to plaintiff's evidence. 3d, Rendition of the judgment. The first two having been also submitted, and disregarded, on motion for a new trial. Our points are—1st, That the appeal was not taken in time. 2d, That it was defective for want of a copy of the plat showing the land taken. 3d, That it was also defective for want of justification of the surety to the appeal bond. 4th, That the petition and answer formed a new action of trespass, and were not proceedings under the appeal. 5th, That in any case the damages were excessive, both because founded on a speculative basis of value, and also because they gave Wilder the value of the unincumbered fee of the land, which it is admitted he did not possess. 6th, That the judgment is erroneous, being inapplicable to an appeal, and giving no appellate redress of any sort."

I. In answer to the first point, Wilder, the defendant in error, says in his brief: "The first point made by plaintiff in error is, that the appeal was not taken in time. This objection is now heard here for the first time. In the court below the party moved to dismiss the appeal, but did not mention this ground. He did not raise the objection during the trial; did not mention it in his motion for a new trial; and has not alleged it in his petition in error, but keeps it back, and first starts it in his brief." In reply to this, plaintiff in error says: "This objection, so far from being made for the first time, is properly preserved on the motion to dismiss." There seem to be four questions concerning the appeal which the plaintiff in error now desires to raise: First, That the appeal bond was not filed with the county clerk in time; second, that the sureties on the

appeal bond did not justify; third, "that the certified copy of the proceedings of the commissioners was not delivered or transmitted to the clerk of the district court within twenty days from the rendition of the report;" and fourth, that a certified transcript of the plat, showing the land taken by the railroad company, was not filed in the office of the clerk of the district court at all. Now, the second, the third, and the fourth of these questions were raised in the court below, but the first was not. Nor has the first been raised in this court in any manner except by the brief of counsel. It would therefore hardly be proper for us to consider it. The appeal was probably taken in time. But for some unexplained reason the county clerk did not mark the appeal bond filed in time. This is the only objection that can be made as to the time of taking the appeal. It seems that the county clerk had the bond in time, and approved the surety thereon in time; but why he did not mark the bond filed in time, is not shown. Probably if the plaintiff in error had raised this question in the court below, the whole thing would have been explained. But instead of raising this question in the court below, the railroad company raised other questions with reference to the appeal, and when those other questions were decided against it, it then proceeded with the trial of the cause as though the appeal had been taken in proper time, and as though the appeal was sufficient in every other respect. If the appeal bond was actually filed in proper time, the mistake of the clerk in marking it filed at a subsequent period would not vitiate the appeal. And as the clerk had the bond and approved the surety thereon in proper time, it was probably a mistake of the clerk in marking it filed at a subsequent period. When the appeal bond was filed, then the appeal was complete. (Laws of 1870, page 184, §7.) It was not necessary that anything should be first filed in the district court.

II. It is claimed that the surety on the appeal bond did not justify. (This is designated as the third point in the brief of plaintiff in error.) It is possibly true that the sureties did not

justify in this case, and yet we hardly think that this alone is sufficient ground for a dismissal of the appeal. There is no pretense that the surety was not amply sufficient; no objection was made on this ground; and from the subsequent proceedings it would seem that there was not the slightest danger of the plaintiff in error losing anything on account of any insufficiency in the surety. The plaintiff in error refers us to § 723 of the code of civil procedure, (Gen. Stat. 771,) and to the case of *Kelsey v. Campbell*, 38 Barbour, 238. Now if said § 723 is applicable at all in cases of this kind, we would still think that it is merely directory to the officer taking the security, and that a failure on the part of the officer to require the surety to justify would not invalidate the undertaking. Said case of *Kelsey v. Campbell* has no application to this case; for the New York code differs essentially from ours in this particular. Section 341 of the New York code provides that "An undertaking upon an appeal shall be of no effect unless it be accompanied by the affidavit of the sureties that they are each worth double the amount specified therein;" and if objection then be made to the sufficiency of the sureties, then, "unless they or other sureties justify," etc., "the appeal shall be regarded as if no undertaking had been given."

III. It is also claimed, "that the certified copy of the proceedings of the commissioners was not delivered or transmitted to the clerk of the district court within twenty days from the rendition of the report." Now if this is true it was the fault of the county clerk, and not the fault of the defendant in error. The appeal was perfected when the undertaking was given; (Laws of 1870, p. 184, § 7.) And it was then the duty of the county clerk, and not the duty of the defendant in error, to transmit a copy of the proceeding to the clerk of the district court; (Laws of 1870, p. 184, § 7, and pp. 155, 156, §§ 1 and 2;) and such laches on the part of the county clerk is no ground for a dismissal of the appeal.

IV. It is also claimed that no copy of the plat showing the land taken was ever filed in the district court. (This is the

second point made in the brief of plaintiff in error.) Now if this is true, it was the fault of the county clerk and not the fault of the defendant in error. The appeal was good without said plat. But if either party had desired to use it as evidence, such party could have procured an order of the district court on the county clerk to send it up to the district court, provided there was any such plat forming a part of the commissioners' proceedings. Neither party seems to have desired to use it as evidence, for they had ample evidence of the exact location of the railroad without it.

V. In thus disposing of the objections to the appeal, we have disposed of the first, second and third points made in the brief of plaintiff in error. The fourth point made in the brief, is, "that the petition and answer formed a new action of trespass, and were not proceedings under the appeal." It is true that there is much irrelevant matter contained in both the petition and the answer; but still we do not perceive from them that either party intended to wholly abandon the appeal, and to litigate an entirely new action of trespass. Neither do the subsequent proceedings show any such thing. On the contrary, we think the action was prosecuted throughout and decided as a condemnation proceeding, and as an appeal from the appraisement commissioners, except said irrelevant matter contained in the pleadings, and an irregularity in the judgment which will be hereafter mentioned.

VI. The fifth point in plaintiff's brief is, "that in any case the damages were excessive, both because founded on a speculative basis of value, and also because they gave Wilder the value of the unincumbered fee of the land, which it is admitted he did not possess." *First*: Did the court below give to Wilder speculative damages, such as are not authorized by law? Possibly the court did; but we do not think that the record of the case sufficiently shows it. The overruling of the demurrer of the railroad company to the evidence introduced by Wilder, does not show it; for that demurrer ought to have been overruled, even if the court below intended to give Wilder only bare compensation for the three-quarters of an

acre of land actually taken by the railroad company. The introduction of the evidence does not show it, for the court made no ruling with respect to the introduction of any of the evidence. All of the evidence was introduced without objection or exception. Neither do the findings or judgment of the court below show it. The findings were general. No special findings were asked for; and no exception was taken to those found, or to the judgment rendered thereon. Three days after the judgment was rendered, however, the railroad company made a motion for a new trial, which motion was overruled, and to this ruling the railroad company excepted. But this ruling does not show upon what basis the court below made its findings as to damages. The damages properly allowable were for the actual value of the land taken by the railroad company, and for the consequential diminution in value of the rest of the land. And there is nothing in the record of the case that clearly and affirmatively shows that any other damages were in fact allowed. The damages proved by the various witnesses ranged all the way from the amount fixed by the commissioners up to more than the amount allowed by the court. Some of this evidence may have been speculative; but still there is enough not shown to have been speculative or incompetent to sustain the findings of the court below. *Second:* We think Wilder is entitled to the same damages as though he owned the unincumbered fee of the land. (*Kuhn v. Freeman*, 15 Kas. 423, 426, et seq.) DaLee is not entitled to any portion of such damages. DaLee is entitled to the \$2,000 which Wilder owes him, and to nothing more, except that he holds the legal title to the land (and possibly a lien on the damages awarded if he chooses to assert such lien,) as a security for his claim on Wilder. Whether Wilder is entitled to an ordinary personal judgment for the amount of the damages, will be considered hereafter.

VII. As to the sixth point in the brief: The judgment in this case we think is erroneous so far as it attempts to authorize the recovery of \$2,234.75 damages, by execution. The object of appellate proceedings in this class of cases is simply

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to correct the assessment of the commissioners. The judgment does not pass the title to the land, nor to the right-of-way. It simply determines the amount which the railway company shall pay to the owner or owners of the land, or to the county treasurer for their use, in order to secure the right-of-way. It is in the nature of an award of damages, such as is made by condemnation commissioners, except perhaps that as to costs it may be in the form of an ordinary personal judgment. Counsel for plaintiff in error seem to admit that an ordinary judgment for costs would be proper, and therefore we have made the above exception. They say: "The judgment in this cause should have been personal against the corporation for costs only." After the judgment is rendered in a case of this kind, then the railroad company may take the land, or not, at its option. (*Blackshire v. The A. T. & S. F. Rld. Co.*, 13 Kas. 515.) But until it pays for the land it gets no title. And if it does not pay for the land within the time prescribed by law, it may be ejected from the premises, provided of course that it has taken possession thereof. (*St. Jo. & D. C. Rld. Co. v. Callender*, 13 Kas. 496.) An owner of land would not want to take a judgment against an irresponsible and insolvent railroad company as payment for his land; nor would a railroad company want to pay an enormously excessive award of damages for its right-of-way. Therefore it is right that each should have some choice in the matter. Upon this question, see authorities above cited, and *Gear v. Sioux City Rld. Co.*, 20 Iowa, 528; *Stacey v. Vt. Cent. Rld. Co.*, 27 Vt. 39; *Evansville Rld. Co. v. Miller*, 80 Ind. 209.

The case will be remanded to the court below, with the order that the judgment be modified in accordance with the views expressed in this opinion.

All the Justices concurring.

H. K. ROBINSON v. DAVID PERRY.

CONSTITUTIONAL LAW; *Acts of General Nature, Restricted in Operation, Void.* Chapter 116 of the laws of 1870, amending section 1 of chapter 115 of the laws of 1869, prohibiting sheep from running at large except in Doniphan county, and except as otherwise provided, is unconstitutional and void. [*Darling v. Rodgers*, 7-592; *Noffsiger v. McAllister*, 12-315; *Keyes v. Snyder*, 15-143; *Comm'rs v. Higginbotham*, 17-70; *Gray v. Crockett*, 30-138.]

Error from Atchison District Court.

ACTION by *Perry*, brought originally before a justice of the peace, to recover damages for injuries to *Perry's* crops alleged to have been committed by the sheep of *Robinson*. The case was taken to the district court by appeal. The defense was, "that the lands of said plaintiff, at the time of the alleged trespass, were not inclosed by a good, sufficient and legal fence." Plaintiff demurred. The district court, at the September Term 1874, sustained said demurrer; and upon trial gave judgment in favor of *Perry*, plaintiff, for the sum of \$8.60, and costs. *Robinson* brings the case here on error.

W. A. Johnson, for plaintiff in error:

The court erred in sustaining the demurrer. *Perry's* premises, upon which the trespass was alleged to have been committed, were not at the time inclosed by a good, sufficient and legal fence. Sec. 1 of ch. 40, Gen. Stat. 1868, requires all fields and inclosures to be inclosed by a fence sufficiently close, etc.; § 4 of said act declares what shall be a sufficient and legal fence; and chapter 88, laws of 1873, amendatory of said ch. 40 of Gen. Stat., prescribes the dimensions and requisites of legal and sufficient fence. Both of said acts are laws of general nature and application throughout the state; 7 Kas. 592, 599, 479, 491; 12 Kas. 321. Section 17 of article 2 of the constitution, provides that all laws of a general nature shall have a uniform operation throughout the state. By ch. 40, in relation to fences, and ch. 105, in relation to stock, Gen. Stat. 1868, sheep are allowed to run at large and graze

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on the prairies; and in said ch. 40, provisions are made for the assessing and recovery of damages done by trespassing animals, among which sheep are named, in inclosures surrounded by a sufficient and legal fence. And the only attempted limitations and restrictions on said ch. 40, in regard to sheep, are the acts which stand as ch. 115, laws of 1869, and ch. 116, laws of 1870. And said last-named chapters are unconstitutional and void, because they are contrary to and in conflict with said § 17 of article 2, of the constitution.

The opinion of the court was delivered by

VALENTINE, J.: The only question involved in this case is, whether chapter 116 of the laws of 1870 (page 239) is constitutional and valid, or not. The substantial portion of that chapter reads as follows:

"SECTION 1. That section one of chapter 115 of the laws of the state of Kansas, approved March 1st 1869, be so amended as to read as follows: SEC. 1.—All persons owning or having charge of any sheep, shall keep the same from running at large, except as in this act otherwise provided: *Provided*, That the provisions of this act shall not apply to the county of Doniphan."

Said original § 1 of chapter 115 of the laws of 1869, (page 229,) reads as follows: "SEC. 1.—All persons owning or having charge of any sheep in Johnson, Chase, Brown, Dickinson, and Atchison counties, shall keep the same from running at large, except as in this act otherwise provided." Section 2 of said last-mentioned act provides, that "the legal voters of any organized township in the said counties shall have the right at any township or general election to vote to be exempt from the operations of the preceding section," etc. Sections 3, 4 and 5 are concerning said election. Sections 6 and 7 provide for suits for damages caused by sheep running at large in violation of said § 1; and § 8 provides for taking up sheep as strays if found running at large in violation of said § 1. Now according to the decision made in the case of *Darling v. Rodgers*, 7 Kas. 592, said chapter 115 of the laws of 1869 is

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unconstitutional and void. It is in contravention of § 17 of article 2 of the constitution, which provides that "All laws of a general nature shall have a uniform operation throughout the state." If it were enforced it would prevent the fence laws, stray laws, and other laws of a general nature, which, in effect, permit sheep to run at large, from having "a uniform operation throughout the state;" and therefore it would seem that it ought to be held void. And if it were so held, then it would be necessary to hold that there was nothing in the act of 1869 (ch. 115) to be amended. The act of 1870 was not intended to be a complete and original law in and of itself. It was intended merely as an amendment of § 1 of the act of 1869, and was intended merely to take the place of that section. And therefore it was not intended by the act of 1870 to absolutely prohibit sheep from running at large in all counties except Doniphan county; but it was only intended to so prohibit them from running at large in such places only as should not become exempt from the provisions of section one, by a vote of the people had under § 2 of said act of 1869. But said § 2, as we have already stated, was void, and therefore the said act of 1870 could not by any construction have operation as intended by the legislature. We suppose it will hardly be claimed that the passage of the act of 1870 made valid the whole of the act of 1869, from section two to section ten. If it did, it would be an extraordinary kind of legislation; but if it did not, then the act of 1870 could not have operation as intended by the legislature. But said § 1 of the act of 1870 itself violates the provisions of § 17, article 2, of the constitution. It is in substance a "law of a general nature," and yet it is not to "have a uniform operation throughout the state." Doniphan county is excepted from its operation. And the fence laws, stray laws, etc., are laws of a general nature, and yet these laws with respect to sheep, are by the operation of the act of 1870 to have operation in Doniphan county only.

We are constrained to hold that the act of 1870 is unconstitutional and void, and therefore the judgment of the court

below must be reversed, and cause remanded for a new trial.

All the Justices concurring.

KANSAS PACIFIC RAILWAY Co. v. ROBERT REYNOLDS *et al.*

CONTRACT, FOR SHIPPING STOCK; *When Special Contract is Void.* Where a railway company has in fact only one rate at which it carries or offers to carry cattle from O. to S., although it may have posted up in the office of its agent at O. other and higher rates, and an owner of cattle, without anything being said about any special contract, but with the consent of the company, places his cattle in the company's cars at O. to be transported to S., and the agent of the company at O. then presents to the shipper a certain special contract for carrying said cattle at the full rate at which the company carries cattle, though less than said posted rates, and with certain restrictions, limitations, etc., as to the company's responsibility, and the agent then demands that the shipper shall sign said special contract or have his cattle unloaded, and the agent gives to the shipper no other option or alternative, and the shipper then signs said special contract, *held*, that said special contract, so far as it attempts to restrict the liability of the railway company, or to impose additional burdens upon the shipper, as conditions precedent to a recovery for damages resulting from the negligence of the railway company, is without consideration, and void. [*Kallmann v. Express Co.*, 3-205; *R. R. v. Akers*, 4-454; *R. R. v. Reynolds*, 8-624; *R. R. v. Nichols*, 9-249; *Goggin v. R. R.*, 12-416; *R. R. v. Maria*, 16-333; *R. R. v. Simpson*, 30-645.]

Error from Davis District Court.

REYNOLDS and two others, as partners, at the November Term 1874, recovered judgment against the *Railway Company* for \$259.20 damages for injuries sustained to their cattle while being transported over said company's railroad. All necessary facts are stated in the opinion. The *Railway Company* brings the case here.

J. P. Usher, and *E. W. Dennis*, for plaintiff in error.

McClure & Humphrey, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action for damages claimed to have resulted from the negligence of the defendant below, (plaintiff in error,) in transporting certain cattle of the plaintiffs over the defendant's railroad from Ogden east to State Line station. The defendant denied the negligence and damage, and also set forth in its answer that the cattle were transported under a certain special contract, and that no notice of any loss or damage was ever given to the defendant as provided for in said special contract, and therefore that even if there was any negligence, loss, or damage, the defendant is absolved from paying anything therefor. Said special contract as given in the defendant's answer reads as follows:

"LIVE-STOCK CONTRACT.

Nos. of Cars, }

"G. F. O. No. 44, KANSAS PACIFIC RAILWAY,
"Ogden Station, June 18th, 1870.

"Received of Reynolds, Ferrell & Seymour, two cars of cattle, to be delivered at State Line station, at special rates, being forty dollars per car load, each car containing eighteen animals, more or less. In consideration of which, and for other valuable considerations, it is hereby mutually agreed, that said company shall not be liable for loss by animals injuring themselves or each other, or by jumping from the cars, delay of trains, or other damage said property may sustain, except such as may result from the actual negligence of the company or its agents. The owners or persons in charge of stock are passed free on the train accompanying the stock, at their own personal risk, in consideration of the fact that they are to water, feed and take care of the stock at their own expense and risk, and are to assist in unloading the stock at destination, and at feeding or transfer points. It is further agreed that the company shall not, in any event, be liable for any loss, damage or detention, caused by military authority or by rebellion, insurrection or riot, or for stock dying on the train for any cause. Agents are not permitted to ship stock in box cars under any circumstances, without the owner or his agents consent thereto in writing, to be indorsed on this contract, and signed by the agent or owner shipping, and then they are to be entirely at

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the risk of the owner. The company is not to be held responsible for the loss of stock by doors getting closed and stock smothering. No claim for loss or damage on live stock will be allowed, unless the same is made in writing, before or at the time the stock is unloaded. The evidence that the shipper, after full understanding thereof, assents to all the provisions of the foregoing contract, is his signature hereto. The railway company does not undertake to transmit live stock in any given time.

“THEO. WEICHSSELBAUM, *Agent for the Company.*

“REYNOLDS, FERRELL & SEYMOUR, *Shippers.*

“Witness—BEN WOSSBAUM.”

The plaintiffs replied, that said special contract was executed on their part without any consideration; and therefore they claim that the same, so far as it differs from the general contract entered into in such cases between shipper and common carrier, is not binding upon them; and therefore they claim that they were not bound to give said notice of loss and damage.

The evidence shows among other things as follows: The defendant company introduced evidence showing that it had, at the time said cattle were shipped, regular printed tariff rates for the transportation of cattle; that the rate for carrying cattle from Ogden to State Line was \$92 per car-load, and that a copy of said tariff rates was posted up in the office of Theo. Weichselbaum, the agent of the railway company at Ogden. But on the contrary, R. B. Gemmell, the general freight agent of the company at the time these cattle were shipped, to-wit, June 18th 1870, and a witness for the company, testified that “In June 1870, the agent at Ogden had no authority to ship at other than special rates, under such a contract as above referred to.” And Robert Reynolds, one of the plaintiffs, and a witness for the plaintiffs, testified: “At the time I ordered cars, no contract was entered into—nothing said as to terms. * * * Theo. Weichselbaum said nobody could ship unless they signed that contract; said there was no other rates. I got the cattle on the cars without saying anything to Weichselbaum about

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any contract, and believed in law I could force him to take them without any. That is one reason why I objected to signing the contract. He had offered to read the contract. The option was offered us to ship under this contract at this rate, or to unload." E. T. Ferrell, one of the plaintiffs, and a witness for the plaintiffs, testified: "Theo. Weichselbaum said that he would turn out the cattle unless we signed the contract. Reynolds said he thought he could make the company take the cattle without signing any contract. I passed free upon the train with the cattle." While the cattle were being transported from Ogden to State Line an accident occurred at Topeka which delayed the train about twelve hours, and damage resulted to the cattle from their prolonged detention in the railroad cars on a very warm and calm day without food or water. But the plaintiff gave no written notice of any claim for loss or damage, as required by said special contract. They gave a *verbal* notice however. Now we suppose about the only question worth considering in this case is, whether the said special contract was executed on the part of the plaintiffs with or without any sufficient consideration therefor. If it were true that the regular rate for carrying cattle by the railway company from Ogden to State Line, with the extended responsibility of a common carrier, was \$92 per car-load, and that \$40 per car-load for the same service was a special and reduced rate because of a limited and diminished responsibility, and if the plaintiffs had been allowed to exercise their choice as to which of the two ways they would have their cattle carried, and had then chosen the latter, and had then voluntarily executed said special contract, such special contract would under such circumstances be valid and binding, and founded upon a sufficient consideration, and its requirements that the plaintiffs should give said written notice of loss and damage would be reasonable, and could not be ignored with impunity. (*Goggin v. K. P. Rly. Co.*, 12 Kas. 416.) The difference in such a case between the higher rate required by the railway company as a common carrier and the reduced rate accepted by the company

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under a restricted responsibility, would be a sufficient consideration going to the plaintiffs for the execution of the said special contract by them. But it is not true, according to the evidence, that the regular rate for carrying cattle from Ogden to State Line was \$92 per car-load. The regular rate was \$40 per car-load, and no more. There is not the slightest evidence, except merely said printed rates, that the company ever carried or offered to carry any cattle at any other rate than \$40 per car-load; and there was abundance of evidence showing that in fact they had no other rate. Neither did the company give the plaintiffs any option as between rates, or as between terms of transportation. The only option that the company offered the plaintiffs was, to sign said special contract or have their cattle unloaded. It will be remembered that nothing was said about any special contract until the cattle were all loaded in the cars. It was evidently the intention of the plaintiffs to ship their cattle without any special contract, they paying full rates, and the company being liable as common carriers. But after they had loaded their cattle in the cars, then the agent of the company demanded of them that they sign said contract or have their cattle unloaded. This was not right. A railroad company has no right to refuse to carry cattle, and it has no right to refuse to carry them under the full responsibilities of a common carrier. And in all cases, where cattle are carried by a railroad company, each party (the carrier and the shipper) has a right to demand that they be carried under just such terms and conditions, and with just such responsibilities, as are established by law for the transportation of such property by common carriers; and these terms, conditions, and responsibilities, can be varied or altered only by the mutual consent or agreement of both parties. Therefore, under all the circumstances of this case we think the said special contract, so far as it attempted or attempts to restrict the liability of the railway company, or to impose additional burdens upon the plaintiffs as conditions precedent to a recovery for damages resulting from the negligence of the railway company, was and is unfair,

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unjust, without consideration, and void. It is unnecessary to discuss any of the other questions raised in this case.

The judgment of the court below must be affirmed.

All the Justices concurring.

W. F. JOSEPH *et al.* v. FIRST NATIONAL BANK.

1. **INDORSERS OF BLANK NOTES; *When Liable.*** J. and C. indorse a negotiable promissory note, which, so far as the dates, the amount, etc., are concerned, is in blank, and give said note to L. to be negotiated in a bank in paying and taking up another note for \$1,000 then due and held by the bank against J. and L. and a third person, and J. and C. instruct L. to fill up said new note for \$400 only; but L. in violation of such instructions, fills it up or allows the bank to do so for \$1,000, and then L. with said new note pays and takes up the old one, and the bank is fully aware that said new note was executed and indorsed in blank, but is not aware and has no notice that the note was filled up for a larger amount than was authorized by J. and C.: *Held*, That a promissory note may legally be executed and indorsed in blank, and that upon the facts as above stated, the bank is an innocent and *bona fide* holder of said new note for value, and is not responsible for or chargeable with the wrong committed by L. and may therefore recover against J. and C. the full amount of said note. [*Fuller v. Scott*, 8-25; *Sarbach v. Jones*, 20-497.]
2. **OBJECTIONS TO EVIDENCE, *Must be Stated.*** Where a party objects to the introduction of evidence he must state the grounds of his objections. [*Walker v. Armstrong*, 2-198; *Wilson v. Fuller*, 9-176; *Luke v. Johnnycake*, 9-511; *Marshall v. Shibley*, 11-114; *Ferguson v. Graves*, 12-43; *Simpson v. Kimberlin*, 12-586; *Willis v. Sproule*, 13-263; *Rheinhardt v. State*, 14-323; *Botkin v. Livingston*, 16-41; post, 336; *R. R. v. Cutler*, 19-87; *Grandstaff v. Brown*, 23-176; *Humphrey v. Collins*, 23-549; *Edmondson v. Beale*, 27-656; *Stout v. Baker*, 32-113; *R. R. v. Morrow*, 32-217; *Osborn v. Woodford*, 31-290.]
3. **INSTRUCTIONS, *Not Excepted to, Not Reviewable.*** Where a party desires to have an instruction (which is given by the court to the jury) reviewed in the supreme court, he must except to the giving of such instruction. [See cases cited, *ante*, 224, and *Kerr v. Reece*, 27-339.]
4. **GENUINENESS OF SIGNATURE; *Comparison by Jury.*** While juries must always receive and weigh the evidence of the witnesses with regard to the genuineness of a disputed signature of one of the parties to the suit, when such a question is presented to them, yet they may also exercise their own judgment concerning the genuineness of such signature by comparing it with other signatures of the same person already in evidence and known to be genuine. [*Macomber v. Scott*, 10-336; *Anthony v. Stinson*, 4-212; *Ort v. Fowler*, 31-485; *R. R. v. Thul*, 32-255.]
5. **JURY, *After Retiring May Return for Further Instructions.*** Where a dis-

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agreement arises between the members of a jury after they have retired for deliberation, they may be returned into court and further instructions given them with reference to the matter about which they disagree, and the court in further instructing them may exercise some discretion as to the extent of its instructions.

8. ——— *Parties to be Present.* It would be error in such a case for the court to give such further instructions in the absence and without notice to the parties or their counsel; but where the record brought to the supreme court "is a case made for the supreme court," and is silent with reference to the presence or absence of the parties and their counsel, it will be presumed that they were all present.

Error from Butler District Court.

ACTION upon a promissory note by the *First National Bank of Eldorado*, against D. J. Lobdell as maker, and W. F. Joseph, and Henry Comstock, Jr., as indorsers. Lobdell made no defense. Joseph and Comstock answered, denying their alleged indorsement. Trial at the February Term 1875. Verdict and judgment for plaintiff for \$1,210.46. Joseph and Comstock bring the case here for review.

A. J. Miller, and Martin & Case, for plaintiffs in error.

A. L. Redden, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by the First National Bank of Eldorado, Kansas, against the maker and indorsers of the following promissory note:

"\$1,000.

ELDORADO, KANSAS, March 21st, 1874.

"Six months after date, for value received, I promise to pay to the order of Waitman F. Joseph, the sum of one thousand dollars, at the First National Bank of Eldorado, in Eldorado, Kansas, with interest from maturity at the rate of 12 per cent. per annum. And I further agree to pay a reasonable attorney-fee if suit shall be instituted to enforce the payment hereof.

"No. 8216. Due Sept. 21st 1874. D. J. LOBDELL."

Upon the back of which note was indorsed the names of "WAITMAN F. JOSEPH," and HENRY COMSTOCK, Jr."

Joseph and Comstock answered separately, each denying under oath that he ever indorsed said promissory note; and

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Joseph alleging that so far as he was concerned the indorsement was a forgery. The evidence however, as brought to this court, seems to show, beyond all doubt, that the signatures indorsed on said note were and are the true and genuine signatures of the said Joseph and Comstock. The evidence however seems to show that said note was indorsed before it was fully filled up, and while it was partially in blank, but as to how much of it was filled up, and how much of it was in blank, the evidence with regard thereto is conflicting. Some of the evidence tends to show that the dates, the amount, the maker's name, and the payee's name, were all in blank, while other parts of the evidence tend to show that not so much of the note was in blank. The amount at least was probably in blank. Joseph and Comstock endorsed said note at the request of Lobdell, and both Joseph and Comstock testify that Lobdell agreed that the amount to be put in the note should not exceed \$400. But there was other evidence contradicting this, and showing that the note was to be filled up just as it was in fact filled up. This note was executed and endorsed for the purpose of taking up and paying another note for \$1,000 then due, and held by the bank against Lobdell and Joseph and a man by the name of Drake; and there was evidence tending to show that Lobdell, who was the principal debtor, and who procured said signatures, told the indorsers at the time they indorsed said note, that if he got certain money which he expected to get, the amount, that would be placed in the new note should not exceed \$400, and in any case the amount should not exceed \$1,000. The note was in fact filled so as to make the amount just \$1,000. The

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of blank notes.

bank was fully aware that the note was executed and indorsed in blank, but it was not aware until long after it purchased and received the note, and until long after all the blanks were completely filled, that any one claimed or believed that the blanks were not filled up in exact accordance with the expectations and understanding of the indorsers. The note was taken by the bank in good faith as payment for another note of the same amount which the bank held against

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said Lobdell and S. D. Drake as makers, and said defendant Joseph as indorser. Now upon the merits of this case we think the plaintiff below should recover. Promissory notes may legally and properly be executed and indorsed in blank. And knowledge on the part of the payee or holder of the note, that it was so executed and indorsed, will not vitiate the note. All that is necessary in such a case is, that the holder shall be an innocent and *bona fide* holder of the note for value. He is not bound to know that the blanks were filled up in exact accordance with the expectations or intentions of the maker or indorser. The maker and indorser take the risk, when they make and indorse the note. The note is good in the hands of an innocent purchaser for value, even if it was filled up with an amount greater than that authorized by the maker or the indorser. (1 Pars. Notes & Bills, 109 to 113; 1 Daniel on Negotiable Instruments, 111, *et seq.*) The plaintiff in this case was an innocent and *bona fide* holder of the note for value. The plaintiff was wholly innocent of any fraud or any wrong that may possibly have been perpetrated on the indorsers. And in consideration for this note the plaintiff gave up and surrendered a valuable security, to-wit, another note for the same amount on Drake, and on two of the present defendants, Lobdell and Joseph. This was a sufficient consideration, even if the same should be called a preëxisting debt. (1 Parsons on Notes, 219; 1 Daniel on Negotiable Instruments, 145, 146, 620 to 623.) Drake was released, and Lobdell and Joseph got further time, and the note was taken and received in the usual and ordinary course of business, and there was nothing to create the slightest suspicion that the note was not filled up as directed by Joseph and Comstock. It would now be unjust to the bank to hold that the note was void; and therefore, upon the merits of the case, we think the bank should recover.

But aside from the merits, are there any technical grounds upon which the judgment of the court below should be reversed? It is claimed that the court below erred in admitting

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in evidence a certain letter of Miller & Taylor. Now this evidence does not appear from the record to have been competent. It was the admissions of two men, not parties to the record, and not appearing to have any authority from any party to the record to make such admissions. But still the evidence was immaterial; for everything material which the letter tended to prove had already been incontestibly proved or admitted. But whether the evidence was competent or not, or material or not, the defendants cannot complain of its admission by the court below, for they stated no ground upon which they asked to have it excluded. (*Simpson v. Kimberlin*, 12 Kas. 587; 3 *Estee's Pl. & Forms*, 500; 3 *Wait's Pr.* 204, 205.) If the ground for the objection was, that Miller & Taylor did not have authority from either of the defendants for writing said letter, and if such ground had been suggested to the court below, then other and additional evidence might have been introduced showing that Miller & Taylor did have just such authority. This may not however have been the real ground upon which said objection was made. The objection, so far as the record shows, may have been made on the ground that Miller & Taylor did not write the letter, or that the statements therein contained were in and of themselves irrelevant or incompetent; or it may have been on some other supposable ground. Miller & Taylor were attorneys for the defendants. It is claimed that the court below erred in excluding evidence "as to what was said by Miller & Taylor with reference to the note in question." There was certainly no error in this.

The first, second and third instructions of the court to the jury were not excepted to, and hence we cannot review them. (*Wyandotte v. Noble*, 8 Kas. 444, 447; *Norton v. Foster*, 12 Kas. 45; *Wheeler v. Joy*, 15 Kas. 389, 390.) There is no question raised in this court concerning the fourth, fifth, seventh, eighth and ninth instructions. Or at least they are not mentioned in the briefs of the plaintiffs in error, defendants below.

2. Objections to evidence must be stated.

3. Excepting to instructions.

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The sixth instruction is not erroneous. While juries must always receive and weigh the evidence of the witnesses with regard to the genuineness of the disputed signature of one of the parties to the suit, when such a question is presented to them, yet they may also exercise their own judgment concerning the genuineness of such signature by comparing it with other signatures of the same person already in evidence and known to be genuine. (*Macomber v. Scott*, 10 Kas. 336.)

4 Jury may compare signatures.

After the jury retired for deliberation a disagreement arose between them, and they were properly returned into court, when the court gave them other and further instructions. Now there is nothing wrong in this in and of itself. (Gen. Stat. 683, §280.) But it is claimed that the court did not confine itself as strictly as it should have done to the matter in dispute between the members of the jury. We think it did. The court however must in such a case be allowed a little latitude, and be allowed to exercise a little discretion. But it is claimed that the court at this time erred in instructing the jury as follows: "If it is proved to your satisfaction, that the signatures on the back of the note are genuine, the variance between Gossard and Rix is immaterial." The variance referred to related simply to how much of the note was in blank at the time when it was brought to the bank for negotiation; and we think the variance is wholly immaterial. It was wholly immaterial, with respect to this question, whether Gossard or Rix was correct, or whether either was strictly correct. This subject has already been sufficiently discussed in this opinion. The said instruction was not erroneous, and we do not think that any of the other instructions given at this time were erroneous. Besides, none of these instructions were excepted to, and no objection was made to their being given. But it is claimed that the record does not show that the defendants or their counsel were present at the time these instructions were given, and does not show that any notice was given to them. Now if in fact they were not present, and

4 Jury may return and ask further instructions.

4 Parties to be notified when jury return.

had no notice given to them, then they would undoubtedly have the right to have said instructions reviewed without an exception. It would be error for the court to give instructions under such circumstances until after the parties or their counsel had first had notice. (Gen. Stat. 683, § 280.) But the record does not show that the defendants and their counsel were absent and that they had no notice. From anything appearing in the record, the defendants and their counsel may have had ample notice, and may have been present at the time the instructions were given. The record is merely silent upon the subject. Now the defendants themselves brought the record to this court, and instead of bringing the entire and complete record, they brought only what is termed "a case made for the supreme court." Now such a "case made" seldom or never contains all the proceedings of the court below in a case, but contains only so much of such proceedings as is thought necessary to present the errors complained of. (Gen. Stat. 737, § 547.) And it always devolves upon the plaintiff in error, the party complaining, the party who makes the case, to see that enough is put into his "case made" to show affirmatively the errors of which he complains. Error is never presumed from mere silence in a record, and certainly not in favor of a plaintiff in error whose record is merely a "case made." If the defendants were not present, and had no notice when said instructions were given, they should have made their "case made" show that fact affirmatively.

It is also claimed that the verdict is not sustained by sufficient evidence. We think it is; and besides, the record does not show affirmatively that all the evidence has been brought to this court.

The judgment of the court below must be affirmed.

All the Justices concurring.

M. W. DELAHAY *et al.* v. WM. GOLDIE.

1. PETITION; DECREE; *Barring Interest of Incumbrancer.* A petition in an action to foreclose a mechanic's lien in which one L. D. was made a party defendant, and in which the only allegation against her was that she "claims an interest in this controversy adverse to the plaintiff, the extent of such interest, if any, to this plaintiff is unknown, and that she be compelled to set up her interest, if any," does not warrant a decree barring her of all interest in the premises, or any other decree or judgment against her. [*Short v. Nooner*, 16-220; *Nooner v. Short*, 20-625.]
2. MECHANIC'S LIEN; *Verifying Statement.* Under the mechanic's-lien law of 1872 the statement required to be filed may be verified by an agent of the claimant. [*Dorman v. Crozier*, 14-224.]
3. ——— *Lien of Material-man.* Under that law a lumber dealer furnishing lumber to a contractor for the erection of buildings, under a contract with such contractor, and for the purpose of being used in such buildings, and which is actually used therein, may acquire a lien therefor. [*Clark v. Hall*, 10 Kas. 80, commented on and explained; *Weaver v. Sells*, 10-609; *Shellabarger v. Thayer*, 15-619; *Shellabarger v. Bishop*, 14-432; *Clough v. McDonald*, 18-116; *Rice v. Hodge*, 26-164.]
4. ——— *Sub-Contractor; Limit of Lien.* The lien of the sub-contractor is limited only by the amount contracted to be paid to the contractor; and all payments made to the contractor prior to the expiration of sixty days after the completion of the building, are at the risk of the owner. [*Shellabarger v. Thayer*, 15-619; ante, 111; *Clough v. McDonald*, 18-116.]

Error from Leavenworth District Court.

ALL material facts are stated in the opinion of the court. Goldie as plaintiff, had judgment against Taggart and the Delahays, at the November Term 1874. The Delahays bring the case here on error.

Clough & Wheat, for plaintiffs in error.

Lucien Baker, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This was an action by Goldie to foreclose a mechanic's lien. M. W. Delahay was the owner, J. P. Taggart the contractor, and Goldie claimed as sub-contractor. The latter made Taggart, M. W. Delahay, and Louisiana Delahay, parties defendant. He recovered a personal judgment against

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Taggart, and a portion of this amount was adjudged a lien upon the premises. A decree of foreclosure and sale was entered against all the defendants. Taggart is not here complaining of the judgment, and of course we need not inquire whether any error was committed against him. The two Delahays are alone plaintiffs in error, and they present several matters for our consideration. Some of them have been already passed upon in other cases, and we need only refer to them here.

I. The only allegation in the petition against Mrs. Delahay is in these words: "And said plaintiff further says, that the said Louisiana Delahay and the said J. P. Taggart claim an interest in this controversy adverse to the plaintiff, that the extent of such interest, if any, to this plaintiff is unknown, and that they be compelled to set up their interest, if any." She filed no answer. Upon this a decree was entered barring her of all interest in the premises. This was erroneous. *Short v. Nooner*, 16 Kas. 220.

II. The statement for the lien was verified, not by the claimant, but by an agent. Counsel contend that, inasmuch as verification by an agent is not in terms authorized by the lien law, and as the lien law is in derogation of the common law, no such verification is sufficient. If the statute had prescribed by whom the verification should be made, it might well be contended that such provision was exclusive. But the statute simply requires the filing of a statement, "verified by affidavit." Laws 1872, p. 296, § 3. It would be adding to the statute to hold that only the claimant's affidavit was sufficient. In all the instances cited by counsel in which express authority is given to agents and attorneys to make affidavits, the principals are likewise expressly named. The omission here is certainly significant. In Ohio, under a statute which provided that the claimant should file a statement "after making oath thereto," a verification by an agent was held sufficient. *Williams v. Webb*, 2 Disney, 430; *Dorman v. Crozier*, 14 Kas. 224.

III. Again, it is claimed that as Goldie was a lumber dealer, who had no contract with Delahay, but simply sold the lumber

for a gross sum to Taggart, the contractor, he could acquire no lien. This is a mistake. Any person furnishing material under a sub-contract with the contractor is given by the statute a lien. It must be furnished under a contract, and for the purpose of being used in the building, and must actually be so used. *Weaver v. Sells*, 10 Kas. 609. The language used in the case of *Clark v. Hall*, 10 Kas. 80, must be understood in connection with the question therein presented. It was not contended that a lumber dealer furnishing lumber to a contractor could not under the statute acquire a lien. But the claim of the plaintiff was, that he had sold the lumber directly to the lot-owner, and claimed a lien in consequence as an original contractor, while the defendant himself insisted that he had never himself purchased any lumber from plaintiff, that he had contracted with one McFall to furnish the material and do the work, and that McFall had purchased the lumber, and that he had paid McFall in full except about \$80, which he claimed as damages. Upon this was the dispute. If McFall made the purchase, it was primarily McFall's debt, and a subsequent promise of Hall to pay was a promise to pay the debt of another. So also, Clark could not acquire a lien as contractor, but only as a sub-contractor. And a mere subsequent promise by the lot-owner to pay the debt, would not change a sub-contractor into a contractor, or of itself give a lien upon the building.

IV. Finally, it is claimed that as nothing was shown to be due and unpaid by Delahay to Taggart at the time of the filing of the lien, no recovery could be had against the premises. But the contract between Delahay and Taggart provided for the payment of many times the sum now claimed by Goldie; and, as heretofore decided under the lien law of 1872, the lien of the sub-contractor is limited only by the amount contracted to be paid the contractor; and all payments made to the contractor prior to the expiration of sixty days after the completion of the building, or work mentioned in the contract, are at the risk of the owner. *Shellabarger v. Thayer*, 15 Kas. 619; *Shella-*

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barger v. Bishop, 14 Kas. 482. This may be, as counsel earnestly contend, a very harsh provision; but that is a question for the legislature, and not the courts. These are all the matters we deem it necessary to notice.

The judgment of the district court as to M. W. Delahay will be affirmed; as to Louisiana Delahay it will be reversed, and the case remanded with instructions to render judgment in her favor for costs. The costs of this court will be divided between Goldie and M. W. Delahay.

All the Justices concurring.

JAMES C. BARRETT v. MICHAEL BARNES *et al.*

NEW TRIAL; Order Granting, Sustained. Where the district court has set aside the verdict of a jury, and granted a new trial on the ground that the verdict is against the evidence, and there appears to have been conflicting testimony upon the principal question, that of negligence, and it is not clear from the record that the verdict ought to have been upheld, this court will not reverse the ruling of the district court and order judgment on the verdict. [*Post*, 268; *Day v. Harris*, 23-217; *Brown v. R. R.*, 29-189; *Beal v. Coddington*, 32-107; *Bedell v. Bank*, 16-130.]

Error from Wilson District Court.

ACTION by *Barrett* against *Barnes* and three others, on an official bond, to recover damages for the alleged negligence of *Barnes* as sheriff of Neosho county. The action was commenced in Labette county, and afterward the venue was changed to Wilson county, where it was tried at the May Term 1874. Verdict for plaintiff for \$2,080. On motion of defendants, this verdict was set aside and new trial granted. From this order granting a new trial the plaintiff appeals, and brings the case here on error.

A. M. York, and *L. U. Humphrey*, for plaintiff.

C. F. Hutchings, for defendants.

Opinion of the Court.

The opinion of the court was delivered by

BREWER, J.: This was an action on the case, brought by plaintiff against defendant Barnes, as sheriff of Neosho county, and against the other defendants as sureties on his official bond, for damages alleged to have accrued to him by reason of the negligence of Barnes while having the legal custody and control of plaintiff's cattle.

The admissions in the pleadings establish the following facts: That in the month of August 1870, the plaintiff was the owner of certain cattle, at that time in his possession in said county; that on or about the 10th of August 1870, plaintiff was arrested and brought before T. F. Rager, a justice of the peace of said county, charged with having driven said cattle into the state of Kansas from the Indian Territory at a time prohibited by law; that the justice issued his writ, directed to said defendant Barnes as sheriff, commanding him to drive or cause to be driven said cattle without the state of Kansas, over the same route over which they had been driven in; that said writ came into the hands of said Barnes on the 11th of said August, and that he, under said writ, took the said cattle into his possession, and started to drive the cattle to the Indian Territory; that while they were being thus driven toward the southern boundary of the state, and while in the county of Labette, a number of individuals came upon them in the night time, between the 12th and 13th days of August, and shot, killed, wounded and injured a number of said cattle. It is further admitted by the pleadings, that at the time of the alleged wrongs, etc., said Michael Barnes was the sheriff of the said county, and the other defendants were sureties upon his official bond. The question of fact presented by the pleadings was, whether the defendant Barnes, in the execution of said writ, was guilty of such negligence as to render him liable in law. Upon the trial of the cause the jury found the issues joined in favor of plaintiff, and assessed his damages at \$2,080. On motion of defendants, the court below set aside said verdict and granted a new trial, on the grounds that the

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verdict "was not sustained by sufficient evidence, and was contrary to law." To this order plaintiff excepted, and brings the case here for review. We have had several cases before us in which the action of the district court in granting a new trial has been made the subject of review, and the rules of decision in such cases are well settled, and have been often announced. *Anthony v. Eddy*, 5 Kas. 127; *Field v. Kinnear*, 5 Kas. 238; *Atyeo v. Kelsey*, 13 Kas. 212; *McCrum v. Corby*, 15 Kas. 112. Counsel for plaintiff in error seem to think that there is very little conflict in the testimony, and that there is an overwhelming preponderance of evidence in favor of the verdict. We are not so impressed by a perusal of the record. It seems to us that there was a fair question in the case, with conflicting testimony. There was certainly testimony tending to show negligence, and if the court had approved the verdict it would as to this question have been conclusive upon us. But there was also testimony tending to show that the sheriff had used reasonable care and diligence in the matter. Indeed, if the testimony of the sheriff was all that there was in the case, one could scarcely read it without being impressed with the conviction that it would be grossly unjust to mulct him in damages for the loss of these cattle. Let us notice his testimony, and these are the facts appearing therefrom: The plaintiff being in possession of some southern cattle finds himself in trouble, his cattle seized by a mob, and his life threatened, and gets a party to file a complaint charging him with violating the law in bringing the cattle into the state between the 1st of March and the 1st of December, in order that the justice of the peace may issue his warrant to the sheriff to seize the cattle and drive them, over the route by which they were brought, back into the Indian Territory. The preliminary proceedings are had, and the warrant issued. The case is then continued for final trial several days, and when tried the plaintiff proves that he brought them in between the 1st of December and 1st of March, and is acquitted. A query arises right here, whether a party who thus prostitutes the process of the courts, by causing to be instituted against himself a *quasi* criminal pro-

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ecution, which he knows to be groundless, for the sole purpose of getting his property into the hands of the sheriff, can afterward recover anything from that officer in case of its loss, be the latter ever so negligent. But we forbear to press this query. The sheriff receives the warrant, and with three assistants starts to drive the cattle to the territory, the distance being about thirty miles. He calls upon the plaintiff to accompany them, but he refuses, though he now complains that the sheriff did not take force enough to protect the cattle. He drives until 11 o'clock at night, and then turns off the road and drives the cattle into a ravine where they are as far as possible concealed. About 2 o'clock some forty to sixty armed persons ride up and commence firing into the cattle. They were stampeded, some killed, and less than half ever recovered by the plaintiff. The sheriff, though he had weapons, made no resistance to this armed party. The next morning he with his assistants hunted till nearly noon for the cattle, and then having had nothing to eat since the previous noon, he went to a near village to get dinner and help. Unable there to get help, he returned to the county-seat. There he informed plaintiff's counsel of what he had done, secured men to accompany him, but was detained a day waiting for horses which the counsel agreed to furnish. He subsequently made search for half a day, with four or five men in the vicinity of the place where the cattle had been stampeded. He found where several had been killed, and the meat appropriated by individuals, but found only one alive, and that wounded. Led to believe that there were none to be found alive, he returned and reported to plaintiff the names of the parties who had the meat.

Counsel asserts, that, to sustain the allegation of negligence the plaintiff relied upon the following facts as testified to by witnesses on the trial: *First*, That defendant Barnes started to drive the cattle out of the state with only three men to assist him, after having received warning that the destruction of the cattle was threatened. But the sheriff says he called upon

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the plaintiff to go, and he refused. Can he now be heard to say that the sheriff did not summon force enough? He was under equal obligation with any other citizen to obey the call of the officer, and interested above all others. He was unwilling to risk his own life, and now wants the sheriff to pay him because he did not compel others to risk theirs. *Second*, That Barnes did not start with the cattle until two o'clock P. M. of the 12th, when he might have started in the morning, and by doing so could have driven them out of the state that same day, and thus have avoided a night attack. But Barnes says that when he went to get the cattle he reached Barrett's at ten o'clock A. M. and found them in the custody of a constable, and in the possession of armed men appointed by the constable, who refused to give them up without word from that officer; that he was compelled to ride five miles to get him to come and turn over the cattle, and that hence he did not get started with them until two o'clock P. M. And so we might go on through the remaining five facts stated by counsel. Some, as the sixth, were denied by Barnes, and for others he gave his reasons for his conduct.

We do not mean to assert that the facts were as Barnes testified them to have been. That is a matter to be settled in the trial court, and as to that matter both court and jury must agree. All we assert is, that the testimony was not entirely one-sided—that there was much tending to show that the sheriff used reasonable care, or at least that the plaintiff was estopped from saying that he did not, and that therefore as the trial court was constrained to hold that the verdict ought not to stand, we must abide by its decision. It must be borne in mind that negligence is not one of those independent, absolute facts, like the signing of a note, to which the testimony goes directly *pro* and *con*, but is often one of those mixed questions upon which even when the facts are entirely undisputed minds may often fairly disagree. That which seems negligence to one, may seem reasonable care to another. Especially therefore should there be agreement between the trial court

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and jury as to the existence of negligence before an officer is mulcted in heavy damages on account of its supposed existence in the discharge of his official duties.

The ruling of the district court will be affirmed.

All the Justices concurring.

SOUTHWESTERN STAGE COMPANY V. ROBERT PECK.

1. *CONTRACT; Agreement to Pay on Delivery of Goods; Action; Defense.* P. contracted with a stage company to deliver to it fifty tons of hay, the first ten tons not to be paid for until all delivered, and the remainder to be paid for as delivered. In pursuance of said contract, after delivering the first ten tons, P. delivered two tons, and demanded his pay therefor, and the company refused to pay for them: *Held*, That an action would lie at once for the whole twelve tons delivered, and that the company could not set up the contract in defense of any present liability for the ten tons, or as the foundation of a claim against P. for damages for failing to deliver the remaining thirty-eight tons. [*Usher v. Hiatt*, 18-196; *Duncan v. Baker*, 21-99.]
2. ——— *Breach of Contract.* Upon on a contract to deliver hay at so much a ton, to be paid for as delivered, the vendor is entitled to pay for each ton as soon as it is delivered; and he does not, by failing to demand pay until several tons have been delivered, waive his right thereto as to each ton delivered, or to treat the vendee's then refusal to pay for any ton, as a breach of the contract.

Error from Cherokee District Court.

THE opinion of the court contains a full statement of the facts and proceedings. *Peck* had judgment at the January Term 1875, and the *Stage Company* brings the case here.

McComas & McKeighan, for plaintiff in error.

Matheny & Ritter, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This was an action brought by defendant in error before a justice of the peace of Cherokee county, to recover for twelve tons of hay, claimed to have been sold to

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plaintiff in error at the price of \$3 per ton. Peck recovered judgment for \$36, from which judgment an appeal was taken by the company to the district court. At the April term 1874 of said court, the case was tried before a jury. Peck recovered a verdict for \$6, which, on motion of the stage company was set aside. At the October term 1874, the case again was brought on for trial. Peck's evidence introduced; objection to company's evidence sustained; leave given to file amended answer; jury discharged, and cause continued. The company filed an amended answer, setting out the contract under which the hay was delivered, claiming a performance, and alleging a breach on the part of Peck, and asking judgment for damages sustained. At the January term 1875, the case was again tried; judgment for Peck for \$38.65; motion for new trial overruled.

The errors mainly complained of are errors in giving and refusing instructions. The contract was in writing, and there was no dispute as to what the contract was. It was in substance a contract for the sale and delivery by Peck to the company of fifty tons of hay at \$3 per ton, the first ten tons not to be paid for until the entire fifty tons were delivered. The remainder of the hay was to be paid for as delivered. There was no dispute, and the testimony showed, on both sides, the following facts: That on the 27th of October 1873, Peck had delivered about fifteen tons, ten tons of course of which he was not to be paid for until he delivered all the hay; that at that date he was paid \$9; that afterward, and up to the 15th of November, the plaintiff delivered between three and four tons, for which, before the commencement of this action, he received his pay. After that came the divergence in the testimony, the plaintiff introducing evidence tending to show that when the \$9 was paid there was a dispute as to whether two tons were good and merchantable, as stipulated in the contract; that the plaintiff did not accept the \$9 as payment in full for the hay which the defendant then owed for; that the last of November the plaintiff demanded pay for the two tons, which defendant refused on the ground that said two tons were not good, and

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plaintiff had accepted said \$9 as payment in full; that the plaintiff then refused to deliver any more, and that the two tons were good and merchantable hay. On these controverted points the company introduced evidence tending to show that the two tons delivered prior to October 27th were not good hay, and that the plaintiff was told not to put it in the barn; that this amount was by the assent of plaintiff deducted, and \$9 accepted in full for which pay was then due; that subsequent to the 18th of November the plaintiff was requested to go on and deliver more hay, who at first said he could not, but promised to have it delivered, and that a few days afterward he demanded \$6 in payment of the two tons delivered as a condition for further performance, which being refused, he refused to deliver any more hay. The company also showed, which was not contradicted, that when Peck made his final refusal hay had advanced from \$3 to \$5 and \$6 per ton.

The foregoing statement of the case is taken from the brief of plaintiff in error, and upon this statement counsel for plaintiff in error say:

"On such a state of facts we claim that the instructions of the court were wrong, not merely in some particular parts, but in their entire scope and aim, although the instructions do not point out what would excuse Peck from performing his contract; yet in view of the general features of the case, the leading idea of the court probably was, that if the jury found that the company failed to pay for the two tons of hay, such failure excused Peck from performing his contract, and authorized him to treat the contract as annulled or rescinded."

We think this is a fair statement of the case, and that if the failure of the company to pay for the two tons, they being good and merchantable hay, excused Peck from delivering any more hay, then no substantial wrong has been done plaintiff in error, and the judgment must be affirmed. It will be observed that, outside and independent of the contract, under the testimony, Peck's right to recover would be unquestioned. He had delivered twelve tons of hay, and the company had accepted and appropriated them to its own use. It was therefore *prima*

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facie bound to pay for them. It had paid at the same time \$3 a ton to plaintiff for hay. And this would be *prima facie* sufficient evidence of value. It interposes this contract as a defense to Peck's claim, and as a basis to its claim for damages. But it is guilty of the first breach. Can it say that that contract which it has broken is still in force, and operative to defeat plaintiff's otherwise just claim? Can it insist upon Peck's performance of the contract when it has failed to perform? Is it any more binding upon Peck than upon it? It is generally true, that the party who is guilty of the first breach of a contract can neither found a right of action upon such contract, nor make it the basis of defense to an otherwise just claim. And we think this case furnishes no exception to the general rule. After the first ten tons had been delivered, the hay was to be paid for as delivered. Upon the delivery of each ton Peck was entitled to his pay therefor, and if the company then refused it was guilty of a breach. But say counsel, Peck delivered hay after the refusal to pay for the two tons, and therefore waived his right to insist upon the breach. We do not so understand the testimony, or the contract. We do not understand that there was any refusal to pay for these two tons until after the 13th of November. There was a dispute as to whether these two tons were good and merchantable hay, which, according to Peck, was left unsettled, and according to the company was settled by Peck's conceding that they were not. According to the verdict of the jury, Peck's statement must be held to be the correct one. There was therefore no distinct refusal to pay, no positive breach, until after Peck had delivered all the hay which he did deliver. He delivered nothing after the company refused to pay. And we do not understand that upon the delivery of each separate ton Peck was under obligations to make a specific demand for the pay for that ton, or on failure to do so waived the right to insist upon a subsequent refusal to pay as a breach of the contract. His right to pay existed at the delivery of each ton, and the right continued, although not insisted upon, until several tons had been delivered. We think

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therefore the first breach is chargeable to the company, and that there was no waiver of the right to insist upon that breach.

The judgment will be affirmed.

All the Justices concurring.

JAMES WASHINGTON v. B. F. HOBART.

1. **ACTION ON NOTE; Allegation of Ownership; Pleading; Issue.** In an action on a promissory note by a person who is not the payee thereof, where the petition says nothing about any indorsement of the note, but there is an allegation in the petition which states that said note was duly transferred to the plaintiff, and that he is now the owner and holder thereof, such allegation may be put in issue by a pleading not verified by affidavit. [*Pattie v. Wilson*, 25-380.]
2. ——— **Issue; Unverified Answer; Burden of Proof.** And in such a case, where the defendant files an answer not verified by affidavit, denying that said note was ever transferred to the plaintiff or to any one else, denying that the plaintiff was the owner or holder thereof or that he had any right, title or interest therein, and alleging that the payee was still the owner and holder thereof, *held*, that it devolved upon the plaintiff to prove that the note had been transferred to him.
3. ——— **Error; Instruction.** And where such a case is submitted to a jury, and no evidence is introduced, it is error for the court to instruct the jury to find for the plaintiff.

Error from Sedgwick District Court.

HOBART, as plaintiff, at the March Term 1875, recovered judgment against *James Washington* and *W. B. Simpson*, for the sum of \$10,477.52, and costs. *Washington & Simpson* bring the case here. All necessary facts and proceedings are stated in the opinion of the court.

Tucker & Fisher, and Ruggles & Sterry, for plaintiffs in error.
Adams & Harris, and H. G. Webb, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action on four certain promissory notes. Each of the notes was executed by the defendants below, "Washington & Simpson." Two of the notes were made payable "to the order of A. L. Austin," and the other two "to the order of John Getty." The plaintiff Hobart now claims to be the owner and holder of said four notes. He does not however allege in his petition below or elsewhere that the notes were ever *indorsed* to him, or to any one else, or that they were ever indorsed at all, or that they were transferred to himself or to any one else by indorsement; and the copies which he gives do not purport to have ever been indorsed. He alleges that each of the notes was *transferred* to him; but how it was transferred, he does not state. As to the first note, he says "that before said note became due it was for a valuable consideration by the said Austin transferred to the said plaintiff, who on the 28th of August 1874 was and now is the lawful owner and holder thereof." He alleges the transference of the other three notes in substantially the above form. The defendants in their answer deny that said notes were ever transferred, or that the plaintiff was ever the owner or holder thereof, or that he ever had any right, title or interest therein, and allege affirmatively that the payees of said notes are respectively the owners and holders thereof. These allegations and denials in the answer were not verified by the affidavit of any person. The defendants also alleged some other matter in their answer, to which the plaintiff replied. A jury was then impaneled to try the cause. Neither party introduced any evidence. The court then instructed the jury as follows: "Gentlemen of the jury, you are instructed that upon the pleadings and the evidence in this case the plaintiff is entitled to recover of the defendants the sum of \$10,741.18." The jury then found a verdict in favor of the plaintiff for that

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amount, and judgment was rendered accordingly. The judgment was however afterward reduced to \$10,477.52, which was the aggregate amount of the notes with interest. The defendants moved for a new trial, which motion was overruled. All said rulings were duly excepted to by the defendants, and they now bring the case to this court for review.

We think the court below erred in its charge to the jury. Under the pleadings it devolved upon the plaintiff to prove that he was the owner and holder of said notes, and as he did not do so the verdict and judgment should have been for the defendants. Ordinarily, where a note payable to order is transferred, it is so transferred by a written indorsement placed on its back. And ordinarily when such a note is sued on, the plaintiff inserts in his petition an *allegation of the execution of such indorsement*, and such "*allegation*" can be put in issue only by a denial thereof, verified by affidavit. (Gen. Stat. 650, §108.) The statute provides that "in all actions, *allegations of the execution of written instruments, and indorsements thereon*, * * * shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney." But a negotiable promissory note, payable to order, as well as every other kind of promissory note, may be transferred in this state without any indorsement, or without any written instrument, and by delivery merely, and so as to authorize the transferee to sue in his own name. (Gen. Stat. 635, § 26; *Williams v. Norton*, 3 Kas. 295; *McCrum v. Corby*, 11 Kas. 465, 470.) Therefore, in an action on any kind of promissory note by a person who is not the payee thereof, where the petition says nothing about any indorsement thereof, but there is an allegation in the petition stating that the note was duly transferred to the plaintiff, and that he is now the owner and holder thereof, such allegation may be put in issue by a pleading not verified by affidavit. Now in the present case there is no "*allegation*" of any "*indorsement*" of either of the notes sued on. As to two of them, there is not the slightest intimation to be found in any portion of the record as to any kind of an indorsement.

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As to the other two, the only intimation of any kind as to any indorsement is to be found in the third count of the petition, where it is stated that these two notes were protested, and notice of their dishonor was "duly given to the indorsers." Now it will be remembered that the plaintiff in this case was not the payee of any one of said notes, and was not entitled to recover on any one unless it was legally shown that he was the transferee thereof. We do not think that it was legally shown that he was the transferee of any one of said notes, yet he was allowed to recover the full amount of every one of them. We think the court below erred in this.

The judgment of the court below must therefore be reversed, and the case remanded for a new trial.

All the Justices concurring.

ST. JOSEPH & DENVER CITY RAILROAD CO. V. JAMES E DRYDEN.

1. **DEMURRER TO EVIDENCE—When Sustained.** Where an action is brought by a railroad company in possession of the right-of-way through a tract of land, and using it for its railroad track and telegraph line, to restrain the owner of said land from interfering with its possession and use of the right-of-way, and upon the trial the plaintiff offers no testimony tending to show that the defendant ever had interfered, or threatened or was likely to interfere therewith, a demurrer to the evidence is properly sustained. [*Schafer v. Weaver*, 20-296.]
2. **INJUNCTION—What Facts will not Sustain Action.** Proof that the defendant asserted that a railroad company did not own a certain right-of-way, that he was going to have the right-of-way adjusted, and recover damages therefor, is not sufficient evidence of a threat or danger of violent interference to sustain an action of injunction against the defendant. [*Dryden v. R. R.*, 23-527; *Henderson v. Marcell*, 1-137.]
3. **DISMISSAL OF ACTION, Without Prejudice—When not Allowed.** After a demurrer to evidence has been sustained, the plaintiff has not the right to dismiss the action without prejudice to a future action. [*R. R. v. Couse*, post, 571; *Schafer v. Weaver*, 20-294; *State v. Furbeck*, 29-532.]
4. **TRIAL; OPENING CASE, and Receiving New Testimony.** After the testimony has once been closed, the court has the power to open the case and receive further testimony; but neither party can insist upon this as a legal

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right. It is a matter resting in the sound discretion of the court, and its ruling will not be reversed unless it appears from the record that such discretion has been abused. [*Swartzel v. Dey*, 8-244; *Cook v. University*, 14-548; *Meizell v. Kirkpatrick*, 33-282.]

Error from Doniphan District Court.

THE opinion of the court contains a full statement of the facts and proceedings. The district court, at the September Term 1878, gave judgment for costs in favor of *Dryden*, and the *Railroad Company* brings the case here for review.

Doniphan & Reed, for plaintiff.

A. Perry, and *Price & Heatley*, for defendant.

The opinion of the court was delivered by

BREWSTER, J.: The substantial question in this case is, whether the district court abused its discretion in refusing to open up a case and permit the plaintiff to offer further testimony after it had sustained a demurrer to the evidence. The facts are these: Plaintiff in error, plaintiff below, brought an action to restrain defendant from cutting down telegraph poles or interfering in any manner with plaintiff in the operation of its railroad and telegraph line on a strip one hundred feet in width across the defendant's land. The petition, which was used as an affidavit on application for a temporary injunction, and which therefore stated the facts very fully, and much in detail, alleged the organization of the company, that the land at one time belonged to one Howard, and that while so owned by him he conveyed by deed the right-of-way to plaintiff, that the deed was never recorded, and was burned up in a fire at St. Joseph, the subsequent conveyance by Howard to Dryden, also the construction of the road and telegraph line over this right-of-way, also facts tending to show a knowledge by defendant of plaintiff's construction of the road over his land, and an acquiescence therein, and an estoppel on him, and also, further, that he had cut down some telegraph poles on said land, and was threatening to cut down any that might be re-

placed thereon, etc. To this an answer was filed, denying all the allegations of the petition except the existence of the corporation plaintiff, and that Howard was at one time the owner and the grantor to defendant. To this answer an affidavit was attached verifying the denial of the execution of any conveyance of the right-of-way by Howard to plaintiff. On the trial plaintiff introduced testimony tending to show the execution of a conveyance of the right-of-way, and its destruction by fire, also tending to show an estoppel on defendant, but nothing showing any interference or threat of interference by defendant with plaintiff's possession or use of the right-of-way, and then rested. It is true, that there was testimony that Dryden said that the plaintiff had no right-of-way over his land, that he was going to have the right-of-way adjusted, and to have damages; but no hint of violence, or threat of violence. A demurrer to the evidence was filed, and sustained. The plaintiff then asked leave to open the case, and introduce testimony to show defendant's interference and threats, but the court refused permission. It then moved for leave to dismiss the action without prejudice, but the court overruled the motion and rendered judgment in favor of defendant for costs. That the court properly sustained the demurrer, is clear. The gist of the action was to restrain the defendant from interfering with plaintiff's possession and use of the right-of-way, and there was no testimony to show that he ever had interfered, or ever threatened or was likely to interfere. Hence the plaintiff's cause of action was not made out. There was a total failure of evidence on one material point, and the demurrer therefore was properly sustained. The motion to dismiss without prejudice was also properly overruled. (Laws 1872, p. 329, § 1.) Where a demurrer to the evidence is sustained, the case is ready for judgment. It has been finally submitted to the court, and the plaintiff has no more right to dismiss than he has after a verdict is returned. The case is decided, and the plaintiff has no right to avoid that decision by a dismissal. (*Schafer v. Weaver*, 20 Kas.

1. Demurrer to evidence.

2. Motion to dismiss action without prejudice.

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294, 296; *Mason v. Ryers*, 26 Kas. 464, 466.) There is therefore but the single question stated in the opening. Did the court abuse its discretion in refusing to open the case and permit further testimony? That the court has power, ^{4. Opening case for new testimony.} after a case is closed, to open it for further testimony, will be conceded; but it is a matter resting in its sound discretion whether it will do so. Neither party has a legal right to have it done. Before then this court will reverse the action of the district court in such a case, it must appear from the record that there was an abuse of that discretion. *Swartzel v. Dey*, 8 Kas. 244. The presumption in the silence of the record will be in favor of the ruling. But no showing of any kind whatever was made on the application for leave to open the case and offer further testimony. We know not why this further and needed evidence was not offered before the plaintiff rested. Was it because it had no such testimony present? Was it merely saving a point for error? Did it consider the testimony immaterial, and purpose simply to ask a decree quieting its title to the right-of-way? Had any interference, or threat of interference in fact, been made, or had the plaintiff simply been misinformed when it filed its verified petition? Can we in the absence of any showing upon these and other points hold that the court abused its discretion in refusing to open the case? It is true, in the motion for a new trial it is stated that the plaintiff was misled by the declarations of defendant's counsel, and also by the ruling of the court in relation to the issues. The only evidence in support of this is to be found in this extract from the bill of exceptions, showing what took place immediately prior to plaintiff's resting its case:

"Plaintiff then offered the records of the company to prove the change of name of the company, and that defendant was a director, and had managed the construction of the road over the land after he owned it. To this defendant objected, stating it was not necessary, as they had not denied anything under oath but the deed of Howard, and that it was unnecessary to prove what was not denied. Defendant then read the affidavit of defendant to his answer to show what was denied. The

court then refused to permit plaintiff to read from the records, saying it was unnecessary to prove matters that were not denied, and were admitted. To this the plaintiff at the time duly excepted. Plaintiff then rested."

It cannot be denied that there seems to be some foundation for the plaintiff's claims, that it was misled by the declarations of counsel, and the ruling of the court. Indeed, it is quite doubtful in our minds whether the case is not one calling for our interference. And yet, after a careful examination we are constrained to say that there is not enough to overthrow the presumption in favor of the court's ruling. The statement of defendant's counsel is not an admission of a fact or facts, or a waiver of proof, but rather an expression of an opinion as to the construction of a pleading. The terms of this answer were as fully known to one counsel as another. It was not a long, complicated pleading, but as short and simple and clear as language could make it, a general denial excepting a couple of facts. The statement of counsel was not in reference to the matters concerning which plaintiff omitted to offer testimony. And especially there is no evidence that the plaintiff was actually misled in this matter. It may have been misled; the circumstances were such as might easily have misled. But then the omission may have been intentional, or from any of the reasons heretofore suggested. Which was the truth, was not shown. We can only infer; and it is a fact which should have been positively shown. If the court had sustained the application, we might fairly have said that it was satisfied from all the circumstances, (those countless matters which can never be written down and placed upon record,) that the plaintiff was misled. As it overruled the application, we are compelled to think that it was likewise satisfied that the plaintiff was not misled. More than this: plaintiff is in possession, and having the use of the right-of-way. This decision is no adjudication, or at least can be shown from the whole record to be no adjudication against its right to the possession and use. If Dryden wishes to recover possession, he will have to establish his right by other evidence than this judgment. He may be

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relieved from liability for any prior trespass, but he is not thereby given license for future wrong. Taking everything into consideration we, though with grave doubts, shall affirm the judgment.

KINGMAN, C. J., concurring.

WESLEY McLAUGHLIN V. THE STATE OF KANSAS.

1. JUDGMENT ON FORFEITED RECOGNIZANCE; *Death of Principal*. Where a judgment is rendered against the principal and surety on a forfeited recognizance after the death of the principal, the judgment may be vacated under subdivision six of §568 of the code, as to the principal, but not as to the surety.
2. ACTION TO VACATE JUDGMENT; *Sufficiency of Petition*. Where a surety on a forfeited recognizance commences an action to vacate a judgment previously rendered against him on such recognizance, and states in his petition no ground for the vacation of such judgment except merely that the principal recognizor had died before such judgment was rendered, and gives no reason why he did not set forth such death as a defense to the original action on the recognizance, *held*, that such petition does not state facts sufficient to constitute a cause of action.

Error from Clay District Court.

THE opinion of the court contains a sufficient statement of the facts. The district court, at the May Term 1876, sustained a demurrer to the petition of *Wesley McLaughlin* to vacate a judgment previously rendered by said court; and from such decision said *Wesley McLaughlin* appeals, and brings the case here on error for review.

McClure & Humphrey, for plaintiff in error.

C. M. Anthony, for The State.

The opinion of the court was delivered by

VALENTINE, J.: This is an action brought by *Wesley McLaughlin*, and *Adelaide H. McLaughlin*, administratrix of the

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estate of Johnson B. McLaughlin deceased, to vacate a certain judgment previously rendered against said Wesley and said Johnson B. on a forfeited recognizance previously executed by said Johnson B. as principal, and said Wesley McLaughlin and one William A. Keith as sureties. (For additional facts concerning said judgment and said recognizance, see *McLaughlin v. The State*, 10 Kas. 582.) The only thing set forth in the plaintiff's petition as a foundation for their cause of action, or rather as a ground upon which they asked to have said judgment vacated, was, that prior to the rendition of said judgment said Johnson B. McLaughlin had died. Johnson B. died August 30th 1872. Said judgment was rendered November 19th 1872. Adelaide H. was appointed administratrix March 31st 1873; and this suit to vacate said judgment was commenced May 26th 1874. The state demurred to said petition, on the ground that it did not state facts sufficient to constitute a cause of action, and the court below sustained the demurrer as to Wesley, but overruled the same as to Adelaide H., administratrix. Wesley now brings the case to this court, and assigns for error the ruling of the court below on said demurrer. We think however the ruling of the court below was correct. It must be remembered that the only ground assigned for the vacation of said judgment was the death of said Johnson B. McLaughlin. There is no claim that Wesley McLaughlin did not know of said death at the time it occurred. There is no claim that he did not have ample evidence to prove said death at the time said judgment was rendered. And there is no claim that he ever exercised the slightest diligence to avoid the rendition of said judgment. The petition below is wholly silent upon these matters. From anything that appears in the record, Wesley McLaughlin could just as well have set up and proved said death as a defense to the action on the recognizance as he can now set it up and prove it as a ground for vacating said judgment. Wesley McLaughlin however founds his right of action upon a certain statute which reads as follows:

“SECTION 568. The district court shall have power to vacate

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or modify its own judgments or orders, at or after the term at which such judgment or order was made; * * * *Sixth*, For the death of one of the parties before the judgment in the action." (Gen. Stat. 742, 743.)

Now this statute evidently applies to the judgment as rendered against Johnson B. McLaughlin, for as to that judgment the state and said Johnson B. were the parties, and one of such parties was dead at the time of the rendition of the judgment. But does the statute apply to the judgment as rendered against Wesley McLaughlin? We hardly think it does. As to that judgment both of the parties—the state, and said Wesley—were still in existence at the time that said judgment was rendered, and capable of suing and being sued, and capable of having judgment rendered for and against them. In this state a valid judgment may be rendered against any one or more of the several parties to a recognizance. In this state all joint contracts are also several. (Gen. Stat. 183, § 1.) And in all cases of joint obligations or joint assumptions suits may be brought and prosecuted against any one or more of those who are liable. (Gen. Stat. 183, § 4; *id.* page 637, § 39.) Judgments may be rendered against any one or more of those who are sued; (Gen. Stat. 704, § 396.) And the property of any one or more of those against whom judgments are rendered may be taken in execution for the satisfaction of such judgments. Hence it does not follow, that because a judgment may be void as to one joint contractor, or one joint obligor, or one joint recognizer, it is void as to all. Nor does it follow that because a judgment may be vacated as to one of such joint contractors, obligors, or recognizers, it may be vacated as to all. The judgment in all such cases is a several judgment as between the plaintiff and each of the several defendants, although a satisfaction of the judgment as to one of the defendants would be a satisfaction as to all. It is claimed that the death of the principal recognizer at any time before final judgment is rendered, is a good defense for the surety on any action brought against him on the recognizance. We have assumed this to be true, although we do not now

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wish to be understood as deciding the question. Section 149 of the criminal code, (Gen. Stat. 843,) is an argument in favor of its correctness, while the following statutes are rather the other way: Gen. Stat. 183, § 3; id. page 708, § 421; id. page 844, § 155. The case of *Woolfolk v. The State*, 10 Ind. 532, is also in favor of the correctness of said claim of the plaintiff in error, Wesley McLaughlin. But assuming that such claim is correct, how can it help the plaintiff in error in this case? Where a defendant has a good defense to an action which he could easily interpose before judgment, if he should choose to do so, but he does not so choose, may he afterward be heard to interpose such defense? Or, even if he should choose to interpose the defense, and the court should rule against him, would his proper remedy be to wait over a year and a half and then commence an action to vacate the judgment? The judgment rendered against Johnson B. McLaughlin should not be considered as an element in the proceeding to vacate the judgment against Wesley McLaughlin at all. This case, so far as it applies to Wesley McLaughlin, should be considered as though Wesley McLaughlin had been the sole defendant in the action on the recognizance; that Johnson B. McLaughlin had died before judgment was rendered against Wesley; that Wesley knew of such death in time to have interposed the same in his own defense, if he had chosen to do so, but that he did not choose to do so, and allowed judgment to be rendered against him. Now upon this state of facts, will an action lie in his favor to vacate said judgment? We hardly think it will. The rule is, that if a defendant has a defense to an action, and knows it, he must set it up in that action, or he loses it; and about the only exceptions to this rule are where he has been prevented from setting it up by the fraud of the other party, or by some unavoidable casualty or misfortune. None of these exceptions intervened in this case.

The judgment and order of the court below will be affirmed.

All the Justices concurring.

J. C. MERRITT V. WILLIAM WILLIAMS.

1. **PARTNERSHIP; Notice of Dissolution.** Only those who are in the *habit of dealing* with co-partners are entitled to actual notice of their dissolution.
2. ——— A *single cash sale* of cattle to a partnership firm dealing in cattle does not make the vendor such a dealer as entitles him to actual notice of the dissolution of the partnership, or through lack of such notice to hold both partners on a sale made two years thereafter, and eighteen months after the dissolution of the firm, where the actual dealings are had with only one of the former partners.

Error from Allen District Court.

ACTION by *Williams* against "*Merritt & Sprague*," as partners, to recover the purchase price of a lot of cattle sold by him. *Sprague* made default. *Merritt* answered for himself, denying under oath, that any partnership existed between himself and *Sprague*, and denied any purchase by himself, or by himself and *Sprague*, or any indebtedness on his part for the cattle sold by *Williams*. Trial at the April Term 1875. It was shown by the evidence that *Merritt* and *Sprague* had been partners in 1872; that in that year *Williams* had sold them one lot of cattle; that they dissolved their partnership in the spring of 1873; that the sale upon which the present action was grounded was made in September 1874, and that the parties present and acting in the making of said sale and purchase were *Williams* and *Sprague*. *Williams* claimed that *Sprague* made the purchase for the copartnership of "*Merritt & Sprague*." The court gave among others the following instruction:

"If the jury believe from the evidence that the defendants during the years 1872 and 1873 were partners in the business of buying and selling cattle, and that during that time the plaintiff and defendants had business transactions together with reference to said business, and afterward said partnership was dissolved, and that afterward plaintiff sold to one of said defendants the lot of cattle sold on or about the 10th of September 1874, and the price of which is the subject of this action;

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and if the jury further believe that the plaintiff's residence is comparatively remote from the defendants', and plaintiff had no actual notice of the dissolution of the partnership, they will find for the plaintiff."

Verdict and judgment for plaintiff against both defendants, and *Merritt* appeals, and brings the case here for review.

W. A. Johnson, and *H. H. Pulver*, for plaintiff in error, contended, first, that the testimony showed only one transaction between Merritt & Sprague and Williams, and that a cash transaction, and that therefore Williams was not entitled to notice of dissolution. Second, that if the sale, (as stated in the instructions,) was to "one of the defendants," the plaintiff had no need of notice of the dissolution of the partnership, for it would not affect this transaction, the credit not being given to the partnership, but to an individual.

The opinion of the court was delivered by

BREWER, J.: On the 10th of September 1874, Williams sold forty-eight head of steers. He claims that he sold them to the firm of Sprague & Merritt. Merritt denies that there was such a firm, or that he was a partner of Sprague, and alleges that the sale was made to Sprague, who alone was responsible therefor. The question therefore in the case was, whether Merritt was a partner of Sprague's, or had so acted as to justify Williams in holding him as a partner, or had joined with Sprague in making the purchase. No question is made in this court upon the admission or rejection of testimony, but error is claimed on the instructions. We shall notice but a single matter, as in that we think there was error. Both Sprague and Merritt testified that no partnership existed at the time of the purchase; that while they had at one time been partners in the cattle business, such partnership had been dissolved some eighteen months or more prior thereto. Williams lived about thirty-five miles from Iola, in or near which both Sprague and Merritt resided. Some two or two-and-a-half years prior to this sale, and while the firm of "Sprague & Merritt" existed, Williams sold them a lot of cattle. This single sale was the

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only transaction between the parties prior to this controversy. It does not appear whether it was made for cash, or upon credit. Of course it cannot be presumed to have been made upon credit; and whoever would found a right upon the claim that it was so made, must prove it. Williams testified that if the firm of Sprague & Merritt had been dissolved, he had no notice of the dissolution, and supposed they were still partners. Was he entitled to actual notice? and could he, for lack of it, hold both Sprague and Merritt, although the partnership had in fact been dissolved, and the dealings were had solely with Sprague? We think not. The language of the books is, that those who have been in the habit of dealing with a firm are entitled to actual notice: Collyer on Part., § 538; Story on Part., § 161. Can a man who has simply made one sale to it, be considered in *the habit* of dealing with a firm? Does one who sells only for cash extend any credit to a firm because of its individual partners? Will a single transaction with a firm carry with it through all time the right to notice of a dissolution? and must a firm run back through all the years of its existence, and give actual notice to every individual who has ever had a single dealing with it? It may be that the number, and character, and time of the dealings, which will entitle a party to actual notice of a firm's dissolution, are not exactly specified, and that often it is a question for the jury whether such notice was requisite to release a retiring partner. But we think no authority can be found to sustain the necessity of notice in a case like the present. When a known partner retires, why should different notice be given to a dealer with the firm than that which is given to the public generally? Any person may know that he was a member, and any one not actually informed may be misled into trusting the firm on the supposition that he is still a member. Why any distinction? Because he who has established a course of dealing with a firm may be supposed to have made prior inquiries as to the members of the firm, and their respective business character and standing, and gives his credit upon the faith of such inquiries and the consequent information. It is fair that that course of

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dealing should be continued upon the same basis of trust and confidence as that upon which it was commenced, and that he should be informed if any change is made which affects the conditions of that credit. But when no credit has ever been extended, and no occasion to make any inquiries, the reason for the rule ceases. *Cessante ratione legis cessat ipsa lex*. Hence, if a dormant partner retires, no notice is necessary, because no credit was ever given to the firm on account of his supposed membership in it. So also, as is said in *Clapp v. Rogers*, 12 N. Y. 283, "it follows that a purchase strictly for cash would not constitute a dealing within the rule, for a person selling under such circumstances would have no occasion to inquire who the partners were, or as to their responsibility." 2 Bell's Com. 540; *Vernon v. Manhattan Co.*, 22 Wend. 183. In *Wardwell v. Haight*, 2 Barb. 549, the court declares that, "The principle is, that credit already raised on the faith of the partnership is presumed to be continued on the same footing unless special notice of a change is given." For these reasons, and upon these authorities, we think the jury should have been instructed that this single prior sale did not give Williams a right to actual notice of the dissolution, or to hold both partners because of a want of such notice; and that any instruction implying the contrary was wrong. For this error in giving instructions, judgment will be reversed and the case remanded for a new trial.

We of course express no opinion as to whether the firm had in fact been dissolved, or whether Merritt actually joined in the purchase. We may also remark, that acts and conduct which induce a belief in the mind of a party dealing with certain persons of the existence of a partnership between them, must, to support a finding of a partnership, be such as would induce the belief in the minds of men of ordinary judgment and prudence.

All the Justices concurring.

E. N. MORRILL *et al.* v. J. C. DOUGLASS.

1. **TAX-DEED; *Tax Sales, When Illegal.*** Under the law of 1862 the county could not, while holding a legal certificate issued to it upon a valid tax sale, become again the purchaser of the same tract at a sale for taxes levied subsequent to the first purchase; and a deed, *prima facie* valid, would be invalidated by proof that it was based upon such second purchase by the county. [*Ewing v. Baldwin*, 24-88.]
2. ——— ***Void Sale—Second Sale.*** If such prior sale and certificate were for any reason void, the mere fact that a form of sale had been gone through with, and a formal certificate issued, would not prevent the county from subsequently acquiring and transferring a valid sale-certificate for the taxes of a succeeding year. [*Millbank v. Ostertag*, 24-475; *Railway v. Cheney*, 30-202; *Bels v. Bird*, 31-142.]
3. ——— ***Sales for Taxes of 1860.*** Under the law of 1860 a sale made January 1st 1862, for the taxes of 1860, was *prima facie* valid. [*Morrill v. Douglass*, 14-311; *Patterson v. Carruth*, 13-494; *Harris v. Curran*, 32-584.]

Error from Jackson District Court.

ACTION by *E. N. Morrill* and *W. W. Guthrie* to quiet their title to the southeast quarter of sec. 24, township 6, range 14, containing 160 acres of land in Jackson county. An action between the same parties, concerning other lands in the same county, is reported in 14 Kas. 293. The pleadings and proceedings in this action are almost identical with the pleadings and proceedings in that; (see 14 Kas., pp. 295 to 297.) Trial at the April Term 1874. Plaintiffs showed a regular title from the government patent down to themselves, and that the land was vacant. Plaintiffs then produced the records of three tax-deeds covering said land, all issued to defendant *Douglass* as assignee of Jackson county, which deeds plaintiffs asked might be adjudged and decreed to be null and void as clouds upon their title, to-wit: one tax-deed dated 8th Sept. 1868, reciting a sale made 1st January 1862, for taxes of 1860; another tax-deed dated 8th Sept. 1868, reciting a sale made 3d May 1865, for taxes of 1864; and a tax-deed dated 30th January 1872, reciting a sale made 7th May 1863, for the taxes of 1862. The plaintiffs also called the county clerk, who pro-

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duced the records of his office showing that the lands in controversy were assessed for taxation in 1860, and in every year since; that on the 1st of January 1862 said lands were sold to the county for the taxes of 1860, and that the county owned and held the sale-certificate issued on such sale until the 11th of May 1868, when it was assigned to defendant *Douglass*. The district court held and decided that the two deeds first described were void on their face; but said tax-deed dated 30th January 1872 was held to be valid, and to vest in defendant *Douglass* the paramount title to said lands. Decree accordingly, and for defendant for costs, and plaintiffs bring the case here for review.

W. W. Guthrie, and John S. Hopkins, for plaintiffs.

John C. Douglass, defendant, for himself.

The opinion of the court was delivered by

BREWER, J.: This is a tax-title case involving the same questions as those presented in the case between the same parties heretofore decided by this court. (*Morrill v. Douglass*, 14 Kas. 293.) A motion for reargument was presented in that case, and heard at the same time with this. That motion has been overruled, and it is unnecessary to say more than that the reargument has not succeeded in altering our views as then expressed.* It was a singular omission that the learned counsel, never, in his brief, nor in his elaborate and extended argument, once alluded to that peculiar section of our statute by which the legislature has announced its will concerning tax titles. That section was first enacted in 1862, and as amended in 1868 now reads:

"No irregularity in the assessment-roll, nor omission from the same, nor mere irregularities of any kind in any of the proceedings, shall invalidate any such proceeding, or the title conveyed by the tax-deed; nor shall any failure of any officer or officers to perform the duties assigned him or them, upon the day specified, work an invalidation of any such proceedings, or of said deed." Gen. Stat., p. 1057, § 113.

[*No opinion was filed on the overruling of the motion for rehearing. The case as originally decided in this court, is reported in 14 Kas. 293.—REPORTER.]

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This disposes of a vast multitude of questions which the ingenuity of counsel, here and elsewhere, have raised concerning tax titles. A mere irregularity counts for nothing as against a tax-deed in Kansas.

One question is presented this case which did not exist in that (*Morrill v. Douglass*, 14 Kas. 298,) and requires separate notice. The tax-deed held good was upon a sale in 1863 for the taxes of 1862. At the time of this sale the county held a certificate on a sale made January 1st 1862, for the taxes of 1860; and the law then in force (Comp. Laws, p. 868, § 48,) provided, that "no lands or town lots, so bid off for the county, shall be sold for any taxes levied subsequent to such bid, until it shall have been redeemed, or shall be sold by the county, or the tax certificate issued to the county shall have been assigned." To obviate this, counsel reply, that the statute attempting to authorize a sale on January 1st 1862 for the taxes of 1860 was unconstitutional and void, and therefore that the sale and certificate were equally invalid. The act to which he refers is ch. 84 of the laws of 1861, and the objection to it is, that though plainly a general law it is not made of uniform operation throughout the state, but is specifically limited to certain portions and counties. *Darling v. Rodgers*, 7 Kas. 592. We concede the claim, that if the sale and certificate were void in the hands of the county, there was no restriction on its purchasing in 1863; and that if the sale was made at a time not authorized by law, the sale, and certificate reciting such a sale, were both void. But whether the statute cited be unconstitutional or not, we do not decide, for under a peculiar section of the law of 1860 we have already decided that a sale might under some circumstances be made upon a day other than the regular sale-days, and that therefore a deed reciting such a sale was *prima facie* valid. *Patterson v. Carruth*, 13 Kas. 494. Of course, the certificate would be equally *prima facie* valid. There is nothing in the record to overthrow this *prima facie* evidence, and therefore the judgment will have to be reversed, and the case remanded for a new trial, because

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the sale, in 1863, while the county held under its purchase made January 1, 1862, was void.

We understand the same question exists in the succeeding case of *Guthrie v. Douglass*, and the same judgment will be entered in that case.

KINGMAN, C. J., concurring.

J. W. MCCARTNEY v. MARY J. WILSON.

1. CHATTEL MORTGAGE, *Given by Person Legally in Custody of an Officer, to Secure his Discharge, is Void.* Mrs. W. was a prosecuting witness in a certain criminal proceeding, and was adjudged by the court to pay the costs of the prosecution and stand committed to the county jail until the same were paid. Afterward, and while in the custody of an officer who had full authority to commit her to jail, as ordered by the court, she gave to such officer a note and a chattel mortgage for the amount of said costs, and in consideration therefor the officer released her. The mortgage was given to the officer and to the state jointly, to secure said note, and was given for no other consideration than said release. The officer did not agree to pay said costs, except possibly by implication he agreed to pay them as he collected the same from W. on said note, or as he made the same from the sale of said mortgaged property; and said costs have never been paid: *Held*, That W. was not released from paying said costs, nor legally released from said imprisonment; that said mortgage was without sufficient consideration, and is therefore void.
2. ——— *Replevin will Lie, to Recover Goods held by an Officer under a Void Mortgage.* The mortgage contained a stipulation that the mortgagor should retain the mortgaged property in her possession until default, unless the property should depreciate in value, etc. Afterward the officer took said property into his possession because of a supposed depreciation in value, and the mortgagor then replevied the same from the officer: *Held*, That the mortgagor is not estopped from claiming that said mortgage is void, and she may maintain said action of replevin for the recovery of the property upon the ground that said mortgage is void.

Error from Sedgwick District Court.

REPLEVIN, brought by Mrs. Wilson, to recover possession of a span of horses, alleged to have been wrongfully taken and wrongfully detained by McCartney. All necessary facts are

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stated in the opinion of the court. Trial at the March Term 1875 of the district court. Judgment for plaintiff, and *McCartney* brings the case here on error.

Adams & English, for plaintiff in error.

Kirkpatrick & Harris, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action of replevin brought by Mary J. Wilson against J. W. McCartney. The property in controversy belonged to Mrs. Wilson, but McCartney claimed to be entitled to the possession thereof by virtue of a certain chattel mortgage executed by Mrs. Wilson to himself to secure the payment of a certain promissory note. The mortgage stipulated among other things, that the property should remain in the possession of Mrs. Wilson until default should be made in the payment of said note, unless Mrs. Wilson should sell or offer to sell the same, or remove or offer to remove the same from Butler county, or unless the same should depreciate in value, or unless the security should in some other manner become impaired, in which case McCartney was authorized to take the property into his possession and sell the same for the purpose of paying said note. Afterward McCartney did take the property into his possession. The record states such taking, and the grounds therefor, as follows: "*He deemed the property therein described inadequate security by reason of the great depreciation in value, and therefore he took possession of the same in order to advertise and sell the same and apply the proceeds in payment of said note, and before the sale thereof this suit was brought in replevin by the plaintiff to recover possession of said property.*" Now, there is nothing in the record which shows that said property had in fact depreciated in value, or that anything else had in fact transpired to give to McCartney the right to the possession of the property; and for this reason alone the judgment of the court below, which gave the property to the plaintiff, should be affirmed. But the plaintiff seems to have prosecuted her

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action in the court below solely upon the ground that the said mortgage was void. We shall therefore examine the case from that standpoint.

It seems that some time prior to the execution of said note and mortgage, the plaintiff was the prosecuting witness in a certain criminal proceeding, in which proceeding she was adjudged to pay the costs, and to stand committed to the county jail until the same were paid. The defendant was the officer who had her in charge, and instead of executing the judgment of the court, as he should have done, he took said note and mortgage, and in consideration thereof released his prisoner. The note was executed by Mrs. Wilson to herself, indorsed in blank, and delivered to McCartney. The mortgage was executed by Mrs. Wilson to the state of Kansas and to the defendant McCartney jointly, and delivered to McCartney. Now we think that such a mortgage is void. There is certainly no statute that authorizes the execution of such a mortgage. Mrs. Wilson might have given a bond under § 18 of the act regulating procedure before justices of the peace in misdemeanors; (Gen. Stat. 881, 882, § 18.) But there is certainly no statute authorizing such a transaction as the one which brought this mortgage into existence. Said mortgage was void because there was no sufficient legal consideration therefor. Mrs. Wilson was never released, or attempted to be released, from paying said costs. She was never legally released from her liability to suffer said imprisonment in the county jail, to which she was adjudged. She might legally have been arrested and committed to the county jail the very next minute after she executed said note and mortgage, and after she was released by McCartney. McCartney never paid said costs, or offered to pay them, and they never have been paid. The record in fact does not show that he ever even agreed to pay them, and we suppose he never did agree to pay them except possibly by implication he agreed to pay them as he collected the same from Mrs. Wilson on the note, or as he made the amount from the sale of said mortgaged property. It will therefore be noticed that this case differs widely from the case of *Converse v.*

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Safford, recently decided by this court, (*ante*, p. 15.) The note and mortgage were sustained in that case upon the ground that they were given substantially for a loan of money.

It is claimed however that Mrs. Wilson is estopped from setting up any claim that said mortgage is void; and we suppose that this claim is made upon the ground, principally, that if any wrong was done she is in *pari delicto*. This would probably be so if the note and mortgage had been executed, the property delivered, and Mrs. Wilson released, all at the same time, as parts and portions of one and the same transaction. But this was not so. It does not appear that the property was ever delivered to McCartney. On the contrary, the record shows that "he took possession of the same" long after the note and mortgage were executed, long after Mrs. Wilson was released, and probably against her will, for she (shortly after it was taken) replevied it. We suppose it will be remembered that all presumptions, from silence on the part of the record, must be construed against the plaintiff in error. Error is never presumed, but must be affirmatively shown. The presumptions are all in favor of the correctness of the decision of the court.

The judgment of the district court will be affirmed.

All the justices concurring.

THE STATE OF KANSAS V. ARTHUR WINNER

1. **JUDGMENT, Not Reversed for Immaterial Error.** A judgment will not be reversed for immaterial error, not even in a criminal case; nor where the defendant is under sentence for murder in the first degree. [*Hall v. Jehness*, 6-357; *R. R. v. Pointer*, 9-620, 627; *R. R. v. Durkee*, 10-128; *Norton v. Foster*, 12-45; *R. R. v. Little*, 19-267; *Germond v. Liltleton*, 22-730.]
2. **EVIDENCE; Acts and Declarations of Co-Conspirators.** The acts and declarations of one co-conspirator in furtherance of the principal object and design of the conspiracy, may be shown in evidence against each of the conspirators. [*Chapman v. Blakeman*, 31-684.]
3. ——— Where a party has treated certain acts and declarations, purporting to be those of a particular third person, as though the same were in fact the acts and declarations of such third person, and where such acts and declarations would be competent evidence provided they were in fact the acts and declarations of such third person, the same may be introduced in evidence against said party, and be treated as the acts and declarations of such third person, unless other evidence is introduced showing the contrary.
4. **ORDER OF TESTIMONY; Ordinarily Principal Fact to be First Proven.** Ordinarily when the acts and declarations of one co-conspirator are offered in evidence as against another co-conspirator, the conspiracy itself should first be established *prima facie*, and to the satisfaction of the judge of the court trying the cause; but this cannot be always required. It cannot well be required where the proof of the conspiracy depends upon a vast amount of circumstantial evidence—a vast number of isolated and independent facts. And in any case where such acts and declarations are introduced in evidence, and the whole of the evidence introduced on the trial taken together shows that such a conspiracy actually exists, it will be considered immaterial whether the conspiracy was established before, or after, the introduction of such acts and declarations. [*Brown v. Holmes*, 13-482; *Taylor v. Mason*, 28-381.]
5. **EVIDENCE; Acts and Declarations of Third Party, in Absence of Accused** Where a person seems to be preparing to leave a certain place, and does in fact leave, but before leaving he bids a friend "good-bye," and says he is going to a certain other place, these acts and declarations may be given in evidence along with other evidence as *tending* to show that such person did in fact go to such other place, although the party against whom they are introduced was not present at the time the acts were performed, or the declarations made.
6. **CRIMINAL LAW; Corpus Delicti; Circumstantial Evidence.** In a criminal prosecution, and even in murder in the first degree, the *corpus delicti* may be proved by circumstantial evidence.

Appeal from Sedgwick District Court.

AN information was filed in the district court, charging Joseph W. McNutt and *Arthur Winner* with the crime of murder in the first degree. The charging part of the information is as follows:

"That heretofore, to-wit, on the 25th day of December 1878, at the county of Sedgwick and state of Kansas, Joseph W. McNutt and Arthur Winner, unlawfully, and of their malice aforethought, contriving and intending one W. W. Seiver, otherwise known as 'Texas,' otherwise known as 'Tex,' then and there being in a certain frame house situated upon lot No. 73 on Main street in the city of Wichita, in the county and state aforesaid, feloniously, willfully, deliberately, premeditatedly, and of their malice aforethought, to burn, kill and murder, then and there, with force and arms, unlawfully, feloniously, willfully, deliberately, premeditatedly, and of their malice aforethought, did set fire to and burn the said frame house, he the said W. W. Seiver then and there, before, at, and during the said burning, being in the said frame house, and they the said Joseph W. McNutt and Arthur Winner then and there, before, at, and during said setting fire and burning, well knowing him the said W. W. Seiver to be in said frame house, and that they, the said Joseph W. McNutt and Arthur Winner, by so setting fire to, and firing and burning the said frame house as aforesaid, then and there did unlawfully, willfully, feloniously, deliberately, premeditatedly, and of their malice aforethought mortally burn the body of him the said W. W. Seiver, by means of which said mortally burning of the body of him the said W. W. Seiver he the said W. W. Seiver then there instantly died."

The defendants asked for separate trials, and *Winner* was tried at a special term begun and held on the 18th of May 1874. The material facts and proceedings are sufficiently stated in the opinion. The jury returned a verdict finding "the defendant guilty of murder in the first degree, as charged in the information." New trial refused. The judgment and sentence was, that the said "*Arthur Winner* be taken hence by the sheriff of the county of Sedgwick to the jail of the said county of Sedgwick, and that from thence he be taken by said

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sheriff to the penitentiary of the state of Kansas and be delivered to the warden of said penitentiary, and that he be by said warden, at such time as the governor of the state of Kansas for the time being may appoint, hanged by his neck until he is dead." From this sentence and judgment *Winner* appeals to this court. No briefs on file.

M. S. Adams, and *Harris & Harris*, for appellant.

H. C. Sluss, and *W. E. Stanley*, for The State.

The opinion of the court was delivered by

VALENTINE, J.: This was a criminal prosecution for murder in the first degree. The defendants, Joseph W. McNutt and Arthur Winner, were duly charged by information of the county attorney with killing and murdering one W. W. Seiver, otherwise known as "Texas," otherwise known as "Tex." A separate trial was granted to the defendants, and Arthur Winner was tried, convicted, and sentenced, and he now appeals to this court. The county attorney prosecuted the action upon the theory that the defendants caused the death of said Seiver in pursuance of a previous conspiracy entered into by them for the purpose of fraudulently procuring from the "Metropolitan Life Insurance Company" the sum of \$5,000. Or in other words, the defendants, in pursuance of a previous design and arrangement, procured an insurance policy from said company on the life of said McNutt for the sum of \$5,000, and then, in order to make it appear that McNutt had subsequently been killed by robbers, and thereby that the insurance money had become due, killed Seiver, under such circumstances, and burned his body in such manner, as to lead people to believe that McNutt had been killed, and that the lifeless body of Seiver was that of McNutt. We believe that the theory of the prosecution is the true theory of the case, and that such theory was sufficiently substantiated by the evidence introduced on the trial. We do not propose to discuss all the evidence however. It is voluminous and circumstantial, and composed of a vast number of minor facts which when taken separately may not

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seem to be very important in the case, but which when taken together seem to prove the guilt of the defendant beyond all reasonable doubt. To discuss only a few of these minor facts, would seem to be useless; and to discuss the whole of them, would make this opinion entirely too voluminous. We would say however, that no theory has yet been advanced except that of the prosecution which can satisfactorily explain all of these minor facts. And we do not think that any reasonable theory can be advanced except that of the prosecution. Neither do we think it is necessary to discuss all the points made by the defendant in this court. The defendant has made twenty-eight principal points in this court, and by subdividing some of his principal points has made several other minor points. Now to discuss all of these points in detail would be very much like writing a treatise on criminal law. We have examined all of these points carefully, and have also examined carefully every portion of the record to which they are supposed to apply, and we do not find any ruling or decision of the court below so materially erroneous as to require or authorize a reversal of the judgment. The only ruling upon which this court has at any time had any doubts was the admission of certain telegraphic dispatches in evidence. These dispatches are four in number, and as follows:

No. 1. "*J. W. McNutt, 73 Main street, Wichita: O. K. Tex starts this Thursday A.M. No coat or boots.*"

(Signed,) "WINNER."

No. 2. "*A. Winner, Topeka, Kansas: No money come in. All paid out. Will write.*"

(Signed,) "J. W. McNUTT."

No. 3. "*December 22d, 1873. W. W. Seiver, care H. C. Copson, Topeka, Kansas: Come to-day without fail. Go to postoffice; letter for you.*"

(Signed,) "A. WINNER."

No. 4. "*Topeka, December 23d, 1873. Winner: I leave here this afternoon train.*"

(Signed,) "W. W. SEIVER."

The objections that the defendants urged in the court below against the admission of these dispatches were, first, "That defendant could not be bound by any dispatch sent by McNutt

to him; second, that there is no proof that either of these dispatches was sent by either of the persons whose names are attached to them." The court overruled these objections, and allowed the dispatches to be read to the jury, to be considered by them on condition that they found evidence that the dispatches purporting to be sent by Winner were actually sent by him. We shall now take up the dispatches in their order.

No. 1. The evidence shows that this dispatch was sent from Kansas City, Missouri, and actually received by McNutt at Wichita, Kansas, on December 18th 1873. The evidence also shows that Winner and Seiver (otherwise called "Tex") were at Kansas City, and had a conversation with each other about that time. The evidence also shows that Seiver left Kansas City about the 18th of December, and said he was going to Wichita. He however stopped at Topeka, Kansas, and stayed there until December 24th, the day before his alleged murder at Wichita. Winner started with Seiver from Kansas City. Whether he stopped at Topeka or not, we think the evidence does not show. He arrived at Wichita December 19th, 1873. Immediately after McNutt received said dispatch No. 1, he sent dispatch No. 2 to A. Winner, Topeka. Winner and McNutt were partners in the painting business, and their place of business was at Wichita. Seiver was also a painter by trade. The evidence also shows that Winner was previously to December 24th 1873, and up to that time, expecting Seiver to arrive at Wichita, and that the defendants had sent money to him. Indeed, the evidence tends to show that Winner expected Seiver to accompany him from Kansas City to Wichita on December 18th and 19th, but that Seiver got off or was put off the train for some reason not shown by the evidence. We think that there is no other evidence tending to show that Winner sent said dispatch No. 1. In all probability he sent it. But even if he did not, still, it was received by McNutt, a co-conspirator, a partner in guilt as well as in business, and was received in furtherance of their common purposes and common designs, and therefore for that reason it was admissible in evidence. (1 Greenleaf Ev., §§ 111, 233, 197; Wharton's Crim.

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Law, §702, et seq.) But even if it was not admissible in evidence, still every material fact which it tends to prove was uncontestibly proved by other evidence, and therefore its admission in evidence was immaterial.

Dispatch No. 2. This dispatch was actually sent by McNutt, but whether it was ever received by Winner is not shown. It proves nothing that is material in the case however, and therefore it need not be further noticed.

Dispatch No. 3. This dispatch is numbered 4 in the record. It was actually sent from Wichita to Topeka on Dec. 24th 1873, although it is dated December 22d. There is no direct evidence showing that Winner sent it, or that Seiver received it; but in all probability both occurred. On that very same day, (December 24th,) Winner went to the office of the telegraph operator in Wichita three or four different times and asked for a dispatch from Seiver; and the telegraph operator testified that he (the operator) "asked for an answer several times before it came." And finally it did come, and it was dispatch No. 4 as above given, (numbered 3 in the record.) Winner received said dispatch No. 4 as a dispatch from Seiver, and as the dispatch he was expecting. It was sent from Topeka to Wichita on December 24th, although it is dated December 23d. At that time Seiver was in Topeka, and probably sent the dispatch.

Dispatch No. 4. We have already stated about all that is necessary concerning this dispatch. There is no direct evidence that Seiver sent it. But it must be presumed that he did, for Winner received and accepted it as a dispatch from Seiver, and as the dispatch that he (Winner) was expecting. The evidence also shows that Seiver on that same day, December 24th, was in Topeka, and there bade a friend "good-bye," and said he was going to Wichita. And he has never since been seen or heard of in Topeka or elsewhere.

We think the dispatch was properly admitted in evidence. The theory of the prosecution is, that when Seiver arrived at Wichita, which was about midnight between December 24th and 25th, the defendants immediately took him to their rooms

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and there stupefied him with whisky and laudanum, and then set the building on fire and burned him to death, and so burned his body that it was past recognition; that McNutt immediately left the state, and went to an obscure village in Ray county, Missouri, and there shaved off all his whiskers, colored his hair, and changed his name, so as to avoid recognition; that Winner remained at Wichita, attempting to make people believe that McNutt and himself were alone in their rooms on that night, that they were then and there attacked by robbers, that he (Winner) was badly injured, and McNutt killed, and that the lifeless body of Seiver found in said burning building was that of McNutt.

We think this theory of the prosecution was sufficiently proved on the trial. All these things were done in accordance with and in furtherance of the original conspiracy and design of McNutt and Winner, and therefore each was responsible for the same. Seiver was probably one of the most suitable persons that could have been found for their nefarious purpose. He was a drunken, worthless fellow, who could probably be easily induced to drink whisky and laudanum. He was without family or property, and was likely to cause as little inquiry as that of almost any other person that could have been found. The defendant claims that the evidence was not sufficient to prove that the body found in the burning building was that of Seiver. Now if it was not that of Seiver, whose body was it? Every particle of the evidence that had any application to the question tended to prove that it was the body of Seiver; and not a particle of the evidence tended to prove that it was the body of any other person. The judgment of the court below must be affirmed; and in affirming the judgment we think we decide the following among other questions, these being the most important questions in the case: 1st, A judgment will not be reversed for immaterial error, not even in a criminal case, nor where the defendant is under sentence for murder in the first degree. 2d, The acts and declarations of one co-conspirator in furtherance of the principal object and design of the conspiracy, may be shown

in evidence against each of the conspirators. 3d, Where a party has treated certain acts and declarations purporting to be those of a particular third person as though the same were in fact the acts and declarations of such third person, and where such acts and declarations would be competent evidence provided they were in fact the acts and declarations of such third person, the same may be introduced in evidence against said party and be treated as the acts and declarations of such third party, unless other evidence is introduced showing the contrary. 4th, Ordinarily when the acts and declarations of one co-conspirator are offered in evidence as against another co-conspirator, the conspiracy itself should first be established *prima facie*, and to the satisfaction of the judge of the court trying the cause. But this cannot always be required. It cannot well be required where the proof of the conspiracy depends upon a vast amount of circumstantial evidence—a vast number of isolated and independent facts. And in any case where such acts and declarations are introduced in evidence, and the whole of the evidence introduced on the trial taken together shows that such a conspiracy actually exists, it will be considered immaterial whether the conspiracy was established before, or after, the introduction of such acts and declarations. 5th, Where a person seems to be preparing to leave a certain place and does in fact leave, but before he leaves bids a friend good-bye and says he is going to a certain other place, these acts and declarations may be given in evidence, along with other evidence, as *tending* to show that such person did in fact go to such other place, although the party against whom they are introduced was not present at the time the acts were performed or the declarations made. (1 Greenleaf Ev., § 108.) The declaration of Seiver that he was going to Wichita, was in the nature of a verbal act, and is explanatory of the other acts, and is a part of the *res gestæ*. 6th, In a criminal case, and even in murder in the first degree, the *corpus delicti* may be proved by circumstantial evidence. We think this is all that is necessary. We might take up the points made by defendant and answer them *seriatim*, thus: *First*: A defendant in

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a criminal case may be arraigned and tried at a special term of court. *Second*: It is not error to refuse a change of venue where the preponderance of the evidence introduced on the application sustains the ruling of the court. *Third*: It is not error to refuse a continuance asked for on account of the absence of evidence, where the applicant has exercised no diligence to procure his evidence. But we do not think it is necessary to proceed further.

The judgment of the court below is affirmed.

All the Justices concurring.

JOHN H. SHULTZ v. N. H. SMITH *et al.*

1. SALES OF LANDS, ON EXECUTION; *Return-day of Writ*. A sheriff cannot legally sell real estate on execution after the return-day of the execution, and more than sixty days after its date and after it was issued.
2. ——— After such a sale has been made, the judgment-debtor whose property was sold may have the sale set aside, on motion in the proper district court.

Error from Howard District Court.

A DECREE of foreclosure and sale was rendered at the October Term 1874 of the Howard district court, in an action wherein *Shultz* was plaintiff, and *Smith* and wife were defendants. On the 24th of November 1874 the clerk of said court issued an order of sale (called in the record "an order of sale, or special execution,") directed to the sheriff of said county, reciting said decree, and the non-payment of the judgment-debt, and commanding said sheriff to cause the mortgaged premises described in the decree "to be appraised, advertised and sold according to law," etc., and to make due return of said writ or order "in sixty days" from the date thereof. The

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sheriff received said writ, (as shown by his return thereon,) on the 4th of December 1874, and advertised said property to be sold (and sold the same) on the 27th of January 1875, to one C. E., for \$370. At the May Term 1875 of said district court, *Shultz* moved for a confirmation of said sale. The defendants objected, and moved to set the sale aside. The motion to confirm was denied, and said sale was set aside by order of the court. From this order *Shultz* appeals, and brings the case here.

C. J. Peckham, and R. H. Nichols, for plaintiff.

Daniel Carr, for defendants.

The opinion of the court was delivered by

VALENTINE, J.: The only question presented for our consideration in this case is, whether the court below erred in setting aside a certain sheriff sale. Indeed, about the only question is, whether a sheriff can legally and properly sell real estate on execution after the return-day of the execution, and more than sixty days after its date and after it was issued. The execution in this case was issued and dated November 24th 1874, and made returnable in sixty days, and the sale was made January 26th 1875. Section 469 of the civil code provides that, "The sheriff or other officer, to whom any writ of execution shall be directed, shall return such writ to the court to which the same is returnable, within sixty days from the date thereof." (Gen. Stat. 720.) And §472 of the same code provides among other things that, "If any sheriff or other officer * * * shall neglect to return any writ of execution to the proper court, on or before the return-day thereof, * * * such sheriff or other officer shall, on motion in court, and two days' notice thereof, in writing, be amerced," etc. (Gen. Stat. 721, 722.) And all the authorities upon the subject seem to indicate that no valid act can be done by an officer under an execution after the return-day thereof, except to return the writ. *Vail v. Lewis*, 4 Johns. 450; *Haggarty v. Wilber*, 16 Johns. 287; *Devoe v. Elliott*, 2 Caines,

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248; *Banard v. Stevens*, 2 Aikins, 429; *Matthews v. Warne*, 11 N. J. L. (6 Halstead) 29; *The State v. Kennedy*, 18 N. J. L. (3 Harrison) 22; *Crews v. Garland*, 2 Munford (Va.) 491.

We think the sheriff had no authority to sell said property at the time he sold it, and therefore that the sale was at least voidable, if not void. The property probably did not bring as fair a price as it would have brought if everything had been regular and valid. The judgment-debtor, the defendant in error in this court, whose property was sold, attacked said sale in a direct manner, and at his earliest opportunity, by moving the court to have the sale set aside, and therefore if the sale was only voidable we think he had a right to have it set aside.

The order of the district court will be affirmed.

BREWER, J., concurring.

JOEL MALTBY v. JOHN J. EISENHAUER.

CONTRACT, BREACH OF; *When Damages not Recoverable*. A. contracts with B. to deliver him at a specified place, and within a specified time, 100 cords of wood at \$4 a cord. B., before any wood is delivered, gives A. an order on C. for goods to be applied in payment of the wood. A. draws goods on the order to the amount of \$112.50, and this before he has delivered any wood. B. then notifies him that he will pay but \$3.50 a cord. A. nevertheless, without any new arrangement, and without intimating that he is not acting under the contract, delivers wood enough, as he thinks, at the contract-price to pay for the goods received, and stops. Afterward, the account for goods amounting to \$8.50 more than he had supposed, he sends that amount to B., who refuses to receive it. He then, hearing that B. claims interest, and is intending to sue, pays C. \$10 to apply on the account. After the expiration of the time for delivering the wood, B. sues for the value of the goods, and on the trial A., after testifying that he delivered the wood because he wanted to put in wood for what he had got, adds: "I hauled no more for the reason that I did not want to take the risk of getting my pay; and so let the contract go." *Held*, That A. could not recover damages of B. for breach of contract.

Error from Saline District Court.

ACTION brought by *Eisenhauer*, who claimed in his bill of particulars that *Maltby* was "indebted to plaintiff in the sum of \$112.50 for divers goods, wares and merchandise by the plaintiff purchased and procured for and delivered to defendant," etc. No credits were given or stated in plaintiff's bill of particulars, and no bill of particulars or answer was filed by defendant at any time. On appeal to the district court, a trial was had at the March Term 1875. The principal facts are stated in the opinion. On the part of *Maltby*, defendant, it was, at the trial, claimed that he was entitled to recoup damages sustained by him by reason of the alleged refusal of *Eisenhauer* to receive the balance of the wood originally contracted for. On this point, after testifying that he had received goods from Ober & Bond on plaintiff's order to amount of \$112.50, for which he had delivered to plaintiff 26 cords of wood at \$4 per cord, and had paid \$10 cash, *Maltby* testified:

"Last fall sometime, I asked Eisenhauer if he would take the remainder of the (100 cords of) wood; and he said he would not take any more until this account at Ober & Bond's was settled. When Eisenhauer told me he would give only \$3.50 per cord, I had about thirty cords cut. I intended to deliver 100 cords. The men were still chopping."

And the defendant asked the court to give the following instruction to the jury, which the court refused:

"If you believe from the evidence that when this last contract for wood was made the price to be paid was the same as paid on the previous contract, which is admitted to have been \$4 per cord, and that afterward plaintiff Eisenhauer refused to pay more than \$3.50, and so informed defendant Maltby, then and under those circumstances that would be such a breach and violation of the contract by Eisenhauer as would entitle Maltby to consider the contract at an end, and wholly rescinded; and if you believe that Maltby did then treat the contract as rescinded, he is entitled to recover whatever damages he has sustained by reason of the failure on the part of Eisenhauer to perform the contract; and the measure of the

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damages would be the difference between the contract-price and the market value of the wood at the time it was to be delivered; and this you should allow him in your verdict."

Instruction refused. Verdict and judgment for plaintiff for \$4.50, and *Maltby* brings the case here on error.

T. F. Garver, for plaintiff in error.

The opinion of the court was delivered by

BREWER, J.: In the fall of 1873, Maltby made a contract with Eisenhauer to deliver to said Eisenhauer at his brick-yard one hundred cords of wood. About the time the contract was made Eisenhauer gave Maltby an order on Ober & Bond, merchants at Salina, for goods, which was in part payment of the wood to be delivered. Goods were thus drawn on Eisenhauer's account to the amount of \$112.50 before any wood was delivered, and no goods were so drawn thereafter. After Maltby began the delivery of the wood, Eisenhauer denied the contract price as claimed by Maltby, and said he would not pay it. Maltby then hauled what he supposed would be sufficient to pay for the goods he had drawn, and stopped without saying anything to Eisenhauer. No request was made for the balance of the wood, and no more was delivered. Eisenhauer claimed that the wood delivered did not pay for the goods obtained on the order, and brought this action to recover from Maltby the balance. The jury gave a verdict for the plaintiff for \$4.50, and judgment was entered for that amount, and the costs. To reverse that judgment this proceeding in error is brought.

The errors complained of are in the instructions. The court charged the jury to allow plaintiff for the goods, and defendant for the wood delivered, and for \$10 cash paid by him to Ober & Bond to apply on the account, and not to allow any damages for the breach of the contract, saying, that "the contract seems to be treated as at an end by both parties." It is of this that counsel complain, and say that the court should have given certain special instructions, one of

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which was to the effect that plaintiff, by denying the contract-price, and saying that he would not pay it, was guilty of a breach of the contract, and that defendant was justified in then treating it as broken, and was entitled as damages for the breach to the difference between the contract-price and the market-value. To what extent a contract may be held to be broken before the time of performance arrives, may not be entirely settled. There are authorities which say that, if, before the time of performing the contract arrives, the promisor expressly renounces the contract, the promisee may treat this as a breach and may at once maintain an action in respect thereof. *Crabtree v. Messersmith*, 19 Iowa, 179; *Halloway v. Griffith*, 32 Iowa, 409; *Hochster v. De Latour*, 20 Eng. L. & Eq. 157; *Damba Rly. Co. v. Xenos*, 103 Eng. C. L. (or 11 C. B., n. s.) 152; 106 Eng. C. L. (or 18 C. B., n.s.) 825; L. R., 7 Ex. 218; *Frost v. Knight*, 5 Albany Law Journal, 235; *Burtis v. Thompson*, 42 N. Y. 246; *Dugan v. Anderson*, 36 Md. 567; *Lamoreaux v. Rolfe*, 36 New Hamp. 88. Several of these cases were for breaches of contracts to marry, and the courts in many express themselves qualifiedly, and as doubtful whether the proposition was correct as applicable generally to all classes of contracts. But be the proposition ever so sound, we think it not applicable here. There was no absolute renunciation of the contract, but rather a dispute as to its terms. Plaintiff did not deny contracting for, or refuse to take the wood, or to pay therefor. He did deny that he had contracted to pay \$4 a cord, and did say that he would pay but \$3.50. Now it occurs to us that it would be carrying the doctrine of these authorities very far to apply it to every case of a dispute about one of the terms of a contract. More than that, we think the defendant's own testimony warranted the court in its instructions. He testifies that after the plaintiff had notified him that he would pay but \$3.50 per cord, he continued to deliver wood. He says he continued to deliver until he had delivered what he thought was enough to pay for the goods he had obtained, but he said nothing as to his intentions, and delivered wood after the notice, as before. And

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for the wood thus delivered he claims the contract-price. In other words, he abides by the contract, after the notice, so far as he deems necessary to pay for what he has received. And indeed, both parties treat the contract as continuing, for the one delivers, and the other receives the wood; and this, without any new arrangement between them, and without an intimation by defendant that he is not on his part carrying out the contract.

What price was the defendant entitled to receive for the wood delivered after the notice? Suppose wood had fallen to two dollars a cord: could the plaintiff have refused to pay more? or, if it had gone up to eight dollars, could defendant have recovered that? It seems to us not. We think that the wood was delivered under the contract, and that the contract-price must control.

Again, when the time for delivering the wood had passed, hearing that plaintiff was about to sue for the goods delivered, defendant sends to him \$8.50 to make up the difference between the goods and the wood, and when plaintiff refuses to receive it defendant pays Ober & Bond \$10 to apply on the account. This certainly seems inconsistent with the idea of a right to damages for breach of the contract. He says of this, himself, that he delivered 26 cords at \$4 per cord, amounting to \$104; that when he found the account was \$112.50 he sent the \$8.50 to pay the difference, and when that was refused by plaintiff he paid Ober & Bond \$10, and paid them that amount because he heard that plaintiff claimed some interest, and he wanted to avoid a lawsuit if he could. Still again, defendant testified in so many words, that he gave up the contract. This is his language: "After we had the conversation in which he said he would pay \$3.50 per cord, I hauled the rest of the 26 cords because I wanted to put in wood for what I had got. I hauled no more for the reason that I did not want to take the risk of getting my pay, and *so let the contract go.*" It would seem from this that defendant had no just cause of complaint if the court held that both parties treated the contract as at an end.

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In support of the verdict, it should be stated that plaintiff claimed that only 20½ cords of wood were delivered, and that there was a conflict of testimony as to the amount actually delivered. We think these considerations also dispose of the other questions raised in the brief of counsel, and the judgment will be affirmed.

All the Justices concurring.

SIDNEY SMITH V. SCHOOL DISTRICT No. 2.

1. *CONTRACT, to Extend Day of Payment.* A contract was made between the plaintiff and defendant for a sale of furniture from the plaintiff to the defendant. The furniture was to be paid for on the 1st of February 1874. The defendant asked for an extension of the payment for one year. The plaintiff agreed to such extension upon the express condition that the defendant would pay to the plaintiff \$4.22 for such extension. The defendant never accepted or assented to said condition. *Held*, That the time for payment was not extended.
2. ——— *Instructions, When Erroneous.* In such a case the court instructed the jury, "that if defendant notified the plaintiff that it (the defendant) could not pay for said goods according to the agreement, and asked a year's extension of time, and in reply plaintiff shipped the goods, accepting the offer to wait until February 1875, the jury will find for the defendant," wholly ignoring said condition of the plaintiff. *Held*, That said instruction was misleading, and erroneous.

Error from Nemaha District Court.

ACTION by Smith against School District No. 2, Nemaha County, on a contract for the sale and purchase of school furniture. Trial at the October Term 1874. Verdict and judgment for defendant. Smith brings the case here. The opinion contains a full statement of the facts.

Baker & Dill, for plaintiff.

Joseph Sharpe, for defendant.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by Sidney Smith against school district No. 2, of Nemaha county, for \$238.50 claimed to be due for certain school furniture furnished by the plaintiff to the defendant. Several questions have been raised in this court by counsels' brief, but the record so obscurely presents the most of them that it would be wholly useless for us to attempt to comment upon them. With reference to most of them we could hardly tell, even with the most careful investigation, whether the court below erred or not. The main question however in the case, both as to law and fact, seems to be whether the parties after making their original contract made a subsequent agreement for the extension of the time for the payment of the price of said furniture. By the original contract the furniture was to be paid for on the 1st of February 1874; and the defendant claims that by a subsequent agreement the time for such payment was extended one year. We have all the evidence before us that was introduced on the trial in the court below, and while it seems that it was supposed that such evidence proved an extension of time, yet we think it proves directly the reverse. Nor was the evidence conflicting; but on the contrary, so far as this question is concerned, it was consistent and harmonious. The clerk of the defendant testified "that he wrote a letter to plaintiff in which he as the clerk of defendant made a proposition for an extension of the time in the contract stated, or asked the plaintiff what the plaintiff would take and extend the time one year; that the plaintiff replied, and proposed to defendant that if defendant would pay him an additional sum of \$4.22 he would extend the contract one year; that to this proposition of plaintiff the defendant did not reply accepting or rejecting the offer made by plaintiff." There was some other evidence upon this same question, but it was all of the same import, except that some of it showed that some days after the defendant received the said letter from the plaintiff, but within the same month; the

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defendant sent another letter to the plaintiff denying all obligation to him, and all contract with him. The court refused to give a certain instruction to the jury for the plaintiff with reference to said extension, but gave one for the defendant upon the same subject. The instruction given for the defendant reads as follows: "The court instructs the jury, that if defendant notified the plaintiff that it could not pay for said goods according to the agreement, and asked a year's extension of time, and in reply plaintiff shipped the goods, accepting the offer to wait until February 1875, the jury will find for the defendant." This was the only instruction that was given in the case, and it was misleading, and erroneous. It is true, that the plaintiff shipped the goods after the defendant asked for the extension of time; and it is also true, that the plaintiff at the time he shipped the goods made the offer to wait for his pay until February 1875; but he made this offer only upon the express condition that he should receive for his goods \$4.22 more than he was to receive for them under the original contract; and this offer was never accepted by the defendant. There was not the slightest evidence tending to show any such acceptance. Therefore no new contract or agreement was ever made between the parties extending the time for payment; and therefore the plaintiff had the unquestionable right to insist upon payment being made under the original contract, and to insist on payment being made on February 1st 1874. This suit was commenced August 31st 1874, and was therefore commenced long after the plaintiff's claim became due. The error of the court below was in wholly ignoring the condition attached to the plaintiff's offer to extend the time for payment. The jury in accordance with the foregoing instruction rendered a verdict in favor of the defendant. The plaintiff then moved for a new trial on the grounds that the verdict was not sustained by sufficient evidence, and that the court erred in instructing the jury. This motion was overruled, and here again we think the court below erred. Judgment was then rendered upon the verdict in favor of the defendant. And for

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the errors above mentioned this judgment must be reversed, and cause remanded for a new trial.

All the Justices concurring.

S. F. NESBIT V. M. O. HINES.

1. **NEW TRIAL; Motion, When to be Filed.** Where a motion for a new trial is not filed within the statutory time, the district court does not err in overruling it. [*Odell v. Sargent*, 3-80; *Mitchell v. Milhoan*, 11-617; *Fowler v. Young*, 19-150; *Clayton v. Sch. Dist.*, 20-256; *Lucas v. Sturr*, 21-480; *Atchison v. Byrnes*, 22-65; *Pratt v. Kelley*, 24-111; *Soper v. Medberry*, 24-128; *Mullen v. Mullock*, 24-774; *Kerner v. Petigo*, 25-652; *Fisher v. Stockebrand*, 28-565; *Hover v. Tenny*, 27-133; *City v. Hamilton*, 29-2; *Fudge v. R. R.*, 31-146; *Cooper v. McDonald*, 32-58.]
2. ——— **Practice.** The supreme court will not in a case tried by a jury set aside a judgment of the district court on account of error in the admission or rejection of testimony, or in the instructions, when it appears that a motion for a new trial on account of such error has been overruled by the district court because not filed in time. [*Typer v. Sooy*, 19-599; *State v. Riddle*, 20-713; *Ingersoll v. Yates*, 21-95; *Grubbe v. Ryus*, 23-196; *State v. Benson*, 22-473; *Jarrett v. Apple*, 31-695.]
3. ——— **Waiver.** Any matter for which a new trial may be granted, is waived by the neglect of the party to move for a new trial. [*Rice v. Harvey*, 19-148; *Holland v. Mudenger*, 22-733; *Atchison v. Byrnes*, 22-65; *Clark v. Imbrie*, 25-425; *Greenwell v. Greenwell*, 28-413; *Decker v. House*, 30-616.]

Error from Doniphan District Court.

THE facts, pleadings, and proceedings, sufficiently appear in the opinion of the court. *Hines*, as plaintiff, had judgment for \$293, and costs, at the March Term 1875, of the district court, N. P., judge *pro tem.*, presiding, and *Nesbit* brings the case here.

W. D. Webb, for plaintiff in error, contended that a motion for a new trial is unnecessary. The only question it raises in this court, if overruled, is, whether or not the court below erred in overruling it. 12 Kas. 39, 44; Civil Code, § 542. The bill of exceptions is made a part of the record in this case, and errors appear therein, to-wit, the excluding of competent testimony, and the giving of erroneous instructions.

A. Perry, for defendant in error, submitted, that as the motion for a new trial had not been made and filed within three days after the return of the verdict, the errors complained of, even if they existed, were waived.

The opinion of the court was delivered by

BREWER, J.: Action on a note. The petition was in due form. The answer was, failure of consideration. On trial, defendant offered testimony in support of his answer. The testimony was rejected, and exceptions taken. The court then instructed the jury that the defense had failed, and to return a verdict for plaintiff, which was done. Exceptions were taken to the instructions. The verdict was returned on March 27th. A motion for a new trial was filed April 5th. The grounds of the motion were the matters above stated. The motion was overruled. This ruling was right. The motion was filed out of time. Gen. Stat. 687, § 308; *Mitchell v. Milhoan*, 11 Kas. 617. If it had been sustained it would have been error calling for a reversal. *Odell v. Sargent*, 8 Kas. 80. Where the grounds of a motion for a new trial do not appear, it is impossible to determine whether there was error in overruling it. *Ferguson v. Graves*, 12 Kas. 39.

Counsel for plaintiff in error would ignore the motion filed in the district court, and ask us to grant a new trial because of the errors on the trial. Can this be done? If it can, the motion for a new trial is a useless ceremony, and might as well be abandoned altogether. A party has no abstract, inherent right to a new trial. He has a right because and so far only as the statute gives it to him. It prescribes the way to obtain it, and that is by motion filed within three days. If he fails to pursue this mode he loses the benefit of any errors on the trial, and is concluded as to all matters occurring at the trial. It will be noticed that the errors complained of are only those occurring on the trial, and that the relief sought is strictly and solely a new trial because of such errors. It is not pretended that the pleadings do not warrant the judgment, or

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that there are any errors apparent in the record except in those proceedings of the trial which are brought into the record solely by the bill of exceptions. It would seem a contradiction to hold that the district court properly overruled a motion for a new trial founded upon certain errors in the trial, and at the same time that a new trial must be granted because of those same errors. It is a common ruling, that where it is claimed that the verdict is against the evidence a motion for a new trial founded upon that claim must be decided by the district court before the question will be considered in the reviewing court. *Polk v. The State*, 3 Mo. 544; *Floesch v. Bank*, 10 Mo. 516; *Rhodes v. White*, 11 Mo. 623; *Poyne v. The State*, 13 Mo. 444; *Kepner, Adm'r, v. Snively's Adm'r*, 19 Ohio, 296; *Westfall v. Dungan*, 14 Ohio St. 276; *Donohue v. The County*, 2 Penn. St. 230; *Farris v. The State*, 35 Ga. 241; *Hayward v. Ormsbee*, 11 Wis. 3; *Jewitt v. Whalen*, 11 Wis. 124; *Barnes v. Barber*, 1 Gilman, 401; *Smith v. Gillett*, 50 Ill. 290; *Kent v. Lawson*, 12 Ind. 675; *City of Aurora v. West*, 22 Ind. 88; *Hallock v. Iglehart*, 30 Ind. 327. The ruling is not so uniform where the alleged error consists in admitting or rejecting testimony, or in the instructions. In the cases from Missouri and Indiana, above cited, the ruling is, that such error will not be considered in the absence of a motion for a new trial. So also is the decision in *Evans v. Lohr*, 2 Scam. 511. But the contrary is held in 11 Wis. 3, and 50 Ill. 290. This latter case reviews and disapproves of *Evans v. Lohr*, supra. And many cases can be found in which the courts of review have set aside the judgments of lower courts on account of error in respect to the testimony or instructions, when no motion for a new trial was filed. Doubtless such rulings were correct, though we are not sufficiently familiar with the practice or statutes of the states in which these decisions appear, to have any opinion upon the question. Perhaps such matters were not proper subjects of motions for new trial, or such motions may have been (as in some decisions they are said to be) merely addressed to the discretion of the trial court, and therefore the ruling on them not the subject of review. In the case of *Kent v. Lawson*, supra, it is said that

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"any matter for which a new trial may be granted is waived by the neglect of the party to move for a new trial;" and such seems a fair statement of the rule as it obtains in the practice here. The granting of new trials is not a matter of discretion with us. It is a matter of strict right. Special grounds for the motion are named in the statute. "Error of law occurring at the trial, and excepted to by the party making the application," is one. Gen. Stat. 687, § 306. Error lies to this court from an order granting or refusing a new trial. Gen. Stat. 736, § 542. But it is said that this court may reverse the judgment of the district court for "errors appearing on the record," (Gen. Stat. 735, § 542,) and this error is brought onto the record by bill of exceptions. If a bill of exceptions is proper in any case, and without reference to whether there be a motion for a new trial, it would seem that any error that occurs may be reviewed by the supreme court without any motion for a new trial. In such case the value of those provisions of the code concerning new trials would seem slight. It cannot be meant that the supreme court *must* reverse for any error which it finds on the record. Some errors work no prejudice, and are immaterial. Some are not excepted to, and some are waived. Among those waived are "errors occurring at the trial" and not presented in a motion for a new trial.

The judgment will be affirmed.

All the Justices concurring.

JOHN H. PRESCOTT V. DAVID BEEBE *et al.*

SCHOOL LANDS—When Sold, are Subject to Taxation. The school lands of this state are, after sale, subject to taxation, although they have neither been patented, nor fully paid for; and tax deeds therefor, if in form, and based upon regular tax proceedings, convey all the interest held by the purchaser from the state. [*State v. Bankers' Ass'n*, 23-502; *Philpin v. McCarty*, 24-402; *State v. Barrett*, 27-218; *Morgan v. Comm'rs*, 27-231; *Comm'rs v. Baldwin*, 29-541; *Baker v. Newland*, 25-26; *Oswalt v. Hollowell*, 15-154.]

Error from Saline District Court.

INJUNCTION, brought by *Prescott*. The S.W. $\frac{1}{4}$ of sec. 36, in township 14 south, range 3 west, in Saline county, was a part of the lands reserved to the state as "school lands." In January 1869 said tract of land was sold in accordance with the laws of this state for \$800, payable in ten equal annual installments, with interest. One George Pearson was the purchaser. Pearson assigned his certificate of purchase to *Prescott*. Said land was assessed in 1869 for the purposes of taxation, and was valued at the full sum of \$800. The taxes not being paid, the land was sold at tax-sale in 1870, defendant *A. M. Beebe* being the purchaser at such sale. In 1878, shortly before a tax-deed was due on said tax-sale, *Prescott* commenced this action, making said *A. M. Beebe*, and *David Beebe*, county clerk, defendants, to enjoin and restrain the issuing of a tax-deed to said *A. M. Beebe* on the sale-certificate held by him for said taxes of 1869. Said *A. M. B.* had paid the taxes on said land for 1870, 1871 and 1872, and such taxes were duly endorsed on the sale-certificate held by him. The application for a temporary injunction was made at the May Term 1878, J. G. S., judge *pro tem.*, presiding. The injunction was refused, and *Prescott* appeals, and brings the case here on error for review.

C. A. Hiller, for plaintiff, contended, first, that ch. 94, Gen. Stat. 1868, "an act to provide for the sale of school lands," is unconstitutional and void, as to §14 thereof, on the subject of taxation, because the law contains more than one subject, and

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one not clearly expressed in its title. 2d, This section, and the tax law, are unconstitutional and void, as impairing the obligations of the contract with the United States regarding the disposal of school lands by the state. 3d, The laws providing for the taxation of this class of lands are unconstitutional and void, in that they do not provide for a *rate* of assessment and taxation, uniform and equal with other property. 4th, If these lands be taxable, the provisions of the law are illegal in providing a remedy by sale and deed of the land itself, whereby a title in fee is created out of a mere contingent interest of the purchaser of school lands; and there is no law for conveying such purchaser's interests. Cooley on Taxation, 4, 131, 476; Const. of Kas., art. 2, §16; 19 Ark. 360; 6 McLean, 386; 87 Ill. 82; 7 Cranch, 164; 4 Wheat. 316; Cooley Const. Lim. 127, 280; 86 Cal. 220; 5 Kas. 362; 6 Kas. 615; 21 Wis. 688.

John Foster, for defendants, against plaintiff's propositions, cited, 6 Kas. 333; Cooley on Taxation, 54, and cases there cited; 69 Penn. St. 138; 7 Kas. 222; 3 Kas. 201, 347; 15 Kas. 154.

The opinion of the court was delivered by

BREWER, J.: The question in this case is, whether school lands, after they have been sold, and before they are fully paid for, are subject to taxation and to sale and conveyance by tax-deed. The plaintiff in error claims that this land cannot be conveyed by a tax-deed, for the following reasons: "First, The law in reference to the sale of school lands, is unconstitutional and void, as to said §14, on the subject of taxation, because the law contains more than one subject, and one not clearly expressed in its title. Second, This section, and the tax-law, are unconstitutional and void, as impairing the obligations of the contract with the United States regarding the disposal of school lands by this state. Third, The laws providing for the taxation of this class of lands, are unconstitutional and void, in that they do not provide a *rate* of assessment and taxation

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uniform and equal with other property. Fourth, If these lands be taxable, the provisions of the law are illegal in providing a remedy by sale and deed of the land itself, whereby a title in fee is created out of a mere contingent interest of the purchaser of school lands; and there is no law for conveying such purchaser's interests."

None of these reasons are, we think, sufficient. Sec. 14 above referred to, (Gen. Stat. 945,) reads, "No purchaser of school lands prior to his obtaining title to the same, shall commit waste upon such land, or take or remove mineral or timber from the same, other than for use upon or improvements of said land. The lands purchased under this act shall be subject to taxation as other land, and in case of nonpayment of any taxes charged thereon, the said lands may be sold as in other cases; but the purchaser at said sale shall be subject to all the conditions of the bond of the original maker, and of the certificate of purchase." The title of the act is, "An act to provide for the sale of the school lands;" and the subject-matter of the act is fairly indicated by its title. Surely, a section defining the interests and rights acquired by a purchaser of these lands, is germane to the subject, and within the scope of the title. The state holds the land free from taxation under that provision of the tax-law which exempts "property belonging exclusively to this state." Gen. Stat. 1021, § 3. Should not a statute authorizing a sale prescribe whether such a sale carried with it the exemption? and could such a provision be held foreign to the subject-matter? *Bowman v. Cockrill*, 6 Kas. 333; *Comm'rs Sedgwick County v. Bailey*, 13 Kas. 600. We fail to see wherein the taxing of these lands after they are sold conflicts with the obligations of any contract made with the United States regarding them. Doubtless the lands would sell for more if they were permanently or even temporarily exempted from taxation in the hands of individuals; but when or by what instrument did the state contract to so exempt them?

Nor do we see any section of the law which orders a different rate of assessment and taxation in respect to these lands from that prevailing as to all other lands. The solitary pro-

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vision is, that "the lands purchased under this act shall be subject to taxation as other lands," etc. The real objection of counsel is exactly the reverse of this, and that is, that this property is assessed and taxed at the same rate as other property, when it ought not to be because the purchaser does not hold the full equitable or legal title. In other words, there is an equitable mortgage on the land belonging to the state, and in the assessment this mortgage ought to be deducted from the value of the land; the purchaser's interest in the land should be taxed, and not the land itself. But in no other case is the amount of an incumbrance deducted from the value of the land in assessing it for taxation. The land is assessed at its full value, and no account is taken of any mortgage or other lien. This may work a hardship on the land-owner, especially when the incumbrances nearly equal the value of the land; but still it furnishes no basis for enjoining the tax. The fact that the state holds the lien, can make no difference. That may render the mortgage exempt from taxation. So it would be if held by a non-resident. And in California it has been decided that taxing mortgages is itself double taxation, and cannot be tolerated, though the contrary is the general current of decision. But none of these questions affect the land-owner. It is one and the same thing to him whether the state, a non-resident, or a resident, owns the mortgage. His land is assessed at the same valuation. He is only interested in this way, and that in common with all others, that the more property there is within the state subject to taxation, the less will be the amount of the tax upon each. Nor does the state school-fund suffer any loss. The holder of the title simply takes the interest of the purchaser. In other words, he buys the land charged with the state's lien. Such is the plain language of the statute. And in this it differs from the case of an ordinary mortgage. There, the tax-deed conveys the land discharged by the lien; here, still charged with it. But this is a matter of which the holder of the tax-deed may alone complain. He alone is wronged, if anybody. And in this case he is satisfied with and insisting upon his deed. But it is said that it is apparent,

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from § 16 of the act, that the purchaser forfeits the land in case of a failure to make the deferred payments at the stipulated times, and that he therefore has neither a legal nor equitable title, but only a "contingent, conditional and inchoate equity," which according to *Parker v. Winsor*, 5 Kas. 362, *Comm'rs of Douglas Co. v. U. P. Rly. Co.*, 5 Kas. 615, is not subject to taxation. It is unnecessary to inquire what would be the rule independent of § 14 above quoted, or whether but for that the interest conveyed would be sufficient to render the land as such taxable. For with it the case stands thus: The constitution only restricts the legislature from taxing property "*used exclusively for state*" and other purposes. That has no application to these lands. They are in no sense "*used exclusively*" for any of the purposes there named. Taxing the interest passed by a sale of these lands, in no way conflicts with any contract made with the United States, or the terms of any grant by it to the state. Being property within the state, and owned by the state, it is subject to legislative control. The legislature has provided for its sale, and in terms declared that when sold, although not fully paid for, it shall become subject to taxation. The purchaser buys with full notice of this condition. Can he complain if it is enforced? We think not.

The judgment will be affirmed.

All the Justices concurring.

CHARLES A. BLISS *et al.* v. ALLEN CARLSON.

CONTINUANCE; Discretion of Court. The matter of continuance is largely within the discretion of the trial court, and its ruling thereon will be sustained unless it appears that such discretion has been abused. [*Association v. Hitchcock*, 4-36; *Hollenstein v. Conrad*, 9-436; *Davis v. Wilson*, 11-74; *Swenson v. Aultman*, 14-273; *Payne v. Bank*, 16-148; *Hockett v. Turner*, 19-529; *Slate v. Hagan*, 22-490.]

Error from Cowley District Court.

ACTION by Carlson against Bliss & Blandon. Trial at the March Term 1875. Verdict and judgment for plaintiff, and defendants bring the case here. The material facts, and errors complained of, are stated in the opinion.

L. J. Webb, and *D. A. Millington*, for plaintiffs in error.

J. M. Alexander, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: The only question presented by counsel is, whether there was error in refusing a continuance. The action was brought before a justice of the peace; the amount claimed was \$115, and claimed as a balance on a building-contract, due since July 1872. On appeal to the district court judgment was recovered for \$61.50. The affidavit for continuance was filed in the latter court on March 26th 1875, and alleged as ground for continuance the absence of a material witness. In reference to his absence, and the probability of procuring his testimony, the allegations are, "that the defendants have not been able to obtain the testimony of said witness; that said witness is somewhere in the territory of Colorado, but just where, or what his post-office address is, affiant does not know, although he has made numerous inquiries to ascertain it; that said absent witness went to Colorado in the spring of 1874, since which time defendant has not heard from him. Affiant further says that he expects to procure the testimony of said absent witness for the next term of this court."

The matter of continuance is largely within the discretion

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of the trial court, and its ruling thereon will be sustained unless it appears that such discretion has been abused. *Ed. Ass'n v. Hitchcock*, 4 Kas. 40; *Hottenstein v. Conrad*, 9 Kas. 436; *Davis v. Wilson*, 11 Kas. 74. That disposes of this case, for it cannot be said that the court abused its discretion in refusing a continuance upon such a showing. The amount in controversy was small. The witness had been absent a year. His exact whereabouts were unknown. "Numerous inquiries" had failed to discover him. The defendant said he expected to procure his testimony at the succeeding term, but no facts were alleged from which the court could see that there was any probability thereof. *Smith v. Williams*, 11 Kas. 104.

The judgment will be affirmed.

All the Justices concurring.

ROBERT HOGG V. ALBERT A. GREEN.

ACTION ON REPLEVIN BOND; Liability of Surety. A. signed a replevin bond in an action brought before a justice of the peace by B. against C. At the time of signing the bond he received from B. certain personal property, to hold as indemnity. Judgment was rendered by the justice in favor of B. for a small portion of the property claimed. The ten days in which to perfect an appeal passed without the filing of an appeal bond. A. returned to B. the property held as indemnity, notified B.'s attorneys not to consent to an appeal, and ordered out an execution. The execution was levied on sufficient property to satisfy it. Subsequently a stipulation waiving the necessity of filing an appeal bond in ten days was signed by the attorneys of the respective parties, an appeal bond filed, and the case taken to the district court. There a trial was had and judgment rendered in favor of C. for costs. An execution thereon against B. was returned unsatisfied, and an action brought against A. on the replevin bond. *Held*, That the action would lie.

Error from Jackson District Court.

A SUFFICIENT statement of the facts will be found in the opinion. *Green* had judgment for \$157, at the April Term 1875 of the district court, and *Hogg* brings the case here.

Dodge & Keller, for plaintiff in error.

Chas Hayden, and *W. S. Hoaglin*, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: The facts in this case are these: One Kenneth McLennan commenced an action of replevin before a justice of the peace against defendant in error, Albert A. Green. Robert Hogg, the plaintiff in error, went on the replevin bond. At the time of signing this bond McLennan gave to Hogg some personal property to hold as indemnity against loss by reason thereof. Judgment was rendered by the justice in favor of McLennan for one of several articles claimed, and costs. The ten days in which to perfect an appeal passed without the filing any bond, and Hogg returned to McLennan the property held as indemnity, notified McLennan's attorneys not to consent to any appeal thereafter, and ordered out an execution. The execution was issued, and levied on enough personal property to satisfy it. Subsequently a stipulation for appeal was signed by the attorneys of the respective parties, an appeal bond filed, and the case taken to the district court. There a trial was had, and judgment rendered in favor of Green for costs. An execution against McLennan was returned unsatisfied, and then this action was brought on the replevin bond to recover those costs. Is the plaintiff in error liable on the bond? We think he is. His bond was conditioned to pay all costs that might be awarded. Any arrangement for indemnity was personal to him and McLennan, and could not in the slightest degree affect his liability on the bond. Whether the same was known or not to Green, was entirely immaterial. One who signs a replevin bond assumes all the liability the law gives to such a bond, and can by no personal arrangement with the party for whom he signs limit or affect such liability. The bond is a protection to the adverse party, and he alone can release or relieve the surety. Nor has the surety, by virtue of signing the bond, any right to control the proceedings in the

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action. His forbidding the attorneys to do this and notifying them to do that, amounts to nothing. They are responsible to their clients, and look to them alone for directions. It would seem very much as though the surety in this case had full control of the action, and could order out process, and stay proceedings, without regard to the wishes of the plaintiff. Neither is the surety discharged by a failure of the party to insist upon every legal right. Here the plaintiff waived the right to insist upon the filing of the appeal bond within ten days. It does not appear to have been a mere wanton act, for he had recovered judgment before the justice for only a small part of his claim. It is reasonable to suppose that he thought that he had a just claim to all he demanded, and that upon a further trial he could make it so appear, and therefore in all honesty and fairness waived the filing of the appeal bond within the ten days. He might have waived a bond altogether, and still the case have passed by appeal to the district court. The surety must abide the result of the action, and it was the same action in the justice's and district courts.

The judgment will be affirmed.

KINGMAN, C. J., concurring.

W. J. HERMAN *et al.* v. WILLIAM MILLER.

1. **SETTING-OFF JUDGMENTS; Discretion.** While the courts have the power to off-set judgments upon motion, yet the exercise of that power is in a measure discretionary, and it will not be exercised in cases in which it would be inequitable to do so. [*Turner v. Crawford*, 14-499.]
2. ——— Where A., a creditor of B., brought suit upon his claim, and in the action caused an attachment to be issued and levied upon the property of B., which attachment was afterward vacated and set aside, and an action for damages brought by B. against C., the surety on the attachment bond, and where in each action judgment was duly recovered, and thereafter A.'s judgment was assigned to C., and where the record fails to disclose any of the facts concerning the attachment proceedings except that they were vacated and set aside, this court is unable to say

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that it was unjust or inequitable to overrule the motion of C. to set-off the two judgments.

1. ——— A party must be the absolute and beneficial owner of a judgment before he can have it set-off a judgment against him. [*Read v. Jeffria*, 16-534.]

Error from Labette District Court.

HERMAN and another, as assignees of a judgment rendered by the district court against *Miller*, moved that such judgment be set-off against a judgment *Miller* had recovered in said court against them. The district court, at the June Term 1875, denied such motion to set-off, and the *Hermans* bring the case here for review. All the facts are stated in the opinion.

True & Madaris, for plaintiffs in error.

A. H. Ayres, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: The plaintiffs in error moved the district court of Labette county to set-off one judgment against another. The court overruled the motion, and this ruling is now presented for review. The facts are these: The Laffin & Rand Powder Company sued Miller. In that action an attachment was issued, and plaintiffs in error went on the bond as sureties. The attachment was dissolved, and Miller brought suit on the bond against plaintiffs in error for damages. Both actions stood for trial at the same term. The first-named case was tried first, and judgment entered, and thereafter, and before the verdict in the second was returned, this assignment was filed, to-wit:

"For the purpose of indemnifying Sylvester F. Herman and W. J. Herman, the defendants in the case now pending in this court wherein Wm. Miller is plaintiff and said parties are defendants, the plaintiffs herein hereby assign to Sylvester F. Herman and W. J. Herman the proceeds in the above-entitled cause. June 15th, 1875.

"LAWLIN & RAND POWDER Co., Plaintiffs,
By *True & Madaris*, their Attorneys."

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In reference to this, one of the attorneys testified that he was instructed by the plaintiffs to make this assignment to the Hermans "to indemnify them against any loss in this case," that is, the one in which Miller sued them. And again: "I assigned because Miller was worthless, and I could not collect the Laffin & Rand Powder Co. judgment against him." And again: "The company assigned to the defendants the judgment they recovered against Miller in that action to indemnify them in this action, and enable them to meet and satisfy whatever damages Miller might recover in this action by an equal amount of Miller's indebtedness to the company for whom the defendants signed the bond on which this action is based." After the verdict was returned in the second suit Miller assigned his verdict and claim to his attorneys for fees.

Should the ruling of the district court be reversed, and a set-off ordered? We think not. While courts have the unquestioned power to off-set judgments upon motion, yet the exercise of that power is in some degree discretionary, and it will not be exercised in cases in which it would be inequitable so to do. *Taylor v. Williams*, 14 Wis. 155; *Burns v. Thornburgh*, 3 Watts, 78; *Simson v. Hart*, 14 Johns. 63; *Zogbaum v. Parker*, 55 N. Y. 120; *Waterman on Set-Off*, § 842; *Simpson v. Lamb*, 40 Eng. L. & E. 59. In the case from 3 Watts, the court says, that "the power to set one judgment off against another is an inherent one, and the only equitable power which the common-law courts originally possessed. Not being conferred by the statute, it is not a legal power, nor its exercise demandable of right; and being discretionary, the propriety of its exercise cannot be questioned here, where we are incompetent to judge of the circumstances." And in the case in Johnson's Reports, it was decided that "a court of law allows set-offs of judgments *ex gratia*, but a party applying to a court of equity is entitled to it as a matter of right." It is apparent from the facts of this case that the court in the above quotation was comparing the remedy by motion with that by bill in equity, and that it meant thereby that while the grant-

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ing or refusing a motion to set-off judgments was a matter of discretion, and not reviewable, yet when the same relief was sought by bill in equity it was not a matter of discretion, but the court was bound to determine the rights of parties according to the established principles of equity. Even in such cases, therefore, no set-off would be decreed unless it were equitable to do so. See also *Dunkin v. Vandenburg*, 1 Paige, 622, in which the chancellor holds, that, "The power of the court of chancery to set-off one judgment against another *on motion* is the same as that of the common-law courts. It is only on bill filed that its jurisdiction is more extensive." And see *Brown v. Warren*, 43 New Hamp. 430; *Camp v. Paige, Adm'r*, 40 Ga. 45; *Bickman v. Manlove*, 18 Cal. 388; *Collet v. Jones*, 7 B. Mon. 586; *Duff v. Wells*, 7 Heisk. (Tenn.) 17. It appears in the case from 18 Cal. that one W. recovered a judgment against Bickman; that execution was issued thereon, and placed in the hands of Manlove, the sheriff, who levied upon certain exempt property belonging to Bickman, and sold it. The latter sued the sheriff for the value of this property and recovered a judgment therefor. W. assigned his judgment to the sheriff, and the latter moved to set-off one judgment against the other. The court held that this could not be done; that it would be unjust, and practically an evasion of the exemption law. Similar views were expressed in the cases cited from Kentucky and Tennessee. In the latter, the court says, that "The statute of this state, and the general rule, that judgments of the same courts may be off-set against each other are applicable only to such judgments as are founded upon matters *ex contractu*." But *contra* to the views of these last cases, see *Temple v. Scott*, 3 Minn. 419. We do not understand the law to be as stated in some of the above quotations, that the granting or refusing of a motion to set-off judgments is a matter purely *ex gratia*, and not subject to review, but we do understand that the determination of such a motion is to be upon strictly equitable principles, and that the mere existence of mutual judgments, though in the same court, and held by

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the same right, does not entitle a party as a legal right to an order directing a set-off. In this case it does not appear that it would have been equitable to have set-off one judgment against the other; or rather, as the facts of the attachment are not fully presented in the record, it does not appear that it was not equitable and just to refuse to set them off. An attachment against the defendant Miller was wrongfully issued. How great a wrong this was, does not appear. There may have been a mere technical omission which caused the attachment to be set aside, or it may have been a wanton and gross outrage upon the rights of Miller. Exempt property may have been seized, or some little business he was prosecuting, and in which he was protected by law, deliberately broken up, because of a failure to pay a debt he was actually unable to pay. To hold that a creditor may resort to unjustifiable and illegal means to harass and annoy his debtor, and then successfully use his judgment to prevent any actual reparation for the wrongs done, would be practically to nullify those laws which the wisdom of the legislature has enacted for the benefit of the honest but unfortunate debtors. We cannot say from anything in the record before us that the district court abused its discretion in refusing to set the one judgment off against the other.

Again, a party must be the absolute and beneficial owner of a judgment before he can have it off-set a judgment against him. It seems fairly questionable whether this assignment was an absolute and unconditional transfer, or made simply to cancel by off-set the judgment in favor of Miller, and intended to be made only to the extent necessary to accomplish that purpose. The assignment was made before Miller had any verdict, and while it was yet uncertain whether he ever would have one, or if he did, what would be its amount. Suppose Miller had recovered nothing, what interest would the Hermans have taken by this assignment in the powder company's judgment? See upon this point, the cases of *Miller v. Graham*, 7 Cow. 468; *Turner v. Satterlee*, 7 Cow. 480;

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Aiken v. Satterlee, 1 Paige, 289; *Mason v. Knowlson*, 1 Hill, 218.

The judgment will be affirmed.

All the Justices concurring.

CALVIN N. HOUCK v. EBEN L. KELSEY.

RIGHTS OF PRE-EMPTOR, *Not to be Questioned by Stranger.* No one without a prior equitable right can question, in the courts, the claim of the pre-emptor who holds the title from the government. If the preëmption was fraudulently obtained, the government may set it aside; but if the government acquiesces in it, a third party, having at the time no interest or equity in the land, cannot disturb the title. [*Lapham v. Head*, 21-339; *R. R. v. Fracht*, 30-75.]

Error from Montgomery District Court.

EJECTMENT, brought by *Kelsey*, to recover possession of a quarter-section of land in Montgomery county, which he claimed to own in fee. *Houck* admitted possession, but claimed to be the equitable owner, alleging such facts as would entitle him to a preëmption-right to government land, and alleging that plaintiff's title was obtained through fraud practiced against the government by plaintiff's grantor. Second trial at the March Term 1875 of the district court. Judgment in favor of *Kelsey*, and *Houck* brings the case here.

Turner & Ralstin, for plaintiff in error.

Geo. & Jos. Chandler, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This case comes before us upon the allegations of the pleadings. The action was ejectment. The legal title of defendant in error was admitted, and plaintiff in error claimed an equitable title. And these are the facts alleged to show his equitable title: The land was entered by one Dallas

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Taggart on July 10th 1871, by him conveyed to C. E. Kelsey, and from him to defendant in error. Both the Kelseys received title with full knowledge of all the facts. The land was subject to entry only by actual settlers in good faith. Taggart was not a settler, but by false and fraudulent testimony made his proofs, and obtained his certificate. The land being vacant, Houck moved upon it, on the 2d of August 1872, with the intention of preëmpting it; he made valuable and lasting improvements thereon, and has ever since continued to occupy it. He was qualified to make a valid preëmption of government land, took all the steps necessary to perfect his right to preëempt this land, and sought to make an entry and receive a certificate, but the land-officers rejected his application on the ground that the land had already been entered by Taggart. From this statement, these things appear: 1st, Kelsey's title was fraudulently obtained from the government; 2d, it was so obtained long before Houck had any possession of or interest in the land; 3d, the government is not disposed to question the fraudulent proceedings of Taggart, or to disturb the title acquired thereby. And from them it follows, that Houck is in no position to question Kelsey's title. In *Caruthers v. Weaver*, 7 Kas. 110, it was decided that a person having no title to or equities in a tract of land cannot question the consideration or good faith of one of the conveyances in the chain of title thereto. The principle is a plain one. If A. by fraud obtains a deed from B., it is B. that is wronged; and if he is willing to abide by the wrong, C., a stranger to the land, has no right to interfere, and say that the deed must not stand, and that the sale must be set aside. The party wronged is the only one who has any right to question the transfer. And that which is true in the case of individuals, is equally true when the grantor is the government. If a fraud is perpetrated upon it, and thereby a conveyance wrongfully obtained, it alone can set aside the transfer and recover the land. A stranger cannot right its wrongs, or compel it to take back lands which have been fraudulently obtained from it. The authorities are clear upon this proposition. "A third

party cannot raise in ejectment the question of fraud as between the grantor and grantee, and thus look beyond the patent or grant." *Field v. Seabury*, 19 How. 324. In the case of *Spencer v. Lapsly*, 20 Howard, on page 272, Justice Campbell quotes approvingly the language used by Baron Parke in delivering the opinion in the case of *Stephenson v. Newman*, 16 Law and Equity, to-wit: "The effect of ordinary fraud is not absolutely to avoid the contract or transaction which had been caused by the fraud, but to render it voidable at the option of the party defrauded. The fraud only gives the right to rescind. In the first instance the property passes in the subject-matter, and vests till avoided. It is well settled, that one without a prior equitable right to the land cannot attack in the courts the claim of the pre-emptor who holds the title from the United States. The land department at Washington may cancel the entry; but the courts have no right to examine into the regularity of proceedings before the register and receiver, unless the claimant shows a prior equitable right to the land when the pre-empter entered it." *Mumford v. McKinney*, 21 La. An. 547. A patent cannot be attacked collaterally even for fraud, whether charged to have existed in the procurement of the original grant, or in the proof of its execution, or in making the survey. For in these matters the right of interference rests only with the government. Individuals can resist the conclusiveness of the patent only by showing that it conflicts with prior rights vested in them. *Moore v. Wilkerson*, 13 Cal. 478. "Now it is apparent that all this charge, as made in the answer, tends to show that the United States were defrauded by this proceeding. These defendants did not suffer therefrom. But the United States do not complain. On the other hand, with every means of inquiring into such a matter in their own tribunals, by their own officers, they accept the sale as a fair one. * * * These defendants cannot avail themselves of an injury, which they charge another has suffered, when the injured party does not only not complain, but even affirms the act by which it was inflicted." *Root v. Shields*, 1 Woolworth, U. S. Ct. Ct. 840. See also *Stark v. Barrett*, 15 Cal. 361; *Mahoney v. Van Winkle*, 83 Cal. 448; *Gibson v. Chouteau's Heirs*, 39 Mo. 536, 565; *United States*

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v. Stone, 2 Wall. 525; *Waterman v. Smith*, 13 Cal. 378; *Leese v. Clark*, 18 Cal. 535; *Brush v. Ware*, 15 Peters, 93. It seems unnecessary to multiply authorities in support of a proposition that is so clear.

The judgment will be affirmed.

All the Justices concurring.

R. S. CROSS V. BURLINGTON NATIONAL BANK.

1. PARTNERSHIP—*Proof of, by General Reputation.* May the general understanding and report of the community be shown in connection with and corroboration of other evidence to prove the existence of a partnership? *Quere.* [*Rizer v. Waters*, 26-221.]
2. OBJECTIONS TO TESTIMONY, *Must be Stated.* An objection to the admission of testimony, in order to be made available in this court as a basis for challenging the ruling of the district court thereon, must ordinarily specify the grounds of the objection. [See cases cited, *ante*, 256; also, *Davis v. Wilson*, 11-81; *Ogden v. Walters*, 12-291; *Long v. Kasebeer*, 28-240.]
3. INCOMING PARTNER—*Liability for Existing Debts.* While an incoming partner is not liable for the prior debts of the firm without a special promise, yet very slight testimony will be sufficient to prove an assumption by him of those debts.

Error from Coffey District Court.

THE *Burlington National Bank*, as plaintiff, recovered a judgment against *Cross*, as defendant, at the December Term 1874, for \$3,592.64, and costs, and *Cross* brings the case here on error. The facts are stated in the opinion.

Martin & Case, and *J. M. Sheafor*, for plaintiff in error.

A. M. F. Randolph, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This action was on a note given by D. Cross & Sons to the defendant in error. The case was tried by the court, without a jury. No special findings were made, but

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only a general finding in favor of the bank. The bank claimed the plaintiff in error was, at the execution of the note, a member of the firm of D. Cross & Sons, and liable thereon. Two questions are presented. Did the court err in the admission of evidence? and does the evidence warrant the judgment? The firm of D. Cross & Sons were operating a flour mill, and in proof that plaintiff in error was a partner therein the court received testimony that he was in the active management of the mill, that he made deposits, drew checks, and paid drafts in the firm name; that he put money into the business; that he made improvements about the mill, and talked much about what they were going to do; that a deed of one-third interest in the mill property was made to him some months prior to the execution of this note, and that it was the common understanding and report in the community that he was a partner. The last is the only testimony concerning which there can be any serious question. It seems to trespass on the rule which forbids hearsay testimony. An examination of the books shows that the authorities are conflicting. Thus, it was declared competent in *Allen v. Rostram*, 11 Serg. & Rawle, 373; *Whitney v. Sterling*, 14 Johns. 214; *Gowan v. Jackson*, 20 Johns. 176; *Bernard v. Torrence*, 5 Gill and Johns. 388. In some of these cases it was held to be competent only when received in connection with and corroborative of other evidence of the partnership; and such seems to be the views of Prof. Greenleaf, 2 Greenl. Ev. § 488. See also *Turner v. McIlhane*, 8 Cal. 575; *Carlton v. The L. W. Mill*, 27 Vt. 296. Other authorities declare it incompetent under any circumstances. *Brown v. Crandall*, 11 Conn. 92; *Halliday v. McDougall*, 20 Wend. 88; *Halliday v. McDougall*, 22 Wend. 264; *Sinclair v. Wood*, 3 Cal. 98; *Earl v. Hurd*, 5 Blackford, 248; *Inglebright v. Hammond*, 18 Ohio, 387; *Hicks v. Cram*, 17 Vt. 449; *Scott v. Blood*, 16 Maine, 192; *Bowen v. Rutherford*, 60 Ill. 41. In support of the testimony, it may be remarked, that one who is not a member of a firm may make himself liable to a third party as a partner therein, if he permits himself to be held out as a partner, or if his acts and

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conduct are such as fairly and justly to induce the belief that he is a partner. In the latter case, the mere belief of the party is not sufficient. The acts and conduct must be such as are reasonably and fairly sufficient to justify such a belief. Proof that the community generally understands and believes him to be a partner, tends to prove that his acts and conduct have been such as naturally, fairly and reasonably create such a belief. It therefore supports the reasonableness of the party's belief. In that light, it may perhaps, in some cases be competent testimony in connection with and corroborative of other evidence. In this case the officers of the bank testified that they supposed plaintiff in error was a partner. Evidence was given of his acts and conduct tending to show him a partner. Does it not support the reasonableness of the officers' belief, that the entire community were led by the same facts and circumstances to look upon him as a partner? But again, no grounds of objection were stated; and it is a general rule, that if a party does not state his grounds of objection the court is under no obligations to search for any. It is like an allegation of error without any specification of the supposed error. *Walker v. Armstrong*, 2 Kas. 199; *Wilson v. Fuller*, 9 Kas. 176; *Luke v. Johnnycake*, 9 Kas. 511; *Marshall v. Shibley*, 11 Kas. 114.

Did the evidence warrant the judgment? If the question were simply whether the plaintiff in error was a partner at the time of the execution of the note, we should have little hesitation, for while the testimony of plaintiff in error, and of S. K. Cross, one of the partners, is positive and clear that he was not, yet there was abundance of testimony, circumstantial it is true, but sufficient to show that he was a partner; and any mere conflict of testimony must, as we have over and over decided, be settled by the trial court. Taking out the testimony of the two Crosses, and a very strong case would remain. The plaintiff in error receives a deed of one-third the property, comes and assumes the active management of the business, puts money into it, makes deposits, draws drafts and checks in the name of the firm, makes improvements in the property.

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and so acts in reference to the business and property that the community generally consider him a partner. Surely this is ample to support a finding that he was a partner. And it concludes this court upon the question. *U. P. Rly. Co. v. Kunkel*, ante, 146. But the point of difficulty lies in the fact that the

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loan for which this note was given was originally made several months prior to the time at which it is claimed plaintiff in error joined the firm, and it is said that an incoming partner is not liable for a prior debt of the firm without a special promise. As Chancellor Kent says, in vol. 3 of his Commentaries, page 36, "It is a general and well-established principle, that when a person joins a partnership as a member, he does not, without a special promise, assume the previous debts of the firm, nor is he bound by them." In reference to this, these facts appear: The firm of D. Cross & Sons was in existence at least as far back as 1871, and engaged in the flouring-mill business. The firm then consisted of D. Cross, S. K. Cross, and Thomas Cross. In the spring of 1872 the firm borrowed \$3,500 of the bank, and gave their sixty-day note therefor. The loan was continued by renewals of the note until February 26th 1878, when the note in controversy was given. In the summer of 1872 Thomas Cross went out of the firm; and in the fall of 1872, as claimed, plaintiff in error became a partner. The name of the firm was not changed. Now while an incoming partner does not by the mere fact of joining the firm become liable for its prior debts, yet he may assume such liability, and it is a question of fact whether he did so. And very slight testimony, the books say, will be sufficient to show that he did. Thus, in *Ex parte Jackson*, 1 Vesey Jr. 131, Lord Thurlow said: "If any interest had been paid upon that bond by both, I should have considered it as adopting the debt, and making the partnership liable for it. * * * If one man, having debts, takes another into partnership with him, a very little matter respecting those debts will make both liable." And in Parsons on Part., §435: "Whether the new incoming partner has assumed the old debts, is sometimes a

difficult question of law and fact. It certainly may be implied by circumstances. And what circumstances should in any case imply it, is a question partly for the court, and partly for the jury. Paying of interest on a debt, or a knowledge without objection that the new firm pays the interest, would warrant a jury in finding such an assumption of the old debt. And perhaps any single fact of a like kind would have the same effect." See also, Story on Part., §§ 152, 153; *Updike v. Doyle*, 7 R. Island, 447; *Ex parte Peele*, 6 Vesey Jr. 601; *Ex parte Williams*, Buck, 16; *Ex parte Freeman*, Buck, 474. And there is manifest justice in this. Where one joins a partnership, as in this case, he makes himself a part of an entity already existing, which has acquired certain property and business, and in acquiring it has incurred certain indebtedness. The firm owns the property, holds the business, and owes the debts. He becomes one of that firm. Should it require much evidence to show that in entering that firm he identifies himself fully with it, becomes in all respects a part of it, and shares in its obligations as well as in its property and business? It is true, that as to the other partners, there is a rearrangement of interests. But as to the property and business, it is a continuous thing. When one buys a share in a corporation, he buys an interest subject to debts. And while there is not the same legal obligation in entering a firm, there is much of practical similarity. Applying that rule to this case, we must sustain the judgment. The plaintiff in error knew of the existence of this debt. The interest on it was, without any objection by him, charged up to the firm by the bank, and entered in its pass-book. Thus appears the very matter specified by Parsons as sufficient to warrant a finding of the assumption of the debt. Again, while he did not sign the new note, and was not present when it was signed, he knew that the bank was seeking a renewal, and made no objection to it. The note was executed in the name of the firm, and was *prima facie* therefore binding on all the members of the firm at the time of its execution. It was a negotiable promissory note, at ninety days. It was such a note,

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as, so far as anything in the record shows, he would naturally expect a bank to take. For banks, as every one knows, as a rule, ask negotiable paper. Negotiated for value before due, it would be good against all those who were members of the firm at the date of its execution. With this before him, he gives no caution to the bank, and makes no objection to the renewal. After all, there is but a question of fact in regard to the partnership, and the assumption of the partnership debts; and being but a question of fact, it is a matter for the determination of the trial tribunal. And as there was ample testimony to sustain its finding, we must affirm it, although the testimony of the two Crosses is plain, direct and positive against it.

The judgment will be affirmed.

All the Justices concurring.

H. D. BAKER v. SAMUEL C. LONG.

1. **CONTESTED ELECTION; Issues; Range of Inquiry.** The inquiry in a court for the trial of a contested election is not necessarily limited to the matters presented in the contestor's statement. The contestee may be heard, not merely in denial, but in proof of other matters tending to show his right to the office, notwithstanding the matters alleged in the statement; and these other matters the contestor may also controvert, or avoid. [*State v. Sheldon*, 2-322; *Steele v. Martin*, 6-431; *State v. Stockwell*, 7-98; *Gililand v. Schuyler*, 9-569; *Jones v. Caldwell*, 21-186; *Buckland v. Golt*, 23-327.]
2. ——— **Pleadings.** Pleadings in the nature of an answer and reply, are proper in such a court, and when filed should be construed according to the ordinary rules applicable to such pleadings.
3. ——— **Reply; Construction of Pleadings.** When a reply is filed containing matters specifically alleged to be in reply to new matter in the answer, it cannot be treated as alleging a new and independent ground of contest; nor can the contestor, on the trial, if he fail in proving the mat-

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ters alleged in his statement, abandon that, and base his claim to the office solely on the matters alleged in the reply.

4. ——— *Amendments of Pleadings.* While amendments of these pleadings may be proper, *query*, could a party amend his statement after the expiration of the twenty days from the canvass within which the statement must be filed, by adding a new and independent ground of contest?
5. FINDINGS—*When Conclusive.* Where the contest court makes special findings of fact, and by one of them (unexcepted to by the contestor,) the only matter of contest alleged in the statement is found against the contestor, such finding is conclusive against the contestor in subsequent proceedings in error. [*Anthony v. Halderman*, 7-65; *Norton v. Graham*, 7-166.]

Error from Saline District Court.

PROCEEDINGS commenced by *Baker*, before the probate judge and two associates, constituting a court for the contest of elections, as provided by §§85 to 105 of ch. 36 of Gen. Stat. of 1868, to determine the right to the office of sheriff of Saline county. The election contested was held November 2d 1875. *Baker*, *Long*, and others, were candidates for sheriff. The canvassers, and the contest court also, declared *Long* elected. The proceedings were removed to the district court, where *Long's* right to the office was confirmed, at the February Term 1876. *Baker* brings the case here for review.

Foster & Banks, and *Martin & Case*, for *Baker*.

C. A. Hiller, and *T. F. Garver*, for *Long*.

The opinion of the court was delivered by

BREWER, J.: This was a contested election case. The parties were candidates for the office of sheriff. The canvassers declared *Long* elected by one majority. *Baker* contested, and as ground of contest alleged a miscount, and prayed for a recount. Over the objection of *Baker*, *Long* filed an answer denying the miscount, and in a second paragraph alleged illegal votes, naming the voters. *Baker* replied to such second defense, with an allegation of illegal votes for *Long*. Before the trial the court declared that the order of testimony would

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be, first, Baker's testimony in support of his statement; then Long's, in favor of his answer; and then Baker's, in support of his reply. On the trial the recount was had, and by it Long had two majority. Baker rested. Long asked for judgment, which was refused. He asked leave to dismiss the second paragraph of his answer, which was refused. He then, offering no testimony in support of his answer, rested. Baker then offered testimony in support of his reply. Long objected, but the objection was overruled, and the testimony received, showing three illegal votes in favor of Long. Long then sought to introduce his testimony to show illegal votes in favor of Baker, which was refused. Judgment was rendered in favor of Baker, declaring him elected sheriff by one majority. Long prosecuted his petition in error in the district court, which reversed the ruling of the court for contested elections. On the reversal, Baker moved the district court to hold the case for trial, or remand it to the contest court for further proceedings, but the court overruled the motion, and rendered judgment in Long's favor for the costs of both courts. Baker now brings the record here for review.

Upon this we remark, first, that the inquiry before a contest court is not necessarily limited to the matters presented in the contestor's statement. Such a statement is in the nature of a petition, and the contestee may defend against it both by denial, and by proof of other matters showing his right to the office, notwithstanding the facts contained in the statement. In other words, he may file an answer containing both a denial and new matter. The contestor may also reply to such new matter. We remark again, that where a reply is filed to an answer containing new matter, it cannot be taken as presenting a new and independent matter of contest, but must be deemed as simply a reply to the answer, and only available as a defense to such new matter. In other words, a party by his reply, cannot add a new cause of action to his petition. He cannot, when the testimony fails to sustain the ground of contest alleged in his original statement, abandon that, and rely

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upon the facts alleged in the reply as constituting his cause of action.

Whether a party can by amendment of his statement add a new ground of contest, after the expiration of the twenty days from the canvass within which the statement must be filed, need not be decided, for no amendment of the statement was asked, no attempt made to add to it a new ground of contest, and the reply states upon its face that it is filed as a reply to the new matter set up in the answer. It seems to follow from this, that the contest court erred, and that the ruling of the district court must be affirmed. It was not necessary to remand the case to the contest court for further proceedings, or to hold the case in the district court for a trial *de novo*, for the contest court made special findings of fact, and one not excepted to by the contestor was that the recount gave Long two majority. Upon the findings therefore, and the pleadings, the judgment should have been in favor of Long.

The judgment will be affirmed.

All the Justices concurring.

FRED. H. WILDMAN v. JOHN ANDERSON.

1. **ELECTION PRECINCTS; *New Voting Places Established; Boundaries.*** Prior to the election in November 1875, the voters in Smolan township in Saline county had voted at only one voting-place, known as "Maltby's school-house," in District No. 6. At that election two voting-places were opened, one at Maltby's and the other at "Hultman's school-house," in District No. 24. Notices of the election were sent by the sheriff to be posted up at each voting-place, and the people were generally notified by the county clerk and the township trustee that there would be two voting-places. The township trustee provided ballot-boxes for each voting-place. He assisted in organizing the election board at Hultman's school-house, and himself cast the second vote. Votes were regularly received, no illegal votes were cast, no legal votes were rejected. The election was beyond all question fairly conducted. The only objection to the canvass and counting of these votes was in the fact that the order

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of the county commissioners for a second election precinct was in these words: "That a voting precinct be and is hereby established in Smolan township, to be known as Hultman's school-house precinct," and specified no boundaries for the precinct. *Held*, That the votes cast at the voting-place at Hultman's school-house should be received and counted. [*Voss v. Sch. Dist.*, 18-473; *Buckland v. Golt*, 23-329.]

2. **ELECTION BALLOTS; *Separate Pieces of Paper*.—*One Ballot*.** A ballot, where several officers are to be voted for, is not necessarily invalidated and to be rejected because consisting of two pieces of paper. And where in such case, one piece of paper contains only the titles of certain township offices and the names of the candidates therefor, and the other only the titles and names of the county offices and the candidates therefor, and the voter folds the one piece of paper within the other and offers it to the judges of election as a single vote, and it is so received and deposited by them in the ballot-box, and the whole is done in good faith, and the voter a qualified elector, the vote so cast should be received and counted. [*Prohibitory Amend. Cases*, 24-720.]

Error from Saline District Court.

At the general election held in and for Saline county on the 2d of November 1875, *Wildman* and *Anderson* were opposing candidates for county clerk. The county canvassers decided that *Anderson* was elected. *Wildman* instituted proceedings to contest the election before a contest court composed of H. S. Cunningham, probate judge, and Evander Light and B. J. F. Hanna, associate justices. The principal matters relied upon by *Wildman* were, first, that the board of county canvassers canvassed two returns from Smolan township, which he alleged was composed of but one election district; and second, that the judges of the election held in Solomon township counted as legal, ballots which were folded together in pairs, and voted by one person as a single ballot. The contest court, (associate justice Hanna dissenting,) held that one set of returns from Smolan township, that of the election held at "Hultman's school-house," should be rejected, which gave a plurality of the remaining votes cast, for *Wildman*, whom the contest court declared to have been the legally elected county clerk, and entered judgment in his favor. *Anderson* carried the case to the district court by petition in error, where, at the February Term 1876, the judgment of the contest court was reversed.

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Of this judgment of reversal *Wildman* complains, and brings the case here on error.

John Foster, and *T. F. Garver*, for plaintiff in error.

J. G. Mohler, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This, like the case of *Baker v. Long*, just decided, (ante, p. 341,) is a contested election case, coming from the same county, and contesting an election held at the same time. The parties in this case were candidates for the office of county clerk. The canvassers awarded the the office to Anderson, stating the vote for him to be 584 and for Wildman 574. The contest court decided in favor of Wildman, and its decision was reversed on error in the district court. Wildman brings the case here, and asks to have the decision of the district court reversed, and that of the contest court affirmed. The principal question arises on these facts: In November 1873, Smolan township was duly set off from adjoining townships, by the county board. The order organizing it established the township, "with a voting precinct at the school-house of district No. 24." In April 1874, certain sections were detached from Walnut, and added to Smolan township. July 20th 1874, the board made another order concerning Smolan township, to-wit, "that a voting precinct be and is hereby established in Smolan township, to be known as Hultman's school-house precinct." No other action was ever taken by the county commissioners regarding Smolan township, or election-precincts therein. As a matter of fact, the first election in Smolan township was not held at the school-house in district No. 24, but at Maltby's school-house in district No. 6, in the eastern part of the township, that being a customary voting-place prior to the organization of the township. Maltby's school-house was the only voting-place used by the electors until the election in controversy, in November 1875, when two voting-places were used, one at Maltby's, and the other at Hultman's school-house in district No. 24. The

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only objection urged to this election, and to the use of the two voting-places, is in the fact that the county board failed to prescribe any *boundaries* to the election-precincts. The contestor did not claim that any persons not legal electors of the township voted at either voting-place, or that any one voted at both places, or that any voter was rejected at one place on the ground that he ought to have voted at the other, and so lost his vote altogether, or that there was anything wrong in the mere conduct of the election. And on the other hand it affirmatively appeared, that the county clerk informed the township trustee prior to the election that the county board had established a new voting-place at Hultman's school-house; that he also spoke to some of the voters of the township about it, and that the trustee went around among the people a few days before the election informing them of the fact; that he caused ballot-boxes to be provided for each voting-place; that he assisted at the organization of the election-board at Hultman's school-house, and himself cast the second vote at that place; that the sheriff sent to each place notices of the election to be posted up as required by law, and that a large vote was polled in the township. In addition, the contestee produced before the contest court all the parties whose names appear on the poll-books of both voting places, and offered to prove by them that they were all legal voters of the township and had voted at that election, and that their votes were cast in respect to the office of county clerk as returned to the canvassing board. Upon

Defective
orders.

these facts ought the votes cast at either voting-place to be rejected? We think not. It may be conceded that the order of the county board in reference to the second precinct was defective in not giving its boundaries; that it had no binding force upon the electors of the township, and might have been ignored by them altogether. Yet it had the semblance of legal force. It was the apparent creation of a voting precinct; and having been accepted by the people, the only ones interested in the matter, and acted upon by them as though it were in all respects legal and binding, the defects in the order cannot now be made the means of disfranchising a

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body of legal voters, innocent of wrong, seeking to exercise their rights of franchise, and only misled by the officers of the law. Even in organizations of a more permanent character, and exercising functions more constantly and seriously affecting the interests of the public, such for instance as townships, an acquiescence by the people may cure defects as serious as those in the order in question. Suppose a township had been attempted to be created by an order just as incomplete as this, and the people resident in the school-district in which was the school-house named—as here, “Hultman’s school-district”—had proceeded to set in motion the machinery of a township organization, it would not be long before acquiescence by the community in these proceedings would put beyond question the legality of the township, and the extent of its limits. It would be impossible to state beforehand the exact length of time that the acquiescence must run before validity would be beyond dispute. Doubtless the time would vary in different cases. But still, being a *de facto* organization, it would soon to all intents and purposes become a *de jure* organization. It could create debts which could be enforced against it. Its acts would be valid upon all within and without its boundaries. If this is true in reference to such permanent organizations, with such continuous duties and officers, how much more is it true in reference to these (so to speak) special organizations, which serve but a single purpose, and whose officers and duties expire in a single day? It may be conceded that time and place are matters of substance, and that to secure a valid election the appointed time and place must be regarded. It may also be conceded that a part of the electors have no right of their own volition to set up a separate voting-place, and insist that votes cast at such place be counted in the result. But this is no such case. The county board has unquestioned power to establish election-precincts. It attempted to create one. Its order was incomplete. But, deemed sufficient by those whose duty it was to carry it into effect, and by those who were to be affected by it, and actually recognized and carried into practical

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organizations.

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not to defeat
election.

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effect by all affected by it, it had sufficient semblance of legality and completeness to make valid the subsequent action. Our statute has this wise provision, that—

“Whenever it shall satisfactorily appear that any person has received the highest number of votes for any office, such person shall receive the certificate of election, notwithstanding the provisions of law may not have been fully complied with in noticing and conducting the election, so that the real will of the people may not be defeated by any informality of any officer.” Gen. Stat. p. 411, § 29.

Does it not satisfactorily appear that the real will of the people was in favor of the contestee? They who voted were legal electors. They claimed and sought to exercise their right to vote. They voted at the place the officers designated. They voted in the manner prescribed by law. Why should the mistakes of any officers operate to disfranchise them? We quote with approbation the clear and forcible language of Associate Justice Hanna in dissenting from the opinion of a majority of the contest court: “It is clearly proved on this trial to the satisfaction of the undersigned, that the county commissioners in establishing the Hultman’s school-house precinct, and that the county clerk, sheriff, and township trustee in giving notice to said voters of the creation of said precinct, acted in good faith, and without any purpose or intention of fraud or wrong; and that the voters in assembling at said Hultman’s school-house on election-day, and then and there voting, acted in good faith, and as they believed and had good reason to believe in strict accordance with law. If any law was violated in the holding of said election at said place, it was a violation of which said voters had no knowledge, for which they cannot properly be held responsible, and for which they should not be punished—and which could not and did not in any manner affect the general result of the election. The recognized and admitted object of elections is to obtain expressions of the will of the people. The conceded purpose of all statute laws regulating elections, is to provide means by

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which a full, fair, honest and untrammelled expression of the will of the people may be obtained through the ballot-box, in the choice of officers, and for other purposes. All laws, construction of laws, rulings or decisions, that interfere with the accomplishment of such purpose, are subversive of the foundation principles of popular government." In this matter then we see no error in the ruling of the district court.

Another question arises on these facts: In one of the precincts some of the votes cast were upon two pieces of paper, instead of one, as the statute directs. It seems that county and township tickets were both printed, that is, some tickets with only the names of the township officers and the candidates therefor, printed on them, and others having only the candidates for the county officers printed thereon. The voter folded the township ticket inside of the county ticket, and handed that to the judges as his ballot, and it was so received and placed in the ballot-box. Did this invalidate the vote of such voter? and ought the judges to have thrown out all such votes? The good faith of all parties is abundantly shown. And the vote can be rejected only by reason of the fact that it was upon two pieces of paper. There was no chance for mistake, for below the title of each office was the name of the candidate therefor—no possibility of an attempt to cast two votes for the same officer. It seems to us the provision of the statute we have heretofore quoted forbids the rejection of such a vote. Sec. 22 of the election law, Gen. Stat. p. 409, which requires certain action in case two or more ballots are found so folded together as to present the appearance of a single ballot, applies where the ballots are alike, or partially so, so as to indicate that a voter has by mistake or intentionally cast two votes for the same candidate. It is a rule in the interest of the purity of the ballot-box, and to guard against illegal votes. It should not be used as a means of disfranchising one whose vote, though upon two pieces of paper, plainly indicates that he is

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casting but one vote upon each question and for each office.

The judgment of the district court will be affirmed.

All the Justices concurring.

THOMAS MOONLIGHT V. WILLIAM H. BOND.

1. ELECTIONS; *Culpable Practices; Candidates Furnishing Spirituous Liquors.*

In a contested election case, where it was found by the contest court that the successful candidate for sheriff did, pending the election, furnish money to a third person "to be used in the procurement of drinks of spirituous liquors for voters generally, with the intent to facilitate his election," and did various other acts equally culpable, and with like intent, but it was not found or shown that any elector was paid or promised anything for doing any act as an elector, nor was it shown that any judge, clerk, or canvasser of the election was paid or promised anything for doing any act as a judge, clerk, or canvasser of the election, *held*, that a judgment in such a case for the contestee was correct. [*Buckland v. Galt*, 23-329.]

2. ——— Such candidate did not forfeit his election under subdivision 4 of section 85 of the act relating to elections, (Gen. Stat. 424,) because of his said acts.

Error from Leavenworth District Court.

PROCEEDINGS instituted in November 1873 by *Moonlight*, to contest the right to the office of sheriff. The proceedings were commenced in a contest court, composed of Richard R. Rees, probate judge, and George H. English and Lucien Baker, associates. Said contest court found and decided in favor of *Bond*, the contestee. *Moonlight* removed the case to the district court by petition in error. The district court, at the May Term 1874, affirmed the decision of the contest court, and *Moonlight*, as plaintiff in error, now brings the case here.

Byron Sherry, for plaintiff in error.

Stillings & Fenlon, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This petition in error was brought in this court for the purpose of reversing a judgment of the district court of Leavenworth county, which affirmed the judgment of a certain contest court of said county which held and determined that the defendant Bond was duly elected to the office of sheriff of said county. The only question presented in this court is, whether the judgment of the contest court was and is sustained by the special findings of such court. Said findings, so far as they are material in the determination of said question, are as follows:

"1st. On the 4th of November 1873, Wm. H. Bond, then a candidate for sheriff, at and while the election was proceeding, did give to one Wm. S. Dent, the sum of one dollar in money, then and there to be used in the procurement of drinks of spirituous liquors for voters generally, with the intent to facilitate his (said Bond's) election to the office of sheriff of Leavenworth county.

"2d. While said Bond was so a candidate for sheriff, he (said Bond) did promise to one Tom Bowman five dollars in money for purpose of procuring the services of said Bowman in canvassing for and soliciting and influencing votes for the said Bond for sheriff.

"3d. Said Bond, while such candidate, did say to Tom Bowman, and to other colored people, that so far as he could control, they should have an equal representation upon the juries of this county with others, and that such promise was for the purpose of enhancing his chances of election.

"4th. Said Bond after such election did agree and promise to pay the sum of \$9.30 to Bowman & Walker for cigars, drinks, etc., drank and used by sundry persons unknown to said Bond, at and before the time of such election.

"5th. Said Bond at and during such election, on the 4th of November 1873, did agree to and with one Harrison Young and one Peter Green, to pay each of them the sum of five dollars for work at the polls on the day of such election; that is, for the canvassing for votes for the purpose of facilitating his (said Bond's) election to the office of sheriff; said Bond did pay to said Young and to said Green each the sum of \$2.50 thereof, and promised to pay the remainder.

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"6th. Said Bond, while canvassing for a nomination for sheriff, did have some conversation with one Lawrence Kiser, in relation to the appointment of under-sheriff, or jailor. And after said election, to-wit, after the said 4th of November 1873, said Bond, in consideration of Kiser's assisting him in procuring surety on his official bond, did promise said Kiser the position of under-sheriff, or jailor.

"7th. Said Thomas Moonlight, the contestor, is and was, at the time of said election, an elector of the second ward of the city of Leavenworth, in the state of Kansas.

"8th. The court do not find that there was, in any case, a bribe or a reward given or offered to any elector, directly, for his vote.

"9th. Said Bond gave to one Lafayette Collins two dollars for canvassing for votes for him (said Bond) on the said election-day, while said Bond was so a candidate for sheriff.

"One witness, Carter, states that Bond had given him one dollar for his vote, (but still denied that he had sold it.) This Bond denies, which makes an equilibrium; but if Bond's interest militates against his statement, it raises reasonable doubt.

"The matter of the license of one Bowman, is entirely too indefinite to make a finding on.

"The evidence of Pemberton, McCormick and McDaniels throws no light upon the issues here, sufficiently important to elicit findings.

"Of the alleged promise of positions to Robert Jackson, Henry Duffy, and William Voss, there is no evidence.

"The testimony of Richard Moore, John Nolan, David Jackson, McAuliff and George Land, and of Miller, are too indefinite to base an action of the court upon, and therefore deemed not of importance in our ultimate determination.

"To sum up the findings of the court in short, they are, that the said Bond did, at, on or before such election, give and offer to sundry electors of Leavenworth county, rewards in money, etc., for the purpose of procuring the influence, coöperation and labor of such electors in facilitating his election, and procuring his success in such election."

It is claimed by the plaintiff Moonlight, that upon the foregoing facts, and under § 85 of the act relating to elections, the judgment of the contest court should have been in his favor,

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and against the defendant Bond. So much of said section as applies to this case reads as follows:

"The election of any person declared duly elected to any county office, may be contested by any elector of the county: * * * *Fourth*, When the contestee has given or offered any elector, or any judge, clerk, or canvasser of the election, any bribe, or reward, in money, property, or thing of value, for the purpose of procuring his election." (Gen. Stat. 424, § 85.)

Now the record in this case scarcely shows that any one of said persons to whom it is claimed a "bribe or reward in money, property, or thing of value," was given or "offered" by the "contestee," was at any time an "elector;" and the record certainly does not show that any one of them was ever a "judge, clerk, or canvasser of the election." Nor does the record show that any person was ever given, offered, or promised anything for his vote. Indeed, the record does not show that anything was done which could by any interpretation or construction come within the implied prohibition of said statute. Wrongs indeed may have been committed, but they were not such wrongs as come within any of the prohibitory clauses of said statute. This statute was intended to prohibit the bribing of electors, as such, and to prohibit the bribing of judges, clerks, and canvassers of elections, as such; and was not intended to prohibit the paying of money or other valuable things for legitimate purposes connected with the proceedings of a fair election. A candidate for office may certainly pay the publisher of a newspaper for announcing his name as a candidate, although the publisher may at the same time be an elector, and although the publishing of such candidacy may be done intentionally "for the purpose of procuring his [the candidate's] election." So the candidate may also pay for a public hall in which to hold political meetings, and may pay for handbills, and for tickets, etc., etc. He may indeed employ an elector to do anything which might properly be done by any person not an elector. Now, while we do not justify all that is shown to have been done in this case, yet we do not think it is shown that any transaction had in the case

was in contravention of any of the provisions of said statute. The first transaction was with Wm. S. Dent. Now it is not shown that Dent was an elector, or that any one expected that he would offer to vote at said election. And whether he was an elector or not, still he may previously have been a friend of the contestee, and working for his election prior to said transaction. He was expected to procure "drinks of spirituous liquors for voters generally," and not merely for those who could be influenced thereby to vote for the contestee. We might proceed with each of the other transactions mentioned in the findings of the contest court, but we do not think that it is necessary. It is not shown that any elector was paid or promised anything for doing any act as an elector, and it is not shown that any judge, clerk, or canvasser of the election was paid or promised anything for doing any act as a judge, clerk, or canvasser of the election; and therefore, although wrongs may have been committed, yet they not being such wrongs as are prohibited by said statute, the judgment of the court below must be affirmed.

All the Justices concurring.

JAMES PRITCHETT v. DAVID H. MITCHELL *et al.*

1. *Usury; Plea of, a Personal Privilege.* The plea of usury is a personal privilege, and if the debtor declines to avail himself of it, no stranger to the transaction can. [*Clark v. Spencer*, 14-399.]
2. ——— *Second Mortgagees.* A second mortgagee cannot plead usury in a prior mortgage, either to defeat or postpone its lien.

Error from Jefferson District Court.

In October 1870, Joseph D. Rollins made and delivered to *Mitchell* his promissory note for \$2,500, with interest at 12 per cent. from date, payable in six months from the date thereof, and Rollins and wife executed a mortgage on real estate to se-

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cure the same. Payments upon said note were made to the amount of \$1,620 prior to August 1873. In June 1873, said Rollins and wife executed and delivered to *Pritchett* their note for the sum of \$3,100, with interest, and their mortgage to secure the payment of the same; and in August 1873, said Rollins made and delivered to *Pritchett*, his note of that date for the sum of \$400, with interest, and jointly with Mary E., his wife, gave a mortgage to secure the same. Said three mortgages were respectively duly recorded, and covered the same real property. In August 1873, and after the first mortgage from Rollins to *Pritchett* had been duly recorded, *Mitchell* brought an action to foreclose his mortgage, making Rollins and wife sole defendants therein, and on the trial thereof, no defense being made, the court gave judgment in favor of *Mitchell*, in November 1873, for \$1,526.50, together with the additional sum of \$126 as attorney-fees for foreclosure, and thereupon decreed a sale of the property, and application of the proceeds in satisfaction thereof, to all which proceedings *Pritchett* was a stranger. In December 1874, *Pritchett* brought his action to foreclose the two mortgages given to him, in which action *Mitchell* was joined with Rollins and wife as co-defendant. *Mitchell* answered, setting up the former judgment, together with the note and mortgage upon which it was based. *Pritchett* replied, alleging usury in the *Mitchell* note and judgment to the amount of \$646.50. Rollins and wife made default. Trial at the February Term 1875 of said district court. *Pritchett* offered evidence to show — *first*, that said Joseph D. Rollins and Mary E. Rollins were insolvent at the time said action was commenced, and ever since; *second*, that the mortgaged premises were insufficient to pay both the claim of said *Mitchell* and of *Pritchett*; and *third*, that payments were made by said Rollins to *Mitchell*, on the *Mitchell* note and mortgage, by way or usurious interest and inducement to contract for more than twelve per cent. per annum. *Mitchell* objected, and the evidence was rejected. Judgment was rendered, that the entire amount of the former judgment in favor of *Mitchell*, be a first

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lien on said mortgaged premises, to which *Pritchett* excepted, and he now brings the case here on error.

Nevison & Alford, for plaintiff, contended, that, under §§ 8 and 4 of ch. 51, Gen. Stat. 1868, whenever it shall be made to appear to the court by any party in interest that a contract sought to be enforced is tainted with usury, the court is bound to render judgment accordingly — citing *Cole v. Bausemer*, 26 Ind. 94; 39 Penn. St. 361; 14 Ohio St. 200. A party having a subsequent lien upon property may protect his interest to the extent of making the entire usurious interest an inferior lien upon the property, and this regardless of the question as to whether the mortgagor is insolvent or the property insufficient to pay both debts. 2 Alb. Law Jour. 100; 8 Paige, 640; 1 Md. Ch. 127; 10 Wis. 333; 40 N. Y. 476; Ord on Usury, 331. Second — a junior mortgagee is not affected by a suit foreclosing a senior mortgage to which he was not a party. 31 N. Y. 218; 23 Cal. 106; 52 Ill. 84; 34 Md. 164; 2 Washb. on Real Prop. 229; 12 Kas. 139.

John W. Day, for defendant in error, submitted, that *Pritchett* was barred by the prior judgment in favor of *Mitchell*, from inquiring into the same; and second, that plaintiff was not entitled to show usury in the *Mitchell* note and mortgage, even if he had been a party to the foreclosure action in which such judgment was rendered. The only person other than *Rollins*, who could interpose a plea of usury against that note, was *Mrs. Rollins*, and she could do so only because and when the land mortgaged, or some part of it, under our statutes, was her homestead. *Clark v. Spencer*, 14 Kas. 398, 407; *Lyon v. Welsh*, 20 Iowa, 578.

The opinion of the court was delivered by

BREWER, J.: Can a second mortgagee plead usury in a prior mortgage? Can he do it either to defeat, or postpone, the lien of such prior mortgage? Authorities are well divided on this question. That he can, is affirmed in Indiana, Pennsylvania,

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Ohio, New York, Maryland, and New Jersey. *Cole v. Bausemer*, 26 Ind. 94; *Green v. Tyler & Co.*, 39 Penn. St. 361; (though under the present statute the opposite ruling seems to obtain; *Miners Trust Co. v. Roseberry*, 2 Law & Eq. Rep. 478;) *Union Bank v. Bell*, 14 Ohio St. 200; *Brooks v. Avery*, 4 Comstock, 225; *Post v. Dart*, 8 Paige, 640; *Banks v. McClellan*, 24 Md. 62; *Cunnins v. Wire*, 6 N. J. Eq. 73. That he cannot, is affirmed in Alabama, Connecticut, Illinois, Iowa, Kentucky, Michigan, Missouri, and Vermont. *Cain v. Gimon*, 36 Ala. 168; *Fielder v. Varner*, 45 Ala. 429; *Loomis v. Eaton*, 32 Conn. 550; *Adams v. Robertson*, 37 Ill. 45; *Powell v. Hunt*, 11 Iowa, 430; *Huston v. Stringham*, 21 Iowa, 36; *Carmichael v. Bodfish*, 32 Iowa, 418; *Campbell v. Johnston*, 4 Dana (Ky.) 177; *F. & M. Bank v. Kimmel*, 1 Mich. 84; *Ransom v. Hays*, 39 Mo. 445; *Austin v. Crittenden*, 33 Vt. 553. These last two cases were not mortgage cases, but the decisions plainly indicate the judgments of the courts upon the question. See also, 3 Parsons on Cont. 122; *Ladd v. Wiggins*, 35 N. H. 421; *De Wolf v. Johnson*, 10 Wheat. 367; *Green v. Kemp*, 13 Mass. 515. We incline to the latter view, and to regard the plea of usury as a personal privilege. When the parties to a contract are willing to abide by its terms, why should one, not a party thereto, be permitted to interfere? If the debts were unsecured, no one would think that the second creditor had any right to interfere. The payor, by payment of the first note according to its terms, and without insisting on any plea of usury, might so diminish his means as to render himself unable to pay the second note, but still that would not give the holder of the second the right to restrain such payment. And the rule would be the same if the securities for the two notes were separate and distinct. Why then should the mere giving of a single security for the two notes enable the holder of the second to interfere? And a mortgage with us, it will be borne in mind, conveys no estate in the land, but is simply a security for the debt. *Chick v. Willets*, 2 Kas. 384. The second mortgagee, it is true, could increase the value of his security by diminishing the amount of the first lien; but he does so only by preventing parties who have made a contract,

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and are willing to abide by its terms, from complying with that contract. When the first mortgage was given, the land-owner had a perfect right to give it. The land stood charged with the lien as he placed it, and no one but he could question the validity of the lien for the entire amount. He still remains willing to abide by the terms of that contract, willing that the land should be held for the face of the note. The taking of the second mortgage was a voluntary matter. The mortgagee finds the property charged with a mortgage, pledged therefore as security for a specified amount, finds that the mortgagor intends that it shall be used in discharging that amount of indebtedness, and voluntarily takes the property thus burdened, as security for his own debt. It is with ill grace that he thereafter endeavors to prevent the mortgagor from complying with his first contract. Yet, even those who are loath to break their own promises, are often willing that others shall, if thereby their own interests are promoted. Surely, a man ought to have a right to say whether he shall keep his own promise or not. In the enactment of laws, usury laws as well as others, the legislature has regard to the general interests, the welfare of the majority. Its laws therefore often bear hardly in individual instances. And while it may be generally true, that a limit to the amount to be paid for the use of money should be fixed, yet every one knows that sometimes such amount is not what in justness and fairness ought to be paid. Men feel honorably bound to pay more than the law authorizes. While the law ought to protect the party from the clamps of the usurer, by permitting him to repudiate all but the legal interest, yet, if the borrower feels in honor bound by the peculiar circumstances of his loan to pay the stipulated interest, it would seem as though no stranger to the transaction should be permitted to interfere.

The judgment will be affirmed.

All the Justices concurring.

Hays, Treasurer, v. Hill.

R. R. HAYS, as Treasurer, &c., v. Z. M. HILL et al.

PARTIES DEFENDANT—*Who are Necessary, in Action to Enjoin School-District Tax.* The plaintiffs commenced an action against the treasurer of Osborne county for the purpose of perpetually enjoining the collection of a certain tax levied for the purpose of paying interest on a certain school-district bond and of creating a sinking fund for the final redemption of such bond. The plaintiffs did not make the school-district which issued said bond a party to the suit. The defendant demurred to the plaintiffs' petition, on the ground that the petition showed upon its face a defect of parties defendant, and the court below overruled the demurrer. *Held*, That said school district was a necessary party, and that the court below erred in overruling the demurrer. [*State v. Anderson*, 5-90; *Gilmore v. Fox*, 10-509; *Beyer v. Reed*, 18-92; *Voss v. Sch. Dist.*, 18-471; *Comm'rs v. R. R.*, 21-749; *Gilmore v. Norton*, 10-491; *Bridge Co. v. Comm'r*, 10-326; *R. R. v. Wilhelm*, 33-206; *Carpenter v. Hindman*, 32-601.]

Error from Osborne District Court.

ACTION by *Hill* and two others, taxpayers of School District No. 13, of Osborne county, to enjoin the collection of a certain tax levied upon the property of said school district by order of the district board for the year 1874. The petition was filed in February 1875, and *Hays*, county treasurer, was made sole defendant. *Hays* demurred. The district court, at the April Term 1875, overruled the demurrer, and decreed a perpetual injunction. *Hays* brings the case here for review.

A. Saxey, for plaintiff in error.

R. G. Hays, and **Z. T. Walrond**, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by *Z. M. Hill*, *W. Bortzfield* and *W. Shearer* against *R. R. Hays*, treasurer of Osborne county, for the purpose of perpetually enjoining the collection of a certain tax. A temporary injunction was allowed at the time of the commencement of the action. Afterward the defendant demurred to the plaintiffs' petition on the grounds, 1st, that the petition showed upon its face a defect of parties defendant; and 2d, that the petition did not

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state facts sufficient to constitute a cause of action. The defendant also moved to dissolve said temporary injunction on the same grounds. The court below overruled both the demurrer and the motion to dissolve, and then rendered judgment in favor of the plaintiffs and against the defendant, perpetually enjoining the collection of said tax, and ordering "that the costs of this action be paid by said R. R. Hays in his official capacity as treasurer of Osborne county."

It will be perceived that the only questions involved in this case are, first, was there defect of parties defendant? and second, did the petition below state facts sufficient to constitute a cause of action? Said tax was levied solely for the purpose of paying interest on a certain school-district bond, and creating a sinking fund for the final redemption of said bond; and the only ground upon which it is claimed that said tax is void is, that said bond is void. Said bond was issued by School District No. 13 of Osborne county; and unless the bond is in fact void, said district is liable for its payment according to the terms thereof. Who the holder of said bond is, the petition does not disclose; but from certain evidence introduced on the hearing of said motion, it would seem that the state of Kansas is the holder, and that the bond belongs to the permanent school fund of the state. But it really makes no difference who owns or holds the bond, except possibly as to whether he is an innocent purchaser for value or not. In any case the holder must look to the school district for the fulfillment of the bond; and if the bond is valid as between the holder and the school district, the school district must look to the taxpayers to furnish the means with which to pay the bond. If there should be any failure in the payment of the bond, or in the payment of the interest thereon, the holder would sue the school district therefor. Hence it will be perceived that the school district is the real party interested in having said tax collected, and is the only party directly interested therein. If taxes are properly levied, collected, and paid over to the bondholder, the school district will never be liable to a suit on the bond; but if taxes are not so levied, collected and paid over, the

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school district will be liable, provided the bond is valid. And this suit cannot determine the validity or invalidity of said bond in favor of or against either the bondholder or the school district, because neither is a party. The county treasurer is a mere nominal party, in such a case as this, and ordinarily he should not be required to pay costs either in his individual capacity or in his official capacity. But if he is to pay costs in his official capacity, where is he to get the funds? from the school district? or from the county? or from the state? or from some other source? We think there was a defect of parties defendant in this case. The school district should have been made a party defendant. (For a further discussion of a similar question, see *Gilmore v. Fox*, 10 Kas. 509, 512, 513.) But as the school district was not made a party, said demurrer should have been sustained. This disposes of the case for the present.

The questions whether the petition below states facts sufficient to constitute a cause of action, and incidentally whether said bond is valid, are also in the case; but we do not think it is necessary to decide them now. Indeed we do not like to decide a question in the absence of every party or person interested on one side of such question, and especially not where a nominal party on that side of the question objects, as defendant below has done in this case, by demurring to the plaintiffs' petition because the plaintiffs have not brought in all the necessary parties. With reference to the validity of said bond, it will be well for the parties to examine the cases of *Marcy v. Oswego Township*, 92 U. S. 637, and *Humboldt Township v. Long*, id. 642.

The judgment of the court below will be reversed, and cause remanded for further proceedings in accordance with this opinion.

All the Justices concurring.

ELI TITUS V. COMM'RS OF HOWARD CO.

1. SHERIFFS' FEES, on Tax Warrants. A sheriff is not entitled to mileage on a personal tax warrant returned no property. [*Comm'rs v. Franklin*, 16-450; *Thralls v. Comm'rs*, 24-594; C. L. 1881, ch. 39, sec. 3.]
2. ——— He is entitled to a fee of twenty-five cents for each return.
3. ——— Where the warrant is not served because the party against whom it was issued had, prior to its issue, paid his taxes in full to the county treasurer, he is entitled to mileage for the number of miles actually traveled in attempting to serve the warrant.

Error from Chautauqua District Court.

TITUS was sheriff of Howard county during the year 1874, and until June 1st 1875, when by the division of said county he became sheriff of Chautauqua county. He presented his claims to the board of county commissioners for fees earned and charged by him on certain tax warrants. The claims were disallowed, and *Titus* took two appeals to the district court. The district court, at the November Term 1875, decided both cases in favor of the county, and *Titus* brings them here for review. The material facts are stated in the opinion.

J. D. McCue, R. H. Nichols, and W. C. Webb, for plaintiff.

S. B. Oberlander, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: The plaintiff in these two cases (Nos. 721 and 722,) was sheriff of Howard county, and the claims are for fees on personal tax warrants. No service was made of these warrants. The officer claimed mileage, and a fee of twenty-five cents for return of "No goods." The district court decided adversely to both claims, and the plaintiff alleges error. The claim for mileage was properly rejected. *Comm'rs Labette County v. Franklin*, 16 Kas. 450. The fee of twenty-five cents, for return of "No goods," should have been allowed. Gen. Stat. p. 477, § 8. This is all there is in case No. 722.

In No. 721 this additional fact appears, which it is claimed will affect the question of mileage. The warrants were for the taxes of 1878. The person who was county treasurer that year became a defaulter, and abandoned the office. The tax-roll was also destroyed. Subsequently a new roll was prepared, which by act of the legislature was declared valid, and warrants ordered to be issued upon it, as upon the original. (Laws 1875, p. 153.) Warrants were issued, and placed in the hands of the plaintiff to collect. Two of the parties against whom warrants were thus issued produced receipts, showing the payment to the defaulting treasurer while in office. Of course that defeated any service of the warrant. Hence plaintiff contends that as he could have served the warrant and attempted to do it, and was prevented only by reason of the fact that the party against whom the warrant ran had already paid his tax, that he is entitled to his mileage, as though he had served it. And this claim seems to us well founded. Officers to whom process for the collection of money is directed, take the chances of finding property, out of which to make the debt; but they have a right, as against the party in whose favor or at whose instance it is issued, to consider the process as valid, and authorizing them to take measures to execute it. If not valid, and not giving the authority to collect, and the defect is chargeable to the party, and by reason thereof the collection is defeated, it would seem clear that the officers would be entitled to fees for what they actually did, just as though the process was valid, and that the party would be estopped from saying that no service had been made of it. Hence we think the sheriff was entitled to mileage on these two warrants.

The judgments in both cases will be reversed, and the cases remanded with instructions to render judgment on the agreed facts in accordance with the views herein expressed.

All the Justices concurring.

SAMUEL R. PETERS V. THE BOARD OF STATE CANVASSERS.

1. **DISTRICT JUDGE; Term of Office.** The constitution of the state fixes the term of office of the judges of the district court at four years, and it is not in the power of the legislature to increase or extend that term, either directly or indirectly. [*State v. Thoman*, 10-191.]
2. ——— **Time of Election.** Where the first judge of a new judicial district was legally elected at the general election in 1867, the election of judge in such district at the general election of 1871 was held at the proper time, and entitled the party elected to a full term of four years from the second Monday in January 1872; and a third election in such district for a district judge for a full term was rightly held at the general election in 1875. [*State v. Thoman*, 10-192.]
3. **MANDAMUS; Board of Canvassers.** Where several thousand votes were in fact cast at a certain general election by the electors of a judicial district for the office of district judge of such district, but it plainly appears that said office was then legally filled, and no election for district judge was necessary or proper, either for a full term or an unexpired term, a writ of mandamus will not be awarded to compel the board of state canvassers to canvass the votes so cast for district judge.

Original Motion for Mandamus.

On the 22d of December 1876, *Samuel R. Peters* filed in this court his petition and motion for a peremptory writ of mandamus to compel the *Board of State Canvassers* to canvass the votes cast in and returned from the several counties comprising the ninth judicial district, for the office of judge of said district. The petition alleges, that by ch. 53, laws of 1867, the sixth, seventh, eighth and ninth judicial districts were created; that pursuant to the provisions of §15 of ch. 52 of the laws of 1867, a judge was elected in and for each of said districts at the general election held in November 1867, for the term commencing on the second Monday in January 1868; that the judge so elected in and for the ninth district was Wm. R. Brown, whose term of four years expired on the second Monday in January 1872; that no election was held in said district in November 1871, for a successor of Judge Brown, but said Brown continued to hold said office after the expiration of his said term, as authorized by §12 of article 3 of the constitution;

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that at the general election held in November 1872, as provided and authorized by the act passed and approved 29th February 1872, (ch. 117, laws of 1872, p. 259; 10 Kas. 193, note,) said Wm. R. Brown was reelected to the office of district judge for said ninth district, and for the term commencing on the second Monday of January 1873; that said Brown duly qualified under said election, and entered upon the duties of his office, and held said office until the 1st of March 1875, when he resigned; that plaintiff *Peters* was thereupon appointed by the governor to the office of district judge to fill said vacancy; that plaintiff thereupon duly qualified and entered upon the discharge of the duties of said office, and continued to hold the same by virtue of said appointment until the second Monday of January 1876; that at the general election held on the 3d of November 1875, the plaintiff was duly elected judge of said district, and that thereupon, and on the second Monday in January 1876, he duly qualified under and by virtue of said election, and entered upon his duties as such judge, and ever since has been and still is the duly-elected and acting judge of said district; that at the general election held in said ninth district on the 7th of November 1876, the plaintiff under and by virtue of said act of 29th February 1872, received 4868 votes cast for him for the office of district judge of said district by legal voters residing therein, and that said number of votes was a majority of over 4000 over and above the votes cast for any and all other persons in said district for said office. The petition then alleged that the votes so cast for plaintiff had been duly and properly returned to the secretary of state; that Thomas A. Osborn, governor, Thos. H. Cavanaugh, secretary of state, P. I. Bonebrake, auditor of state, John Francis, treasurer of state, and A. M. F. Randolph, attorney general of the state of Kansas, constituted *ex officio*, the *Board of State Canvassers*; that as such board it became and was their duty to meet at the office of the said secretary of state, at Topeka, on Monday, the 27th of November 1876, and perform the duties prescribed by § 87 of the general election law, (ch. 36, Gen. Stat. 1868, p. 413,) including the examination and making of a statement of the

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whole number of votes cast in said ninth judicial district at said general election held in November next preceding for the office of judge of the ninth district; that the *Board of State Canvassers* did meet at the time and place designated; that such board, having full knowledge of the premises, and well knowing from the certified abstracts of the votes given in the several counties comprising said ninth district that plaintiff had at such election received more than 4000 votes for said office over and above the votes cast for any other person for said office, did not and would not canvass the votes so cast for said office, but while in session as aforesaid passed and adopted a resolution, as follows:

"WHEREAS, An election for judge of the ninth judicial district was held at the general election for the year 1875, a canvass of which was duly made, and a certificate thereupon issued as required by law: therefore,

"Be it resolved, That the Board of State Canvassers refuse to canvass the votes cast for judge of said district at the general election held in November 1876."

The petition further alleged that said board, after having passed said resolution, had adjourned without day. A peremptory writ of mandamus was prayed for, compelling said board of canvassers to meet and canvass said votes, etc. The motion was heard on the 22d of December 1876. No briefs on file.

C. N. Sterry, appeared for Judge Peters, in support of the motion for a mandamus, and *A. M. F. Randolph*, attorney-general, appeared in opposition to the motion.

Per Curiam: The motion for a mandamus must be overruled, in accordance with the decision of this court in the case of *The State, ex rel. Goodin, v. Thoman, Auditor, &c.*, 10 Kas. 191. In that case we held, that the term of office of judges of the district courts was fixed by the constitution at four years; that it was not in the power of the legislature to extend or lengthen that term, either directly or indirectly; and that when a district judge was legally elected at the general election in 1867, for a

full term, an election for a successor, and for a full term, was rightly held in 1871—such second term commencing in January 1872. In the case at bar, the facts alleged in the petition show, that the failure to hold an election in the ninth judicial district in 1871, did not change the commencement of the regular term of office of judge for that district. Nor did ch. 117 of the laws of 1872 have that effect, for the reason above stated. It also follows, that when Judge Brown was reelected in November 1872, he was chosen for the unexpired portion of that term which had commenced on the second Monday of January preceding. Resigning before such term expired, the vacancy was filled by executive appointment. Whether at the election held in November 1875, the then remaining unexpired term of two months should have been filled by *election*, as well as that a judge should be then so chosen for the full term next ensuing, we need not now discuss. (Const., art. 3, §11.) No such election is shown to have been held. The petition shows that a judge for the ninth district was duly chosen at such general election of 1875, and we hold that the person so elected was elected for the term of four years from the second Monday in January 1876. No vacancy having since occurred in such office, no election for judge of said ninth district could be legally held in November 1876, and the board of state canvassers rightly refused to canvass the votes cast in and returned from such district for such office.

Mandamus refused. Judgment will be entered in favor of the defendants for their costs.

JANUARY TERM, 1877.

PRESENT:

HON. ALBERT H. HORTON, CHIEF JUSTICE.
 HON. DANIEL M. VALENTINE, } ASSOCIATE JUSTICES.
 HON. DAVID J. BREWER, }

MEDBERRY, YETTER & Co. v. SOPER, BRAINARD & Co.

1. PARTNERS, AND PARTNERSHIPS; *Limited Partnerships; Want of Notice.* Where a partner claims that his liability to creditors of the firm is restricted by a special contract between the partners, and no proceedings have been had under the limited-partnership act, it is incumbent on him to prove notice to or knowledge by the creditors of such contract-limitation, or he will be liable equally with the other partners for the entire debts of the firm.
2. TAKING NEW NOTE FOR EXISTING DEBT; *When Payment, and When Not.* The acceptance of a note by the creditor, of one of several joint debtors, does not have the effect to discharge the other debtors, without an agreement to receive it in payment or satisfaction. [*Kermeyer v. Newby*, 14-164; *McCoy v. Haslett*, 14-430; *Shepard v. Allen*, 16-182; *Groat v. Pracht*, 31-658; *Hurd v. Hizon*, 27-728; *Mullins v. Brown*, 32-317.]

Error from Miami District Court.

SOPER, BRAINARD & Co., plaintiffs, at the December Term 1872, recovered a judgment against *H. N. Medberry, Penn Yetter, F. M. Shaw*, and *C. A. Leighton*, as late partners, defendants, for the sum of \$2,715 debt, and \$367.95 costs. The defendants bring the case here for review. The material facts, and the instructions given and refused, are stated in the opinion.

W. R. Wagstaff, for plaintiffs in error.

B. F. Simpson, for defendants in error.

The opinion of the court was delivered by

BREWER, J.: On the 10th of May 1870, the firm of Medberry, Yetter & Co. was constituted by the following article of agreement:

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"Article of agreement made and entered into this 10th of May 1870, by and between H. N. Medberry, party of the first part, and Penn Yetter, party of the second part, whereby said party of the first agrees to furnish two thousand dollars as the capital stock, and the said party of the second part agrees to furnish one thousand dollars, for the purpose of transacting a lumber business in Columbus and Chetopa, Kansas, the profits and losses to be equally divided, a true and accurate account of the transactions of said firm to be kept in books provided for that purpose. The firm-name to be Medberry, Yetter & Co. The Company, C. A. Leighton and F. M. Shaw, are known only as security to the above firm. Said firm to take no risks, go no securities outside of their legitimate line of business, without the consent of all the parties concerned. The said parties not to be bounden for the private accounts of either individual belonging to said firm. This article applies to business anywhere.

"H. N. MEDBERRY.

F. M. SHAW.

"PENN YETTER.

C. A. LEIGHTON."

In November 1870, the firm was dissolved, owing Soper, Brainard & Co. about \$3,500. Medberry continued the business, taking the property, and assuming the debts. In January 1871, having made some purchases since the dissolution, Medberry settled with Soper, Brainard & Co., giving his individual note for the total amount of the firm's and his own debts. This note was subsequently renewed, and payment made of four months' interest in advance. Not being paid when due, Soper, Brainard & Co. brought their action against all the members of the firm of Medberry, Yetter & Co. for the amount due by that firm at the time of its dissolution, and not subsequently paid, and brought the last note of Medberry's into court on the trial and tendered it to the defendants. They also denied any knowledge of the stipulations of the partnership. Shaw and Leighton insisted that they were only securities to the firm for \$1,000, as an accommodation to Yetter to make him an equal partner with Medberry, and that they were not to share in the profits or losses, and that this was duly communicated to Soper, Brainard & Co. Upon the trial the court gave and refused instruc-

Statement of
facts, and
instructions.

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tions to the jury as follows. The plaintiffs below asked the court below to give these instructions:

"1st. The taking of the individual note of H. N. Medberry by the plaintiffs for goods sold by plaintiffs to the firm of Medberry, Yetter & Co., the said H. N. Medberry being one of the firm of Medberry, Yetter & Co., does not have the legal effect to discharge the other members of the firm, unless such individual note was taken with an agreement and understanding to that effect; and the fact that the note was negotiable, makes no difference, when it remains in the hands of the plaintiffs, and is produced at the trial of the action against the firm for the goods sold, but it is not relied on as the cause of action, and the maker has become insolvent. [*Given. Excepted to by defendants.*]

"2d. That the burden of proving the defense in this action, set up by Shaw and Leighton, that they had been discharged by the acts of the plaintiffs from all liability as members of the firm of Medberry, Yetter & Co., and that plaintiffs had knowledge that, at the organization of the firm of Medberry, Yetter & Co., Shaw and Leighton, by special contract, limited their liability to the extent of \$1,000 as security for Yetter, is upon the defendants who plead such defense. [*Given. Excepted to by defendants.*]

"3d. The fact that, at the time of taking the individual note of H. N. Medberry on account of the indebtedness of the firm of Medberry, Yetter & Co. by Soper, Brainard & Co., the amount of said note was passed to the credit of Medberry, Yetter & Co. on the books of Soper, Brainard & Co., and said account balanced, does not alone have the legal effect to work a payment of said account of Medberry, Yetter & Co.; but this is a matter subject to explanation by the evidence in the case. [*Given. Excepted to by defendants.*]

"4th. In all cases the members of limited partnerships shall be subject to all liabilities of general partners, unless at the time of forming such partnership they shall make and severally sign a certificate containing the name of the firm, the general nature of the business to be transacted, the names of all general and special partners, distinguishing them with their place of residence, the amount of capital stock which each special partner contributed to the capital stock, and the period at which the partnership is to commence and terminate. Such certificate shall be acknowledged by the several persons signing the same before some officer authorized by law to take the

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acknowledgment of deeds, and filed in the office of the county clerk of the county in which the principal place of business of the partnership shall be situated, and the terms of the partnership shall be published, when recorded, for at least four weeks in a newspaper published in the county in which the record shall be made; and if such publication be not made, the partnership shall be deemed general." [*Given. Excepted to by defendants.*]

The defendants below (plaintiffs in error,) asked the court to charge jury as follows:

"1st. If the jury find that the firm of Medberry, Yetter & Co. dissolved partnership, and the firm of Soper, Brainard & Co., with notice of the dissolution, continued to do business with H. N. Medberry, and took the individual note of H. N. Medberry for full partnership account of Medberry, Yetter & Co., and extended the time of payment by payment of interest, and that the said H. N. Medberry, at the time of the dissolution of the firm of Medberry, Yetter & Co., had transferred to him assets sufficient to pay the debts of the firm, these facts are to be taken into consideration by the jury as tending to show the release of the firm of Medberry, Yetter & Co. from their liability to Soper, Brainard & Co., and of substituting H. N. Medberry in its stead." [*Given, with the following modification.*] "But the act of taking the individual note of H. N. Medberry for the amount of the partnership account does not operate to pay such account, unless it was agreed to have that effect." [*Modification excepted to by defendants.*]

"2d. The mutual agency of the partners, which is created by the partnership, ceases when it is dissolved; and after dissolution, neither can make a note or other contract binding on the other partners, unless authorized by them to do so; and when one partner goes out of a firm, and another comes in and assumes the debts of the firm, and gives notice of dissolution to creditors of old firm, and with notice that new firm takes all assets and assumes all liabilities, and the creditor with this knowledge, without notice to the retiring members of the old firm, and without their consent, takes the note of the new firm for the old-firm debt, balances the old account by such note, and afterward renews the note, receives interest, and extends payment, the creditor *prima facie* discharges the retiring members of the old firm; and it is incumbent on such creditor to show a different and other understanding between himself and

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the retiring members of the firm. [*Refused, and defendants excepted.*]

"3d. The agreement of parties with regard to settlement of the firm and partnership debts, will not affect third parties who are not advised of such agreement; but when a creditor or creditors are advised of such an arrangement, and the creditors accept one partner as his or their debtor in lieu of the partnership, and a new negotiable paper passes from the debtor so accepted to the creditor, there is a new consideration, and this is generally sufficient to support an agreement to release and exonerate the other partners." *To which the court added*—"but whether there be such an agreement of release is a question of fact for the jury." [*Given as modified; defendants excepted to the modification.*]

"4th. If the jury believe from the evidence, that the firm of Soper, Brainard & Co., on the 18th of August 1871, took from H. N. Medberry, one of the members of the late firm of Medberry, Yetter & Co., a promissory note for the full amount of the indebtedness of the said firm of Medberry, Yetter & Co., payable in four months from date thereof, and received from the said H. N. Medberry the interest in advance on said note for the time it was to run, and extended the time of payment of indebtedness of the said firm of Medberry, Yetter & Co. for the period of four months from that date, without the knowledge or consent of the retiring members of said firm, then, in that case, the firm of Soper, Brainard & Co. were estopped from enforcing the collection of said indebtedness of Medberry, Yetter & Co. during the time said note was to run, and for which interest had been taken; and the insolvency of the maker of the note during the period the note was to run releases the retiring members of said firm. [*Refused, and defendants excepted.*]

"5th. If a creditor of a firm agrees that the retiring partners of a firm shall be considered simply as surety for the debt of the old partnership, and the creditor afterward, whether holding the partnership securities or otherwise, gives time to the new firm for the payment of the debt, the retiring partners in their character as surety are thereby discharged. [*Given.*]

"6th. Shaw, Leighton, and Yetter, in this action, are called the retiring members of the firm of Medberry, Yetter & Co. Soper, Brainard & Co. were creditors of the firm of Medberry, Yetter & Co. At its dissolution, H. N. Medberry was the successor of Medberry, Yetter & Co. The retiring members of the firm are held for the debt of the old firm; unless discharged

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by some act or conduct on the part of Soper, Brainard & Co. The firm of Soper, Brainard & Co. may be held bound by the act or conduct of any member of the firm, so far as the same may concern the business of the firm. It is rarely that a partnership firm, or member thereof, assents to an arrangement to discharge, expressly and directly; but such an assent may be implied. Whether there is such an implied assent or not, is a question of fact for the jury. In determining whether such an assent has been given by Soper, Brainard & Co. to the discharge of Shaw, Leighton and Yetter from the liability of the firm debt of Medberry, Yetter & Co., the jury are authorized to take into consideration the time, facts, and circumstances of the dissolution of the firm of Medberry, Yetter & Co., and notice thereof to Soper, Brainard & Co.; the fact of transferring the accounts to H. N. Medberry; the fact of continuing to extend credit to him; the fact of taking his individual note for the whole amount of indebtedness; the fact of receiving payment; the fact of extending time on the note; the fact of including H. N. Medberry's individual debt with the partnership debt; the fact of surrendering the first, and taking the second note, and receiving interest in advance. These, with all other facts in evidence, are proper subject-matters to be taken into consideration by the jury in arriving at a conclusion as to whether Soper, Brainard & Co. assented to the release of Shaw, Leighton and Yetter from liability to Soper, Brainard & Co. for the firm debt of Medberry, Yetter & Co." [*Refused, and defendants excepted.*]

Upon these instructions we remark, that where the existence of a partnership is conceded, the presumption of law is, that each partner is liable for all the debts of the firm; and that where either party claims that his liability is limited by special contract between the partners, and no proceedings have been had under the limited-partnership act, (ch. 74, Gen. Stat. 1868, p. 600,) it is essential that notice to or knowledge by the creditor of such contract-limitation be shown, or as to him it will not exist. A party dealing with a firm, need not inquire as to the special arrangements between the partners. It is enough for him to know that the partnership exists. Each partner then is liable for the total debt.

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eral joint debtors, does not have the effect to discharge the other debtors, without an agreement to receive it in payment or satisfaction. It will be borne in mind, that the dissolution of a partnership in no respect changes the liability of the several partners to the creditors. Each is liable for the entire debt, after, as fully as before, the dissolution. Nor does the giving by a debtor of his promissory note, discharge the debt. It is but a written evidence of his indebtedness. True, it may be accepted in payment, if the parties so agree; and whether they do so agree or not, is a question of fact. *Kermeyer v. Newby*, 14 Kas. 164; *McCoy v. Hazlett*, 14 Kas. 480; *Cooper v. Condon*, 15 Kas. 572; *Shepard v. Allen*, 16 Kas. 182. If the note of all the partners would not discharge the debt of the firm, *a fortiori* the note of one would not. Authorities are conflicting as to whether the receipt of a note is or is not *prima facie* evidence that it is taken in satisfaction of the prior indebtedness. But it is generally agreed that it is not necessarily satisfaction, and that whether it be so or not depends upon the agreement of the parties. Dixon, C. J., in the case of *Eastman v. Porter*, 14 Wis. 89, says: "It is a clear rule of the common law, that a subsisting simple contract is not discharged or extinguished by the acceptance of another contract of the same nature, given by the same party, and founded upon the same consideration, unless it be expressly so agreed. The new contract is considered as nothing more than a new evidence of the same original contract or indebtedness; and if it is not performed, the party may resort to his remedy on the latter." And again: "The promissory note of the debtor, taken for an antecedent simple contract debt, does not extinguish the original debt, if the note remains in the hands of the creditor, due and unpaid." In *Parker v. Canfield*, 37 Conn. 250, it is decided that "the taking of a renewal note from one who had dormant partners when the original was given, after the termination of the partnership, and without any intention to discharge the dormant partners, does not discharge the claim against the copartnership." So in 29 Penn. St. 404, in the case of *Cal-*

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lier v. Leech, the court says: "Where the creditor of a firm takes the notes of the surviving partners for the amount of his claim, or a judgment against them for the same, he does not release the estate of the deceased partner, *unless it is so agreed at the time.*" In *Harris v. Farwell*, 15 Eng. L. & Eq. 70, it is decided, that "a contract to discharge a retiring partner from a debt due from the firm, may be proved either by an express agreement, or by facts and conduct from which it may be fairly inferred. Taking a new security is not of itself sufficient to discharge the retiring partner, *but there must also be an agreement*, either express, or to be implied, to discharge the old firm." It is decided in the case of *Yarnell v. Anderson*, 14 Mo. 619, that "taking a new note with surety from a partner, after the partnership is dissolved, for the note of the partnership, is *not of itself* a discharge of the partner who has retired." In Gore on Partnership, Am. Ed. of 1825, p. 200, the rule is thus defined: "When the two requisites of a joint interest and a joint credit concur, *nothing but actual satisfaction*, or the extinguishment of the original consideration by the acceptance of a *higher security*, can *invalidate* the claim which the creditor possesses against the firm." The New York authorities are still stronger. In *Cole v. C. & E. Sackett*, 1 Hill, 516, this was the decision: "C. & E. being partners, gave their note for a debt of the firm, under an agreement that it should be in full satisfaction; and, after dissolving, E. agreed, for a consideration received from G., to assume and pay the debt for which the note was given, and accordingly took up the firm note and gave his own in lieu; and it was held to be no bar to a recovery on the original consideration." The opinion in that case was delivered by Judge Cowen, and he declared the doctrine to be entirely settled, that the promissory note of a debtor, given for a precedent demand, will not operate as payment, so as to preclude the creditor from suing on the original consideration, though given under an express agreement that it should be received in full satisfaction; but otherwise, if the note be that of a third

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person. This doctrine was subsequently reconsidered and approved in *Waydell v. Luer*, 5 Hill, 448; and in that case it was held that the giving of a promissory note by one of several partners, for a demand antecedently due from all, will not extinguish their liability, although the creditor expressly accepts the individual note in satisfaction. Judge Cowen delivered the opinion in that case also, and reviewed all the authorities, English and American. See also, *Hughes v. Wheeler*, 8 Cow. 77; *Frentress v. Markle*, 2 G. Greene, 558. In Vermont, Massachusetts, Maine and perhaps other states, the receipt of the note seems to be considered evidence, *prima facie* at least, that it was taken in satisfaction of the original debt. *Stephens v. Thompson*, 28 Vt. 77; *Chapman v. Durant*, 10 Mass. 47, and note; *Descadillas v. Harris*, 8 Greenleaf, 298. Such also seems to be the view of Prof. Parsons. 1 Pars. on Cont. 145, 146; Pars. on Part. 422, 423.

There was no error in refusing the second instruction asked by the defendants. It is based upon an assumption not in accord with the facts of this case. "When one partner goes out of a firm, and another comes in." Here some of the partners went out, but no new ones came in. The notes carried the promise of no one, not originally liable, no one not a member of the firm at the time of the creation of the debt. The refusal of the sixth instruction, if error at all, was not one prejudicing the material rights of the plaintiffs in error sufficiently to justify a reversal of the judgment against them. It amounted simply to this, that all the facts in evidence were proper for the jury to consider in determining whether the plaintiffs in error were released by defendants in error. The special matters named had been nearly all referred to in the first instruction given at the instance of defendants, and it was unnecessary to refer to them again.

We see no error of which the plaintiffs in error can complain in the instructions. The conflict in the testimony was

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settled by the jury against them, and therefore the judgment must be affirmed.

VALENTINE, J., concurring.

HORTON, C. J., not sitting in the case.

JAMES HOFFMIRE v. WM. L. HOLCOMB.

ACCEPTING BENEFITS OF JUDGMENT, *Admits its Validity; Waiver.* A party holding the fee in mortgaged premises, and against whom a decree of foreclosure is entered, cannot, after voluntarily taking the surplus arising from the sale of said premises upon such decree, maintain a proceeding in this court to set aside the decree of sale. The receipt of such surplus is a waiver of any errors, if errors there be, in the proceedings. [*Babbitt v. Corby*, 13-612.]

Error from Dickinson District Court.

At the April Term 1873 of the district court, *Holcomb*, as plaintiff, recovered a judgment against Samuel H. Weaver for the sum of \$582.29, and costs, and a decree against said Weaver and wife, and *James Hoffmire* and three others, foreclosing a mortgage given by Weaver and wife to secure the note on which said judgment was recovered, and for a sale of the mortgaged premises. Sale thereof was had; and at the September Term 1873 of the said court, a motion by defendants to set aside said sale was overruled, and the sale confirmed—the court ordering the sheriff to pay a surplus arising on such sale into court to abide its further order. Said surplus was afterward paid to and received by defendant *Hoffmire*. *Hoffmire* brings the case here, and alleges error in overruling the motion to set aside said sale. In this court *Holcomb* moves to dismiss the petition in error.

James Mahon, in support of the motion to dismiss.

Case & Putnam, for Hoffmire, in opposition.

The opinion of the court was delivered by

BREWER, J.: This was an action in the district court of Dickinson county, to foreclose a mortgage. A decree was entered, and sale made. James Hoffmire, the grantee of the mortgagor, and who held the fee at the time of the foreclosure, is the only party complaining here. On the sale, the property realized more than the claims against it. Upon confirmation of the sale the district court ordered that the surplus be paid over to Hoffmire as the owner of the fee, and it was done. Having received such surplus, can he now question the sufficiency of the proceedings? We think not. A party cannot voluntarily appropriate the benefit of judicial proceedings, and at the same time maintain an action to have them set aside. Take the present case: Suppose on the examination of the record it should appear that there was error in the decree, or sale, and a reversal should be ordered: the money which the purchaser paid would be in Hoffmire's possession, while the purchaser would have nothing. The only right which Hoffmire had to take the money, rests upon the assumption that a valid sale had been made. He cannot act upon that assumption, and at the same time deny its existence. *Babbitt v. Corby*, 18 Kas. 612.

The motion to dismiss will be sustained.

All the Justices concurring.

KANSAS PACIFIC RAILWAY CO. v. JOHN BRADY *et al.*

1. VERDICT, *When Sustained; Conflicting Testimony.* The question as to when a judgment will be reversed because of an insufficiency of the evidence to sustain the verdict, again considered, and the decision with regard to such question as heretofore made by the supreme court, reaffirmed. [See cases cited, *R. R. v. Kunkel*, ante, 148, 169; *Sch. Dist. v. Griner*, 8-224; *Ulrich v. Ulrich*, 8-402; *R. R. v. Montelle*, 10-127; *R. R. v. Chase*, 11-48; *R. R. v. Stanford*, 12-369.]
2. CONTRIBUTORY NEGLIGENCE; *Care and Diligence; Question of Fact.* A person who stacks his hay on the open prairie near a railroad track, with dry grass all around the hay, and dry grass intervening all the way from the stack to the railroad track, without taking any means for the protection of his hay from fire, may be guilty of negligence in not taking better care of his property so as to protect the same from fire; and whether he is guilty of negligence or not, is a question of fact for the jury, and not a question of law for the court to decide. [*R. R. v. Rollins*, 5-181; *R. R. v. Butts*, 7-316; *R. R. v. Hand*, 7-389; *Lobenstein v. Prichett*, 8-218; *R. R. v. Rice*, 10-426; *R. R. v. Chase*, 11-55, 56; *R. R. v. Pointer*, 14-52; *R. R. v. Salmon*, 14-527; *R. R. v. Henigh*, 23-358; *R. R. v. Fitzsimmons*, 22-688; *R. R. v. Hoitham*, 22-52; *R. R. v. Owen*, 25-421; *R. R. v. Philippi*, 20-12; *R. R. v. Richardson*, 25-391; *Smith v. R. R.*, 25-738; *R. R. v. McCandless*, 33-366; *Osage City v. Brown*, 27-74; *R. R. v. Kincaid*, 29-654; *R. R. v. Cornell*, 30-35.]

Error from Pottawatomie District Court.

ACTION by John Brady and David F. Easton, as plaintiffs, to recover from the *Railway Company* for injuries to plaintiff's property alleged to be occasioned by the negligence of the defendant. Trial at the February Term 1875. Verdict and judgment for plaintiffs for \$385, and the *Railway Company* brings the case here.

J. P. Usher, and *C. E. Bretherton*, for plaintiffs in error.

A. L. Williams, and *J. S. Merritt*, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by John Brady and David F. Easton against the Kansas Pacific Railway Company for alleged negligence in permitting fire to escape from one of the company's locomotive engines, whereby damage was done to certain property belonging to the plaintiffs. The evidence shows that fire did so escape, and in consequence

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thereof a hay-stack and a fence around it, both belonging to the plaintiffs, were consumed. The evidence also shows that said engine from which said fire escaped was one of the best of engines, that it was skillfully constructed, in good condition, and was provided with the best of appliances and all proper appliances for the prevention of the escape of fire. The best and safest kind of fuel was used, and the engine was managed by a competent and skillful engineer. The fireman also seems to have been competent and skillful, and to have done his duty. But it is claimed that on this particular occasion the engineer was careless and negligent, and regardless of his duty. Whether this is so or not, or rather whether there is sufficient evidence in the case to show *prima facie* that the engineer was negligent, is the first question presented in the case. The evidence tending to show that the engineer was negligent is as follows: At the time said fire occurred, the weather was dry and windy. A very strong wind was blowing from the south. The plaintiffs' hay-stack was situated about one and one-half or two miles north of the railway. The intervening space was an open prairie, covered with dry grass. The engine from which the fire escaped was one of the best, and the best of fuel was furnished with which to operate it. Other engines passed that same place under similar circumstances without producing fires; yet this particular engine produced three or four different fires, and perhaps a greater number, and the engineer who had it in charge did not even know that it produced a single fire. Taking this whole evidence together, and we think it is sufficient to make out a *prima facie* case of negligence against the engineer. That the engineer should allow his engine to produce so many fires, amidst surrounding circumstances calling for the greatest vigilance on his part to prevent the escape of fire, when a single spark escaping might produce a fire that would spread all over the country and do incalculable damage, and he at the same time not knowing of a single fire being produced, would seem to indicate very strongly that he was not exercising the greatest vigilance in the performance of his

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duties. We have given only one side of the evidence with reference to the negligence of the engineer. The evidence tending to show that he was not negligent we have not given, for it was all parol testimony, such as properly goes to the jury for their consideration, and this court does not weigh conflicting parol testimony for the purpose of reversing judgments. This court reverses judgments for insufficiency in the evidence only where the evidence most favorable to the findings made in the court below fails to prove *prima facie* some material fact necessary to be found in the case in order to uphold such findings, or where such *prima facie* proof has been rebutted and overcome by that kind of evidence which of itself is conclusive, and whose weight and value belongs to the court to consider, such as written instruments, documents, and record evidence. The rule would seem to be, that where the verdict of a jury is not sustained by sufficient evidence to make out a *prima facie* case in favor of such verdict, the judgment founded thereon should in all cases be reversed, provided of course that the question is properly presented to the supreme court. But where the verdict is sustained by evidence sufficient to make out a *prima facie* case, and all the evidence against the verdict is merely in parol, the judgment founded upon such verdict should not be reversed unless some ground for reversal is found other than merely that the preponderance of the evidence is against the verdict. The case of the *A. T. & S. F. Rld. Co. v. Stanford*, 12 Kas. 869, is a good illustration of these propositions. In that case the evidence most favorable to the verdict made out a *prima facie* case in favor of all the material findings of the verdict, but the preponderance of the evidence was clearly against some of the findings, and the judgment in that case was sustained. (See also, *K. P. Rly. Co. v. Montelle*, 10 Kas. 126, 127; *K. P. Rly. Co. v. Kunkel*, ante, pp. 146, 168.)

The only other question in this case is, whether the plaintiffs below were guilty of contributory negligence. Or rather, the only other question is, whether there was any evidence tending to show that the plaintiffs were guilty of contributory negligence; for if there was any such evidence, then

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the court below erred in refusing to submit the question of contributory negligence on the part of the plaintiffs to the jury. The evidence claimed as tending to show contributory negligence on the part of the plaintiffs is substantially as follows: The plaintiffs stacked their hay within a mile-and-a-half or two miles of the railroad, on an open prairie which extended all the way from the hay-stack to the railroad, and which was covered with dry grass. The plaintiffs put a fence around the stack, which was also burned. Every season nearly all the country in that vicinity is burned over. The plaintiffs knew that their property was in danger from fire, and that it ought to be protected. They therefore plowed partially around it, but did not plow all around it, and the fire was communicated to the hay-stack over the ground which was not plowed. The plaintiff Easton testifies among other things as follows:

"The hay and fence were burned on the afternoon of the 6th of November 1874, about 3 or 4 o'clock. Witness (Easton) sent his servants to plow around it, but whether they plowed all around it he does not know. There were grass and weeds around the stack. There ought to have been furrows plowed, and a rod between them burnt out, to prevent the fire from communicating. The wind was blowing very hard the day of the fire," etc.

William Everett testifies among other things as follows:

"It is a common thing for the entire country to be burned over the entire season. Not entirely so this. The growth was not so luxuriant, owing to the drouth. Generally the whole country is burned over every season. I went to the other stacks, [at the time of the fire;] did not go to the plaintiffs'; supposed it was protected."

John A. Storm testifies among other things as follows:

"He (witness) visited the place where the stack of hay of the plaintiffs was burned. It was plowed partly around, but not all the way, and the fire communicated to the stack over that part of the ground not plowed. Where it had been plowed, which was part on the south side and on the east, the fire had not burned."

There is nothing in the record which shows when the plaintiff Easton sent his servants to plow around said hay-stack.

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If it was after the fire escaped from the defendant's engine and before it reached the plaintiffs' hay-stack, the question of whether the plaintiffs were not guilty of negligence in not plowing all around their hay-stack, should beyond all doubt have been submitted to the jury. The court could not say under such circumstances that as a matter of law the plaintiffs were not guilty of negligence. The court could have come nearer saying that under such circumstances the failure of the plaintiffs to plow all around their stack was, *per se*, and as a matter of law, negligence. If the plaintiffs even knew of the escape of the fire from the engine before it reached their property, it was their duty to use all reasonable means to avoid the destruction of their property; and a failure to do so would be negligence.

But suppose the plaintiffs did not know anything about said fire until their property had been completely destroyed: then, would it be so utterly impossible under such circumstances for ^{negligence from want of care and diligence.} the plaintiffs to be guilty of any negligence, as between themselves and the railway company, that the court below could say as a matter of law that the plaintiffs were not guilty of any negligence? Now it has been laid down as a general rule of law, that no one is bound to anticipate the negligence of others, or to act as though others might be negligent. (*Kellogg v. C. & N. W. Rly. Co.*, 26 Wis. 223.) But it has also been held that this rule of law has its limitations and its exceptions. (*Kesee v. C. & N. W. Rly. Co.*, 30 Iowa, 78, 83.) The rule stated in general terms would seem to be, that all persons must take the risk of accidents, but not of the negligence of others. (As to accidental burnings, see *K. P. Rly. Co. v. Butts*, 7 Kas. 308; *M. K. & T. Rly. Co. v. Davidson*, 14 Kas. 349.) But why should not all persons be required to prepare for a certain amount of *anticipated* negligence? All prudent persons do so; and many decisions of courts seem to have been made on the theory that all persons are required to do so. All persons are sometimes negligent. Even the most prudent are sometimes lax in the amount of care and vigilance which they ought to exercise. All men

know this. Then why should not all men be required to anticipate that average amount of negligence which must in the very nature of things be expected to transpire? All men know that fire escapes from railway engines, and that it often escapes from negligence as well as from accident. And so long as human beings are imperfect, all men know that fire will continue to escape from engines from negligence as well as from accident. In the very nature of things this must be so; and fires must always be expected to originate from such a source. Then why should not all men in the vicinity of railroads be required to make some preparation for negligent fires, as well as for accidental fires? Why should they not be required to make such reasonable preparation to avoid loss from fires, as reasonably prudent men in the same vicinity usually and ordinarily do? Would any less degree of care and diligence than this, be regarded as reasonable care and diligence? Would any less degree of care and diligence than this be as much care and diligence as a reasonably prudent man would usually and ordinarily exercise? Do not all reasonably prudent men in the transaction of their own affairs make some preparation for the negligence of others, as well as for accidents? If so, then the general proposition that no man is bound to anticipate the negligence of others, or to make any preparation therefor, would seem to have its limitations or exceptions; for we take it that all men are bound to exercise that degree of diligence to prevent injuries to their own property which a reasonably prudent man would exercise under like circumstances. But let us view this question in another aspect. Permitting fire to escape from a railway engine, whether accidentally or intentionally, is never *per se* negligence. And whether it is negligence in any particular case, always depends upon the particular circumstances of such particular case. Where the fire could do no possible injury to any person or thing, the permitting the same to escape could never be considered as negligence. Take the present case as an illustration of these propositions: If on the

day that said fire escaped, rain had been descending in copious showers, making everything wet and invincible to fire; or, if all the grass in that vicinity had been green, or had been burned off the day before; or if the ground between the stack and the railway track had been freshly plowed, no one would think of calling the acts or omissions of the defendant in permitting the fire to escape, negligence. Even if a strip of the land around said stack had been freshly burned, or freshly plowed, no one would think of imputing negligence to the railway company as against the plaintiffs, for by no possible contingency could the escape of the fire in such a case injure the plaintiffs. Neither could negligence be imputed to the defendant, if the plaintiffs had stacked their hay on safer ground. The plaintiffs were not bound to stack their hay where they did stack it, but evidently they could have found some safer ground on which to stack it if they had so chosen. Hence it will be seen that if the defendant was negligent at all as against the plaintiffs, it was about as much because of the acts and omissions of the plaintiffs as because of the acts and omissions of the defendant. If the defendant was negligent at all as against the plaintiffs, it was really as much because said hay was stacked in a dangerous place, and because dry grass was allowed to intervene all the way from the stack to the railway track, as because said fire was permitted to escape. Now as the burning of said hay was the result of the acts and omissions of both the plaintiffs and the defendant, it would seem that the acts and omissions of both parties should have been submitted to the jury. Both parties may have been negligent, and the acts and omissions of both should have been subject to the scrutiny of the jury. But it is claimed that the plaintiffs could not under any circumstances be considered negligent. It is claimed that they had a right to stack their hay as they did stack it, in a dangerous place, with dry grass all around it, and without taking any precautions for its protection. And this is claimed upon the theory that every man has a right to use his own property as

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he pleases without reference to the great inconvenience he may thereby impose upon others. Is this theory, or rather the plaintiffs' application thereof, correct? Suppose that the plaintiffs had owned the land from the railway track to their hay-stack, and that they had the entire possession and control of such land: and suppose that said land had been entirely free from all combustible material, but that the plaintiffs in the exercise of their right to use their own property in their own way had strewn gunpowder along the railway track and from the railway track to their hay-stack: and then suppose that the defendant had negligently, but not willfully or intentionally, permitted fire to escape from one of its engines, and the gunpowder thereby becoming ignited had almost instantaneously communicated the fire to the plaintiffs' hay-stack, and consumed it: could the plaintiffs recover from the railway company for such loss? In such a case the plaintiffs would simply have used their own land, their own hay, and their own gunpowder, in their own way, and without molesting any one else, or meddling with any other person's property. Then why could they not recover? Will it be said that they voluntarily chose to suffer the loss? Will it be said that by allowing them to recover it would allow them to so use their own property as to injure the general welfare of others? These would seem to be at least plausible reasons why they should not recover. It is said that the maxim, *sic utere tuo ut alienum non lædas*, has no application in such a case. But if it has not, then some similar maxim should have. Why should any person be allowed to invite the destruction of his own property by his own negligence, so that he might by recovering for the loss thereof lessen the estate of another to that extent? Why should any person be allowed to so use his own property that in the natural course of things he would most likely injure the estate of another to the extent of the value of such property? Or, why should he have it within his power to so use his own property as to make it so hazardous for others to use theirs that such others must necessarily abandon the use

of theirs? The fact is, that all persons in the use of their own property, or in the transaction of their own affairs, should use reasonable diligence to avoid injuries to any property, whether such property belongs to themselves or to others; and generally, in such cases all persons should exercise that degree of diligence which an ordinarily prudent man would exercise under like circumstances were all the property his own. Generally all persons have a right to expect that this amount of diligence will be exercised. In the present case, the plaintiffs had a right to expect that the defendant would exercise reasonable diligence to prevent the escape of fire; and the defendant had a right to expect that the plaintiffs would exercise reasonable diligence to avoid injuries from fire. Neither was bound to suppose that the other would be negligent in this respect. Now it is conceded that the defendant was negligent; but were not the plaintiffs also negligent? If they were, then they cannot recover. They cannot recover for the destruction of property which would not have been destroyed except for their own negligence. If reasonable diligence required that the plaintiffs should have plowed around said stack, then the defendant had a right to suppose that the plaintiffs had done so, and that the stack was protected to that extent; and in such a case the defendant is not liable for the loss of the stack. The defendant is liable in such a case for only so much of the damages which it causes by reason of its negligence as could have not been avoided by the plaintiffs by the exercise of reasonable diligence on their part. If the plaintiffs were in fact negligent, then the negligence of the defendant was in fact founded upon the negligence of the plaintiffs, and was caused thereby. If the plaintiffs in such case had not been negligent in allowing their stack to be exposed, the defendant could not have been negligent as against the plaintiffs in permitting the fire to escape. The exposure of the stack, is what made the escape of the fire negligence. If the stack had been protected, the acts and omissions of the defendant would have been innocent and

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harmless. The plaintiffs themselves, by their own acts and omissions, made the acts and omissions of the defendant negligence; and except for their own negligence in not protecting their stack, its loss would never have occurred. Now can they recover because of the negligence of the defendant, when they themselves were the cause of such negligence? Whether the plaintiffs were in fact guilty of any negligence, we do not know. There was evidence tending to show that they were negligent; and the question of whether they were or not, should have been submitted to the jury. But it was not submitted to the jury, and in this we think the court below erred. The plaintiffs should have exercised that degree of diligence to avoid injuries to their own property by fire escaping from the defendant's engines, which an ordinarily prudent man would have exercised under like circumstances. As sustaining our view of the question, we would refer to the following cases: *Kesee v. C. & N. W. Rly. Co.*, 30 Iowa, 78; *Garret v. C. & N. W. Rly. Co.*, 36 Iowa, 121; *O. & M. Rld. Co. v. Shanfelt*, 47 Ill. 497, 505; *Ill. Cent. Rld. Co. v. Munn*, 51 Ill. 78; *C. & N. Rly. Co. v. Simonson*, 54 Ill. 504; *Coates v. M. K. & T. Rly. Co.*, 61 Mo. 38; *St. J. & D. C. Rld. Co. v. Chase*, 11 Kas. 47, 56. See also, upon this question, the following cases: *Fero v. B. & S. L. Rld. Co.*, 22 N. Y. 209; *Cook v. Champlain Trans. Co.*, 1 Denio, 91; *Kellogg v. C. & N. W. Rly. Co.*, 26 Wis. 223; *Salmon v. D. L. & W. Rld. Co.*, 38 N. J. Law, 5. The last-mentioned cases present the other side of the question, so far as the other side has been presented in any case.

The judgment of the court below will be reversed, and cause remanded for a new trial.

BREWER, J., concurring.

HORTON, O. J., not sitting in the case.

THE STATE OF KANSAS V. N. LOFLAND.

1. **APPEALS FROM JUSTICES, in Criminal Actions.** The judgment of a justice of the peace in a criminal case cannot be reviewed on petition in error in the district court. [*State v. Young*, 6-37; *State v. Armell*, 8-293; *Jones v. Sch. Dist.* 8-364; *Copeland v. Majors*, 9-104; *State v. Harpster*, 15-322; *State v. Anderson*, ante, 89; *State v. Forner*, 32-281.]
2. **JURISDICTION OF DISTRICT COURT; Error from Justices Courts.** The district court has no jurisdiction of a criminal case removed on petition in error to it from the judgment of a justice of the peace.

Error from Lyon District Court.

In July 1875, *Lofland* was arrested on a charge of assault and battery and brought before a justice of the peace, and on being arraigned pleaded guilty to the charge. A fine was assessed against him, which with the costs he was adjudged to pay. At the request of the justice the county attorney was present. A fee of \$5 for the trial of the cause, for the county attorney, and a fee of fifty cents for the justice, for trial, were included in the costs taxed against defendant. Defendant moved the court to retax the costs, and strike out these two items, which motion was overruled. Other and subsequent proceedings are stated in the opinion. On petition in error, the district court, at the September Term 1875, reversed the decision of the justice as to said two items of costs, and gave judgment in favor of *Lofland* for the costs in the district court. And from such judgment *The State* now appeals, and brings the record here by petition in error for review.

Gillett & Forde, for The State.

Randolph & Sedgwick, for defendant.

The opinion of the court was delivered by

HORTON, C. J.: This was a criminal action. The judgment of the justice of the peace was rendered on a plea of guilty, and the defendant was sentenced and adjudged to pay a fine of \$5, and the costs of prosecution, and stand committed to the county jail until the same were paid. The defendant ob-

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jected to the costs taxed for the county attorney and the justice of the peace for trial of the case, claiming that, as a plea of guilty was entered upon arraignment, no costs could be taxed for a trial. After a motion to retax costs had been overruled, and exceptions taken, the defendant attempted to remove the case to the district court on petition in error. No appeal was taken. The district court reversed the judgment of the justice of the peace as to the action had in overruling the motion to disallow the costs taxed for a trial of the case, and rendered judgment for defendant for said fees of \$5.50 so taxed against him as costs, and also ordered that defendant as such plaintiff in error recover of the defendant in error his costs taxed at \$2.65. Sec. 20 of procedure before justices in misdemeanors provides, "All proceedings, including the mode of procuring, and the grounds for, a change of venue, upon the trial of misdemeanors before a justice of the peace, shall be governed by the provisions of the code of criminal procedure, so far as the same are in their nature applicable, and in respect to which no provision is made by statute." Sec. 21 of the same procedure authorizes appeals. There is no statute permitting the district court to review on a petition in error the judgment of a justice of the peace in a criminal case. In the case of *The State v. Boyle*, 10 Kas. 118, this court decided that a criminal case must be removed from the district court to the supreme court on appeal, and not on petition in error.

As all proceedings upon the trial of misdemeanors before a justice of the peace are governed by the provisions of the code of criminal procedure, so far as applicable, unless different provision has been made by statute, and as appeals only are authorized in criminal trials before a justice of the peace, we conclude the defendant could not have the judgment of the justice of the peace reversed by the district court on a petition in error. As the district court had no jurisdiction of the cause except on appeal, and as no appeal was taken, the action of the district court was erroneous. The case of *The State v. Menhart*, 9 Kas. 98, referred to by counsel of appellee to sustain the judgment of the district court, is not

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authority, as in that case the jurisdiction of the district court was neither questioned nor passed upon. The judgment of the court below must be reversed.

All the Justices concurring.

THE STATE OF KANSAS V. HENRIETTA COOK.

1. EVIDENCE; *Analysis, Showing Poison; Trial for Murder.* In a criminal prosecution for murder in the first degree, where it is claimed that the deceased came to his death by poison, and that a chemical analysis of his stomach subsequently made tends to show the same, *held*, that where sufficient evidence is introduced on the trial to prove beyond a reasonable doubt that the stomach analyzed was the stomach of the deceased, and that it had not been improperly tampered with, the evidence concerning the analysis may itself be considered by the jury. It is not necessary in such a case that the stomach should be kept continuously under lock-and-key, or continuously sealed up. The court itself should first pass upon the preliminary proof, and if the court should hold the same to be sufficient, then the question of its sufficiency should also be passed upon by the jury, under proper instructions from the court. [*Anthony v. Stinson*, 4-212; *Taft v. Wilcox*, 6-48; *State v. Reddick*, 7-143; *State v. Medlicott*, 9-257; *R. R. v. Frasier*, 27-463; *R. R. v. Thul*, 32-255.]
2. EXPERT; EVIDENCE; *Chemist; Effect of Poison.* A person who is a chemist and toxicologist may testify as an expert concerning the effect of a certain poison upon the human system, although he may not be a physician, or surgeon.

Appeal from Osborne District Court.

INDICTMENT, charging defendant *Henrietta Cook* with having poisoned and killed *Hiram Cook*, by mixing strychnine in his food and drink, and so administering it, on the 8d of March 1876. Trial at the April Term 1876. Defendant asked twelve instructions, of which the 4th, 9th, 11th and 12th were refused. The 4th was in regard to "reasonable doubt," and was in substance included in the general charge. The 9th and 11th instructions so refused are as follows:

"9th. The identity of the substance (in this case the stomach of the deceased) submitted to chemical analysis must be pre-

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served. And the main question to be settled on this point is, are they the same substances? Have they at all times been preserved under lock-and-key? If transported from place to place, have they been carefully sealed? Under all these circumstances the evidence should be such as to preclude the possibility of their having been tampered with."

"11th. The penalty or punishment for every murder which shall be committed by means of poison, purposely, deliberately, premeditatedly, and of malice aforethought administered or given, is death. An offense of such character is murder in the first degree; and the indictment charges such offense. And if from all the evidence the jury cannot find the defendant guilty of said offense as charged, (that is, murder in the first degree,) then they cannot convict in this case, and the verdict must be, not guilty."

The 12th instruction asked and refused, is in the exact words of the 9th, except the last clause, which clause is as follows: "Under all these circumstances the evidence should be such as to preclude beyond a reasonable doubt the probability of their having been tampered with." The prosecution asked several instructions, all of which were given. The 5th instruction so given was as follows:

"5th. Every person deliberately assisting another in the commission of self-murder, is guilty of manslaughter in the first degree; and therefore, if the jury believe from the evidence in this case, that the defendant Henrietta Cook, at any time administered strychnia or strychnine to the deceased Hiram Cook, in quantity sufficient to produce death, and that she knew at the time she administered the same that the same was a deadly poison, and that the quantity was sufficient to produce death, and that said Hiram Cook requested the defendant to administer said poison, then you must find the defendant guilty of manslaughter in the first degree."

The jury returned a verdict of "guilty of murder in the first degree, as charged in the information." New trial refused, and judgment on the verdict. Defendant appeals. No briefs on file.

A. Saxeey, and *Z. T. Walrond*, for appellant.

R. G. Hays, county-attorney, for The State.

The opinion of the court was delivered by

VALENTINE, J.: The defendant in this case was charged with murdering her husband, by poisoning him. She was found guilty of murder in the first degree, and sentenced to suffer death. She now appeals to this court. The record of the case is very voluminous, and shows in detail all the proceedings of the court below. We have examined the record carefully, and also considered carefully all the points made by the defendant's counsel, and we must now say that we do not think that the court below committed any material or substantial error. In answer to the points made by defendant's counsel we would say: First, we think the information was sufficient. Second, the "confession" made by the defendant was beyond all doubt voluntary.

III. The evidence introduced on the trial shows, as we think, beyond all reasonable doubt, that the stomach which was taken from the body of the deceased was the identical stomach which was analyzed by Professor Kedzie, and that no foreign substance such as strychnine or other poison could have been introduced into the stomach, or into its contents, subsequent to the death of the deceased and prior to the analysis of said stomach and its contents. This we think was all that was necessary for the purpose of allowing the jury to consider the evidence concerning the analysis. It was not necessary that the stomach should have been kept continuously under lock-and-key from the time it was taken from the body of the deceased until the final analysis, or that it should have been kept continuously sealed up. The preliminary proof of the identity of the stomach and its contents, and that the same had not been improperly tampered with, was first submitted to the court, and passed upon by the court; and the court decided that the proof was sufficient. This we think was correct. But even if the court had erred, at the time, as to the sufficiency of the proof, still, if at the close of the trial, the proof was sufficient, the error would be immaterial. At the close of the trial the question as to the sufficiency of said proof was

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again brought under review. At this time it was submitted to the jury for their consideration, under proper instructions from the court. This was also correct. Generally the decision of the court that the preliminary proof is sufficient, is only provisional, and the question of its sufficiency must also and at the close of the trial be passed upon by the jury. The jury found against the defendant upon this, and all other questions submitted to it. This we think was correct according to the evidence.

IV. Professor Kedzie, who made the analysis of the stomach and its contents, was a chemist and toxicologist, but not a physician, or a surgeon. He was allowed to testify as an expert concerning the effect of strychnine upon the human stomach and upon the human system. This we think was right. The effect of poisons upon the human system we think comes within the scope of the science of toxicology.

V. The substance of the fourth instruction asked for by the defendant and refused by the court was embodied in other instructions given. The ninth and twelfth instructions asked for by the defendant, and refused by the court, were properly refused. As we have before said, it was not necessary that said stomach should have been kept continuously under lock-and-key, etc. And it was not necessary that all *possibility* of it being tampered with should have been excluded. The court gave proper instructions upon this subject, and all that the defendant was entitled to have given. Assuming for the purposes of this case, that the eleventh instruction asked for by the defendant and refused by the court was good law, and that the fifth instruction given by the court was not good law, and still the refusal of the one and the giving of the other could not, as we think, have prejudiced the defendant's rights in the slightest degree whatever. The instruction refused was, in effect, that the punishment for murder in the first degree is death, and that the jury should either find the defendant guilty of murder in the first degree, or acquit her. The instruction given was, that the jury might under certain circumstances find the defendant guilty of manslaughter in the

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first degree. Now the jury has nothing to do with the punishment for the offense, in any case; and they found in this case that the defendant was guilty of murder in the first degree. The instruction with reference to manslaughter therefore had nothing to do with their verdict.

VI. The evidence does support the verdict; but as it is so voluminous (making over 200 pages of record,) we suppose it will hardly be expected that we shall comment upon the same in detail. There was some conflict in the evidence, however, but this court does not weigh conflicting evidence for the purpose of reversing judgments on the merits where there is sufficient evidence to uphold the verdict. We are inclined however to think that the verdict of the jury was correct, notwithstanding the conflict in the evidence.

The judgment of the court below must be affirmed.

All the Justices concurring.

THE STATE OF KANSAS V. J. A. CROSBY.

CRIMINAL LAW; Verdict of Not Guilty; Twice in Jeopardy. In a criminal prosecution, where the defendant has pleaded "not guilty" to the charge, and where the case is submitted to a jury, and a verdict of not guilty is rendered, and the court enters judgment that the defendant be discharged and go hence without day, such verdict and judgment are conclusive, and this court cannot on an appeal set aside or reverse the verdict or judgment. [*State v. Carmichael*, 3-102; *City v. Adams*, 15-391; *City v. Bell*, 16-480; *In re Scrafford*, 21-735.]

Appeal from Bourbon District Court.

THE defendant *Crosby* was charged by information with the crime of embezzlement. The information alleged that—

"The said *J. A. Crosby*, in July 1875, being then the agent and in the employ of the Howe Machine Company, and being over sixteen years of age, and having in his possession, as agent of said Howe Machine Company, a great number of notes and

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accounts for collection, said notes and accounts being the property of said Howe Machine Company, did, by virtue of his said employment, and while so employed as said agent, collect, receive, and take into his possession, as such agent for said Howe Machine Company, \$131.50, lawful money of the United States, over and above all fees as attorney, charges as agent, or stipulated commissions for making said collections of said money for said company, said Howe Machine Company being a corporation duly incorporated under and by virtue of the laws of Connecticut, and doing business in the state of Kansas, and that said *Crosby*, so having said moneys in his possession, at the county of Bourbon, on the 15th of April 1876, did refuse and neglect, upon demand then and there made by said Howe Machine Company upon him the said *Crosby*, he being then and there the agent of said company, to deliver and pay over to said Howe Machine Company the said moneys so collected as aforesaid, and that he the said *Crosby*, not having lost the said money by means beyond his control before he had opportunity to make delivery thereof to said Howe Machine Company, his employers, nor having been permitted by said Howe Machine Company his employers to use the same, did then and there feloniously embezzle and convert to his own use, without the consent of said Howe Machine Company, his employers, the said sum of \$131.50, lawful money of the United States, of the money, goods and chattels of the said Howe Machine Company, and of the value of \$131.50, contrary," etc.

Arraignment and trial at the May term 1876. Defendant pleaded not guilty. He then moved for a continuance, and filed his affidavit in support of such motion. The motion was denied. On the trial, the county attorney, to sustain the averments of the information, offered in evidence first, what was claimed by the state to be the charter of said Howe machine company, incorporating it under and by virtue of the laws of the state of Connecticut, the paper presented being partly in writing and partly printed, and purporting to be an act of the legislature of said state incorporating said company. The said paper or act fills eight written pages, and is authenticated by the certificate of the secretary of state, and the great seal of Connecticut. The certificate, omitting heading, date, etc., is in these words: "I hereby certify that the foregoing is a true, copy of record in this office." *Crosby* objected to the intro-

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duction of said paper, on the grounds, first, that it was incompetent by reason of the defective and insufficient certificate of the secretary of state attached thereto; and second, that the paper was not shown to be a copy of the original act. These objections were sustained, and *The State* duly excepted, and reserved the point. One Thos. M. Cochrane was then produced as a witness by *The State*, and testified that he was the general manager of the Howe Machine Company at St. Louis, Missouri, and had been since May 1872, and that he had a general knowledge of said company, and was also acquainted with its general reputation. Questions were then put to the witness for the purpose of proving the *de facto* existence of said corporation, and for the purpose of proving its existence by general reputation. *Crosby* objected to each and all of these questions upon the grounds, "first, that the existence of a private foreign corporation cannot be proved in a criminal cause by the parol testimony of a witness as to its existence or non-existence; second, the questions propounded require the witness to state a legal conclusion, and demand of the witness to determine a question which is wholly a question to be determined by the court and the jury trying the cause; and third, because the answer demands secondary evidence of the existence of a fact which (if such fact exists in law at all) can and must be proved by higher and better evidence." These objections were sustained, and exceptions were duly taken and the point reserved by *The State*. The prosecution then offered in evidence the affidavit of *Crosby* filed for the purpose of obtaining a continuance of the case, the object of the state being (as alleged) to prove the incorporation of the Howe Machine Company by the admissions in said affidavit. The affidavit is very long. Among many other statements it contains the following:

"Affiant further states, that his defense in this action rests upon the proper and rightful settlement of a long and very large business transaction between the Howe Sewing Machine Company and this defendant, running back for a period of nearly three years, involving the settlement of the

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entire business between said corporation and this defendant, amounting to probably \$25,000. * * * Affiant further states, that it is necessary for him to look up, and get into his hands ready-for use in this trial, many letters and written statements from said Howe Sewing Machine corporation, which this affiant cannot readily place his hands upon at this time, but which this affiant states that he has among his papers and other documents, which said letters, papers, etc., will when produced abundantly show that the pretended charge of embezzlement with which this defendant now stands charged is wholly and totally false. Affiant further states that said papers, letters and communications which he has and which he received by due course of mail from said Howe Sewing Machine corporation, will show that, instead of his embezzling the sum charged in the information, or any other sum, said Howe Sewing Machine corporation is justly indebted to this affiant in the sum of \$500 over and above all rightful claims of said Machine corporation."

The defendant objected to the introduction of said affidavit upon the grounds, "first, that the same was incompetent, immaterial, and irrelevant; second, there is no admission in said affidavit that the Howe Machine Company is duly incorporated as a corporation under and by virtue of the laws of the state of Connecticut; third, the due and legal existence of such company as a corporation, if in fact it exists as such, can be proved by other, better, and higher testimony than said affidavit; fourth, the existence of such company is a question of law, and not of fact; and fifth, that it is sought by the introduction of said affidavit to make the defendant a witness against himself against his consent." The court sustained said objections, and *The State* duly excepted and reserved the point.

At this point of the trial the county attorney announced that *The State* had in its power no other or further evidence tending to show the incorporation of said Howe Machine Company, and announced to the court and defendant that it reserved the foregoing questions for the purpose of appealing from the rulings of the district court to the supreme court. The jury returned a verdict of "not guilty," and the court

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rendered a judgment of acquittal. *The State* caused a bill of exceptions to be duly settled, and now brings its three "reserved questions" here, as upon appeal, for review.

Eugene F. Ware, for The State:

1. The certificate of the secretary of state of the state of Connecticut was sufficient, and the authentication complete. 19 Abbott's Pr. Rep. 416; 5 Rand. 126; 11 Wheat. 892; 1 Greenl. Ev., §§480, 500; 28 Mich. 481.

2. In criminal cases the *de facto* existence of a corporation may be proven by verbal testimony, and by evidence of general reputation: § 214 of Crim. Code, Gen. Stat. 854; 28 Ind. 321; 29 Cal. 257; 32 Cal. 160; 65 N. C. 318; 2 Wharton's Am. Cr. Law, §1828; 2 Bish. Cr. Proc., §752.

3. The defendant's affidavit was admissible. The objections raised against it do not reach the case. The affidavit admits the corporation, refers to it in connection with the property embezzled, and leaves it beyond all doubt that the defendant had dealt with it as a corporation, and believed it to be a corporation. It was offered to prove defendant's *admission of a fact*, and not as a *confession of guilt*; and as his *admission* of such fact, it was competent; 1 Greenl. Ev., §§170, 194, 213. When Crosby swore that he had settled with said corporation for said property, he thereby *admitted* the ownership as laid in the information, and such admission was *sufficient proof of such ownership*. The district court seemed by its rulings to regard the incorporation of the "Howe Machine Company," as the *gravamen of the defendant's crime*! This we think was error. The incorporation of said company might have been a crime on the part of the Connecticut legislature, but it was no part of the crime of which defendant was charged in the information.

The opinion of the court was delivered by

HORTON, C. J.: The decisions of this court in the cases of *The State v. Carmichael*, 8 Kas. 102, and *The City of Olathe v. Adams*, 15 Kas, 391, are decisive of the questions presented by the appellant. We repeat, what we have heretofore de-

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cided, "We know of no authority in this court or in any other court, to set aside a verdict or finding of 'not guilty,' in a criminal action. We think it is the universal opinion, both of bench and bar, that a verdict of 'not guilty' in a criminal action ends the case." The counsel representing the appellant have not called our attention to any authorities tending to show that the verdict and judgment rendered in this case are not conclusive.*

The judgment of the court below must therefore be affirmed.

All the Justices concurring.

[*SINCE this opinion was filed, counsel for *The State* has called the reporter's attention to the record and to the brief as filed, to show that it was not supposed or claimed by him, nor on the part of *The State*, that the defendant could be again tried, even if the supreme court should hold that the trial court erred in ruling out the testimony. Counsel refers to §§ 283 and 288 of the criminal code, and suggests that the record in this case was prepared expressly by the counsel on both sides, and by the trial court, to present to the supreme court for review the three questions reserved, (see statement of case, in the text, *supra*), "that such questions might be settled, but without a thought that, where there was a verdict and judgment of acquittal, the defendant could be again tried for the same offense." The two sections referred to by counsel are as follows:

"§ 283. Appeals to the supreme court may be taken by the state in the following cases, and no other: *First*, Upon a judgment for defendant, on quashing or setting aside an indictment or information. *Second*, Upon an order of the court arresting the judgment. *Third*, Upon a question reserved by the state.

"§ 288. In case of an appeal from a question reserved on the part of the state, it is not necessary for the clerk of the court below to certify, in the transcript, any part of the proceedings and record, except the bill of exceptions and the judgment of acquittal." (Gen. Stat. pp. 865, 866.)

Query: Is not the fault in the statute? and did not the supreme court decide the only question properly before it? In other words, does not the statute, in the *third* clause of § 283, undertake to do what the legislature had no power to do—that is, to give the state an appeal where the defendant has upon trial been found not guilty, and acquitted? Counsel for the state says he does not contend that Crosby could be tried again—he does not deny "that the verdict and judgment are conclusive." What question, then—conceding (what it would seem will scarcely be controverted) that the trial court erred in its second and third rulings—had the supreme court before them to decide? The judgment of acquittal being conclusive, (once in jeopardy, § 10 of the bill of rights,) the defendant, being acquitted, being discharged *without day*, has no further interest in the case, nor in any question raised and passed upon by the trial court, whether such court decided correctly, or not, or whether the state "reserves" such question, or not. So far as the defendant is concerned, the judgment being final as to him, there is nothing from which the state can appeal. The defendant is no longer a party to any controverted question. He has nothing to settle, by an appeal by the state—no right or interest to be affected by any settlement or decision so made. He is not a necessary or proper party, either as *appellant*, or as *defendant in error*. How then can "reserved questions" in such cases be brought here as upon "appeal by the state?" So much of the statute as attempts to authorize such appeal, must be void. The supposed "appeal" is only an *ex parte* proceeding, (original in its nature,) by which the state in effect presents to the supreme court, not an action, or cause—not a controversy between the state and another party—but original questions. Calling this proceeding an "appeal," does not make it so. And as the supreme court, with respect to such questions, has, not original, but *appellate jurisdiction only* (const., art. 5, § 3,) it would seem that it has no power or authority to review questions presented as were the questions in this case, where the record shows a final judgment of acquittal. Of course appeals may be taken by the state under the *first* and *second* clauses of said § 283.—REPORTER.]

THE STATE OF KANSAS V. GEORGE W. BEEHE.

1. **BURGLARY, in the Night-Time.** Burglary in the night-time, as defined by section 63 of the act relating to crimes and punishments, does not include burglary in the day-time as defined by section 69 of the same act. [*State v. Adams*, 20-329.]
2. **DEGREES OF CRIME; Conviction of Lesser Degree.** Upon an information or an indictment for an offense consisting of different degrees, the jury can only find the defendant guilty of a degree inferior to the one charged when the facts constituting the offense stated include the lesser offense.
3. ——— **When Conviction of Inferior Degree is Error.** Where a defendant is charged in an information with the commission of the crime of burglary in the second degree, and in the night-time, under section 63 of the act relating to crimes and punishments, a verdict that the defendant is guilty of burglary in the third degree is error, and will be set aside on appeal to the supreme court.

Appeal from Leavenworth District Court.

BEEHE was charged by information with the commission of certain acts, constituting burglary in the second degree if committed in the *night*, and burglary in the third degree if committed in the *day-time*. The allegation as to *time*, is, "that *George W. Behee*, at said county of Leavenworth, on the 17th of July 1876, and in the *night-time* of said day," etc. Trial at September Term 1876. Verdict of guilty of burglary in the third degree, and petit larceny. New trial refused, and defendant was sentenced to imprisonment in the penitentiary for two-and-a-half years. *Behee* now brings the case here by appeal.

J. D. Shafer, for appellant, contended, that as, by §§ 104 and 105 of the crim. code, the information must be direct and certain, and that the precise time must be stated where it is an indispensable ingredient in the offense, a person charged with burglary in the *night-time*, cannot be convicted of burglary in the *day-time*. 56 Mo. 181; 46 Ga. 212, 216; 70 N. C. 239; 2 Jones L. 858. The case at bar is not an offense like murder, which includes all lesser degrees of felonious homicide, and where proof of the greater is proof of the lesser offense. In

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burglary, while some of the facts necessary to constitute burglary in the third degree are like those which constitute burglary in the first and second degrees, yet it takes other and different facts from those of the first and second degrees to constitute burglary in the third degree. 6 Mo: 281, 399; 46 Ga. 212.

L. M. Goddard, county-attorney, for the state, submitted: "Upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment and guilty of any degree inferior thereto, or of an attempt to commit the offense;" § 121, Crim. Code. Burglary is an offense consisting of different degrees, under our statute. Burglary in the third degree is included in this information, and remains fully described after striking therefrom the words, "in the night-time." The acts constituting the offense in both the second and third degrees are the same. The only difference is the *time* at which they are done. If the position assumed by defendant is correct, then the state is powerless to punish in a case similar the one at bar. A person leaves his dwelling-house securely fastened—is absent several days. Upon his return he finds his house has been burglariously entered, and his goods stolen. It is impossible to prove the exact time at which the breaking was done. The possession of the property stolen, together with other circumstances, satisfy a jury that A. committed the offense, but the state is unable to prove whether he entered the house an hour before, or an hour after sundown, but alleges that it was *after*. The jury (giving A. the benefit of the doubt) finds it was *before*, and return a verdict of the lower degree, and thereby commit an error that absolutely absolves the offender.

The opinion of the court was delivered by

HORTON, C. J.: The defendant George W. Behee was charged under § 68 of the act relating to crimes and punishments with having on the 17th of July 1876, and in the night-time of said

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day, committed burglary in the second degree, and was thereon convicted of burglary in the third degree under § 69 of the same act. Section 69 provides that, "Every person who shall be convicted of breaking and entering, in the day-time, any dwelling-house, or other building, or any shop, store, booth, tent, boat or vessel, under such circumstances as would have constituted the offense of burglary in the second degree if committed in the night-time, shall be deemed guilty of burglary in the third degree." The information states "that the defendant in the night-time, the dwelling-house of one Frederick Wellhouse, then and there feloniously and burglariously did break and enter, with the intent the goods and chattels of the said Wellhouse, in the said dwelling-house then and there being, then and there feloniously and burglariously to steal, take and carry away," etc., and also that defendant committed larceny. The question presented is, was the defendant rightfully convicted of burglary in the third degree? It is claimed by counsel for the state that under § 121 of the criminal code, providing that "Upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment and guilty of any degree inferior thereto, or of any attempt to commit the offense," the defendant may be charged with the commission of certain acts constituting burglary in the second degree as defined in § 68 of the act of crimes and punishments, and be thereon found guilty of the commission of certain acts constituting burglary in the third degree as defined by § 69 of the same act. If the claim of the counsel for the state is good in this case, then it necessarily follows that under an information charging the breaking into a dwelling-house under said § 63 the defendant could be convicted of breaking and entering a booth or tent or boat, under § 69. Such is not the proper construction of § 121 of the criminal code. The defendant in a criminal case has the right "to demand the nature and cause of the accusation against him;" (§ 10 of the Bill of Rights, Const. of Kansas.) He cannot be charged in the information with one offense, and be convicted

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of another and different offense. Sec. 104 of the criminal code provides, that "the indictment or information must be direct and certain as it regards the party and the offense charged." Whenever the information charges an offense in one degree, and the facts therein stated necessarily include any degree inferior thereto, the jury may find the defendant not guilty of the degree charged, and guilty of a degree therein included. For instance, to convict a person of the crime of burglary in the first degree under § 61 of the crimes act, it is necessary to establish that some human being was in the dwelling-house at the commission of the crime; but if a person commits like acts, and no human being is in the dwelling-house at the time of the wrongful breaking and entering, then the offense is burglary in the second degree under § 63. Upon a charge of burglary in the first degree, if the evidence should fail to establish the existence of some human being in the dwelling, the defendant could be convicted under § 63 of burglary in the second degree, because the facts constituting the offense charged include all the facts necessary to convict under said § 63. In such a case, the party would not be misled or surprised by the failure of the prosecutor to prove all the facts alleged. If sufficient facts were proven on the trial to constitute the crime of burglary in the second degree, under § 63, then rightfully the jury might find the defendant not guilty of the offense of burglary in the first degree, and guilty of burglary in the second degree. The inquiry comes under this construction of § 121 of the criminal code, whether the charge of burglary in the second degree, and in the night-time of said day, under § 63, includes the facts constituting burglary committed in the day-time, in the third degree, under § 69. We think not. The information expressly states that whatever the defendant did was done in the night-time. Time, under § 63, is an indispensable ingredient in the offense. It is a material and important portion of the charge. To convict the defendant of burglary in the third degree, on such an information, authorizes the introduction of evidence to prove different facts than those stated. If such practice was permitted, then a defendant would not be

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informed of the "nature and cause of the accusation against him," when tried upon an information. It is only where the lesser offense is included in the greater, that a verdict can be for the lesser under an indictment or information for the greater. Burglary in the night-time, as charged under said § 63, does not include burglary in the day-time as defined by § 69 of said crimes act. One may be guilty of the latter, and not of the former; and of the former, and not of the latter. *The State v. Alexander*, 56 Mo. 131; *Williams v. The State of Georgia*, 46 Ga. 212. In convicting the defendant of burglary in the third degree, upon the facts charged in the information, the court below committed the error of assuming that burglary in the day-time, under § 69, is included in burglary in the night-time under § 63. The judgment of the court was therefore erroneous.

The counsel for the state suggests, that if the conviction in this case is set aside, as it is often impossible to prove the exact time at which the breaking and entering is committed, offenders of this class of offenses will frequently go unpunished. We answer that we are not called upon to say what the law should be, but to interpret what it is. But under our statute the fears of the counsel for the state are groundless, as § 64 specially provides for the punishment of the crime of burglary, whether committed in the day or night-time. Under § 64, time is immaterial, and evidence could be offered under an information properly drawn, of the commission of the acts of burglary in the second degree either by day or night.

The judgment of the court below must be reversed.

All the Justices concurring.

CITY OF BURLINGAME V. KANSAS VALLEY NATIONAL BANK.

PLEADINGS, FILED OUT OF TIME; Error Waived. Where a reply has stood unchallenged for nearly three years, and where during that time the parties have once consented to judgment in favor of the plaintiff, but through some oversight the same was not entered upon the journals of the court, there is no error in overruling a motion to strike the reply from the files because filed one day after the time. [*Osgood v. Haverly*, McC., 182; *Wilson v. Fuller*, 9-177; *Grant v. Pendery*, 15-236; *Bent v. Philbrick*, 16-190; *Holden v. Clark*, 16-346; *Nelcott v. Porter*, 19-131; *Noonan v. Short*, 20-624.]

Error from Osage District Court.

THE only question here, is one of practice, respecting the filing of pleadings. Judgment was given for the *Bank*, at the December Term 1874, and the *City of Burlingame* brings the case here.

James Rogers, for plaintiff in error.

Peck & Ryan, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: But a single question is presented by counsel for plaintiff in error, and that, it seems to us, is clearly covered by decisions already made in this court. March 21st 1872, was the time for filing a reply. It was filed the next day. Judgment was not entered until December 1874. When called for trial at that time the defendant moved to strike the reply from the files, because filed out of time. The court overruled the motion, and this is the error complained of. It also appears that the case was continued by consent, at the fall term of 1872. At the fall term of 1873, judgment was by agreement of the respective attorneys rendered in favor of the plaintiff, as appears from the minutes of the judge upon the trial docket, though no entry thereof appears on the journal of the court. Was the plaintiff in error prejudiced by the ruling of the court? Clearly not. The reply had stood unchallenged for nearly three years. The parties had once consented to judgment. If no reply had been filed, it would scarcely seem an

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abuse of the court's discretion, if it had permitted one to be filed. *A fortiori*, there was no abuse in permitting one already filed to remain. See upon the power of the court in respect to filing of pleadings, *Douglas v. Rinehart*, 5 Kas. 392; *Davis v. Wilson*, 11 Kas. 74; *Taylor v. Hosick*, 13 Kas. 518; *Clark v. Spencer*, 14 Kas. 398; *Hobson v. Ogden*, 16 Kas. 888.

The judgment will be affirmed.

All the Justices concurring.

EDWARD NASON V. W. K. BEST.

FORCIBLE ENTRY AND DETAINER; Notice, Before Commencing Action. A party desiring to commence an action of forcible entry and detainer should, at least three days before commencing his action, notify the adverse party, by a notice in writing, to leave the premises in dispute; and if he does not give such notice he cannot maintain the action. And this notice should show clearly who claims to be entitled to the possession of the premises, and who makes the demand therefor; and then no one but the person who thus claims the premises and makes the demand can maintain the action under such notice. [*Conaway v. Gore*, 22-216.]

Error from Marshall District Court.

A SUFFICIENT statement of the facts and proceedings is given in the opinion. Judgment for *Best* was given at the August Term 1875, and *Nason* brings the case here.

B. P. Waggener, for plaintiff in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action of forcible entry and detainer. The action was commenced before a justice of the peace, where judgment was rendered in favor of the plaintiff. The case was then taken to the district court on petition in

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error, where the judgment of the justice was reversed, the case again tried, and judgment rendered in favor of the defendant. The plaintiff now brings the case to this court on petition in error.

We cannot tell from the record brought to this court whether the district court committed any material error or not. Certainly no material error is clearly and affirmatively shown: and therefore the judgment of the court must be affirmed. We would say, however, that it is necessary that a party desiring to commence an action of forcible entry and detainer should, at least three days before commencing his action, notify the adverse party by a notice in writing to leave the premises in dispute; (Gen. Stat. 810, § 161;) and if he does not give such notice he cannot maintain the action. *Kennedy v. Hitchcock*, 4 Porter, (Ala.) 230; *Pricket v. Ritter*, 16 Ill. 96; *Dutton v. Colby*, 35 Me. 505; *Mead v. Kirkpatrick*, 8 N. J. Law, 308; *Forbes v. Glashan*, 13 Johns. 158. And this notice should show clearly who claims to be entitled to the possession of the premises, and who makes the demand therefor; and then no one but the person who thus claims the premises and makes the demand can maintain the action under such notice. Therefore, a notice, not showing in the body of the same who claims the premises, but being "served by Noah Nason, in the name of Edward Nason as the agent of Noah Nason," is not a sufficient notice for Edward Nason to found an action of forcible entry and detainer upon. But even if such notice were sufficient, the judgment of the court below in this case would probably still have to be sustained upon other grounds, and for other reasons.

The judgment of the court below is affirmed.

BREWER, J., concurring.

HORTON, C. J., not sitting in the case.

WM. H. BOND v. WILHELMINE WEBER.

AMERCEMENT; Rule Imperative. Sec. 472 of the code, which provides for the amercement of sheriffs, is imperative in its terms, and grants no discretion to the court. Being summary and penal in its nature, a party who asks relief under it must bring his case *clearly and strictly* within its terms. When he has done so, it is the duty of the court to amerce the sheriff, whether his omission result from willful wrong, or mere neglect, and whether such omission has resulted in actual injury or not. [*Armstrong v. Grant*, 7-285.]

Error from Leavenworth District Court.

BOND, as sheriff, at the September Term 1875 of the district court, was amerced in the amount of an execution held by him, for failure to return said writ on or before the return-day thereof. From such order and judgment of amercement he appeals, and brings the question here for review. All the facts and proceedings are stated in the opinion.

J. W. English, for plaintiff in error.

Clough & Wheat, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: On the 20th of May 1875, defendant in error, in the district court of Leavenworth county, recovered judgment against the Westchester Fire Insurance Company, for the sum of \$150, and her costs in that behalf expended. On the 3d of July 1875, a writ of execution of that date was issued on said judgment, directed to the sheriff of said county, to execute against the property of said company, returnable in sixty days from that date, which execution was by William H. Bond, sheriff of said county, received on the 5th of said July. Bond never returned that he had levied or made the amount of the debt, damages and costs, or any part thereof; nor did he return the execution to that court on or before the return-day thereof, but on the contrary made a return to the effect that an appeal-bond had been filed, when nothing of that kind

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had been done, and returned said execution on the 4th of September 1875, being more than sixty days after the date thereof—that is, said return was made on the third day after the return-day of said execution. Mrs. Weber thereupon gave the notice and made the motion to amerce said Bond, required and provided for by § 472 of the code. The sheriff, on the hearing of said motion offered his affidavit, alleging that he made the return in respect to the filing of an appeal-bond through mistake, from information received from the attorney of the defendant; that as a matter of fact the defendant had no property within the county, and asking leave to amend the return to show these facts, and also alleging that the failure to make return within sixty days was owing to his mistaking the date of his receipt of the execution, and that he had no intention of withholding the same. The court sustained the motion to amerce, and the sheriff now alleges error. His counsel says in his brief: "This case involves merely a consideration of the statute of Kansas for the amercement of the sheriff—whether it is imperative, or discretionary with the court." Accepting that as a fair statement of the case, we must answer that the statute is imperative, and not granting a discretion. The statute reads—

"Sec. 469. The sheriff * * * to whom any writ of execution shall be directed, *shall return such writ* * * * within sixty days from the date thereof." (Gen. Stat. 720.)

Sec. 472, on the next page, reads—

"If any sheriff * * * shall neglect to return any writ of execution to the proper court on or before the return-day thereof, * * * such sheriff * * * *shall*, on motion in court, and two days' notice in writing, be amerced in the amount of said debt," etc.

If we give to this language its ordinary meaning, there can be but one conclusion. It is not that he *may* be amerced, but that he *shall be*. The duty of returning the execution within sixty days, is expressly cast upon him; and a failure to perform that duty as expressly subjects him to amercement. The terms of the statute imply no discretion. The command is positive and peremptory. The amercement is

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not in compensation, and to be measured by the extent of the injury, but a penalty for neglect of duty, and of definite and fixed amount. Such were the views held in Ohio from which state we took this statute. In *Duncan v. Drakely*, 10 Ohio, 46, the court says: "In proceedings under the statute authorizing the amercement of an officer, great strictness is required, and he who would avail himself of the remedy therein provided must bring himself both within the letter and spirit of the law. It is right that it should be so, because the remedy is summary, and in its consequences highly penal. There is no trial by jury, and but little, if any, discretion left to the court." And again, after enumerating the cases in which an amercement may be had, it adds: "While in an action at common law, a plaintiff in any of these cases would recover only the damages actually sustained, by seeking his remedy under this statute he is sure to recover, if he recover at all, the full amount of the debt, with the additional penalty. The object of the law is undoubtedly, to induce fidelity on the part of a sheriff, but if carried into execution, it sometimes operates very severely." So also, in *Moore v. McClief*, 16 Ohio St. 50, the court uses this language: "The plaintiff's right to demand a judgment of amercement, in this case, can rest on no equitable ground, for the neglect of official duty of which she complains has done her no injury. The execution-debtor was wholly insolvent when judgment was recovered against him, and has continued to be so ever since. Her rights then are purely statutory. And if she makes a clear case for amercement under the statute, it is no defense against her claim that she had not been damnified. The statute under which she proceeds is of a penal character; it affords a summary remedy, without trial by jury, for official delinquency; and, without regard to the amount of damages resulting in fact from such delinquency, it leaves no discretion to the court as to the amount of the judgment to be rendered against the delinquent officer." That the sheriff by his conduct in this case brought himself clearly within the terms of the statute, is unquestioned. His counsel suggest

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nothing to the contrary, and we see nothing. True, no intentional wrong is shown; but it is *neglect*, which the statute reaches and punishes, and though it seems harsh and rigorous to impose the penalty, yet there is the statute. *Ita lex scripta est*. Its language is plain. Its meaning had been declared by the courts long before Kansas was a state. It grants no discretion. And it is as binding upon us as is any other command of the legislature.

The judgment must be affirmed.

All the Justices concurring.

C. A. RETTMAN v. C. W. RICHARDSON.

QUESTIONS SETTLED—*Not to be Reopened, or Discussed.* Where every legal question involved in a case has already been passed upon by the supreme court in other cases, and when the court below has committed no error for which the judgment of such court can be reversed, such judgment will be affirmed without any discussion of any of the questions involved in such case. [*Lucas v. Sturr*, 21-484.]

Error from Wilson District Court.

ACTION by *Richardson* against *Rettman*, to recover the contract-price of a "Marsh Harvester," sold by plaintiff to defendant. The plaintiff had judgment at the February Term 1875, and defendant brings the case here.

Charles Sweeney, for plaintiff in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action for damages for breach of a contract. The action was commenced by *Richardson* against *Rettman* in a justice's court, where judgment was rendered for the plaintiff for \$56.80, and costs. *Rettman* then appealed to the district court. In the district court the case was tried before a jury. We have all the evidence in-

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troduced on the trial; but none of the instructions given or refused have been brought to this court. The jury found a verdict in favor of the plaintiff for \$34.85, for which amount, together with costs, judgment was rendered. The defendant now brings the case to this court on petition in error. There is no new question of law involved in this case. Every legal question involved therein has already been passed upon and decided by this court in other cases. And the decisions in other cases have been published in the supreme court reports, and have therefore become public. We are also satisfied that the court below committed no error for which the judgment of such court can be reversed. It will therefore be seen that nothing could be gained by a discussion of any of the legal questions involved in this case, and therefore the judgment of the court below will be affirmed without any such discussion.

All the Justices concurring.

THE STATE OF KANSAS V. M. M. YOUNG.

1. LICENSE; INTOXICATING LIQUORS; *Cities of Third Class; Repeal of Statutes*. Statutes are not considered to be repealed by implication unless the repugnancy between the provisions of the new and the former statutes is plain and irreconcilable. The statute authorizing cities of the third class to license the sale of intoxicating liquors, does not repeal the provisions of the dramshop act of 1868. [*Proudy v. Stover*, 11-235; *Elliott v. Lockman*, 1-128.]
2. STATUTES, *In Pari Materia*. Different statutes relating to the same subject-matter are to be construed together. [*Judd v. Driver*, 1-464; *State v. Watson*, 2-32; *Points v. Jacobia*, 12-54; *Bridge Co. v. R. R.*, 12-413; *Comm'rs v. Marshall*, 19-143; *Gardenhire v. Mitchell*, 21-88; *Evans v. Adams*, 21-124.]
3. CITIES OF THIRD CLASS; *License; Dramshop Act*. Cities of the third class have the power to license persons to sell intoxicating liquors within their limits, subject to a compliance with the provisions of the dramshop act of 1868. [*City v. Seitz*, 16-143; *State v. Simmons*, 21-685.]
4. ——— *Petition for License; Dramshop Act*. The presentation of a petition to the city council by a person applying for a dramshop license, as required by § 1 of the dramshop act of 1868, is an essential condition precedent to the validity of a license to sell intoxicating liquors within

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the limits of a city of the third class. A license granted by the corporate authorities of a city of the third class in violation of the provisions of said act, is no protection to the licensee, and is null and void. [*Welford v. Weidlein*, 23-601, 605.]

Appeal from Chase District Court.

At the November Term 1876 of the district court, *M. M. Young*, *L. C. Harrington*, and *Jacob Hornberger*, were severally tried and convicted for selling intoxicating liquors contrary to the provisions of the Dramshop Act, (ch. 35, Gen. Stat. 1868.) The cases were tried by the court without a jury. In each case the defendant admitted the selling of the liquor, but proved as a defense that the selling was done within the corporate limits of the city of Cottonwood Falls; that said city was duly incorporated as a city of the third class; that said city had an ordinance in force regulating tippling-shops;* that the defendant had fully complied with the conditions of said ordinance, and had received a license from the the city council to keep a tippling-shop within the limits of said city. Motions in arrest of judgment, and for a new trial, were overruled. Judgment was rendered, fining each defendant \$5, and costs. *Young* brings the case here by appeal. It was stipulated that the judgment of the supreme court should be the same in the other cases as in the *Young* case.

Ruggles & Sterry, for appellant.

S. N. Wood, county-attorney, for The State.

The opinion of the court was delivered by

HORTON, O. J.: The defendant was convicted of selling liquors in Cottonwood Falls, Chase county, contrary to the provisions of the dramshop act of 1868. The selling of the liquors was admitted, but defendant established on the trial that Cottonwood Falls was an incorporated city of the third class; that the city had an ordinance in force at the time of the commission of the acts alleged in the information, regu-

*An ordinance "regulating tippling-shops," is a singular feature in city government. Sec. 59 of the third-class city-charter act gives power to the council "to restrain, prohibit and suppress," but not to "regulate," nor to license "tippling-shops." Nor does any statute authorize the licensing of "tippling-shops," by that name.—REPORTER.]

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lating tippling-shops; that defendant had received a license from the city authorities to keep a tippling shop within the city during the period of time within which it was admitted the defendant sold liquors, and that defendant complied with the conditions of the ordinance of the city relating to the sale of liquors. The ordinance makes no provision that the applicant for a license shall comply with the conditions of the dramshop act; neither did the defendant ever present to the city council the petition prescribed in §1 of said act, or give the bond required by §5 of the act.

The defendant appeals to this court to set aside the judgment of the court below; and counsel for the appellant claim "that by the passage of the ordinance as shown by the record, the city of Cottonwood Falls must be deemed to have acted under the power granted by §50 of the third-class city-charter act, chapter 60, laws 1871, page 181; that this section gave it ample authority to pass the ordinance; that the defendant was protected by complying with its conditions, and therefore the judgment should be reversed." This court decided in the case of the *City of Salina v. Seitz*, 16 Kas. 143, that cities of the third class have the right to pass ordinances for the issuance of licenses upon certain terms and conditions to persons to sell intoxicating liquors; and hence, the first question presented, is, whether such power must be exercised in harmony with the provisions of the dramshop act, or whether cities of the third class may by ordinance, or otherwise, dispense with the conditions therein contained? In the case of *Alexander v. O'Donnell*, 12 Kas. 608, it is held, under ch. 100, laws 1872, p. 206, §47, providing "the city council shall have exclusive authority to levy and collect a license tax on saloons, liquor-sellers," etc., that "the dramshop act is operative within the territorial limits of cities of the second class. The charter does not in terms limit the operation of the dramshop act. Exclusive authority over the liquor question is not granted, but only exclusive authority to levy and collect licenses. The general law, in terms reaching to cities, prohibits a sale without license." No greater power is granted to cities of the third class by §50, ch. 60, laws

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of 1871, and §48 of the same chapter, as amended by §2 of ch. 102, laws of 1872, as to the authority to levy and collect a license-tax on saloons, liquor-sellers, etc., than was bestowed on cities of the second class by ch. 100, laws of 1872, p. 206, §47. Nor can it be said that the provisions of the dramshop act have been repealed by the laws of 1871 or 1872 authorizing the incorporation of cities of the third class. The repeal of laws by implication is not favored by courts, and there is no repugnancy between the provisions of the dramshop act and the acts permitting cities of the third class to be incorporated. It is urged by appellant's counsel, however, "that cities of the third class may act under either power granted by § 50, laws 1871, page 131, or by §48, laws 1871, page 130, as amended by §2, laws 1872, page 234, or by the sections of ch. 35, laws 1868, page 399; and that having acted under one, they avoid the necessity of acting under either of the others." We think this argument fallacious. It is well settled, that different statutes relating to the same subject are to be construed together. If it be conceded that the dramshop act is in force within the limits of incorporated cities of the third class, then it follows, its provisions cannot be disregarded. The various sections of the laws of 1871 and 1872, giving authority to cities of the third class to "levy and collect a license-tax on saloons, liquor-sellers," etc., must be construed in harmony with the provisions of the dramshop act, and persons wishing to engage in the sale of intoxicating liquors within the corporate limits of this class of cities must fully comply with its provisions. The city of Cottonwood Falls cannot act under one of the powers granted, and disregard the others. There is no conflict between the statutes referred to, and manifestly they stand together. Indeed, this is made certain by the proviso to § 1 of the dramshop act of 1868, to the effect "that the corporate authorities of cities of the first and second class, may by ordinance, dispense with the petition mentioned in this section."

The final question to be considered is, whether the defendant having obtained a license from the corporate authorities of

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Cottonwood Falls, without complying with the conditions of the dramshop act, is protected thereby from punishment for the offense charged in the information? The views already expressed lead to the conclusion that he is not. In the case of *Hartford Fire Ins. Co. v. The State*, 9 Kas. 210, this court held that a certificate of authority by the auditor of state to a foreign insurance company to do business in the state without the previous payment of fifty dollars required by the law, was a nullity. The late chief justice in the opinion states, "when the certificate of authority was issued, one of the vital conditions upon which it could be granted had not been complied with on the part of the plaintiff in error. It was a condition that neither the auditor nor any other officer could waive or dispense with. Because of the nonpayment of this money, the certificate itself was void, and presented no defense to the action." We are therefore clearly of the opinion, upon authority and reason, that the presentation of a petition, as required by § 1 of the dramshop act of 1868, is an essential condition precedent to the validity of a license to sell intoxicating liquors, and that the license introduced in evidence gave no protection to Young. *Palmer v. Doney*, 2 Johns. Cases, 846; *Hauser v. The State*, 18 Ind. 106; *Townsend v. The State*, 2 Blackf. 151; *State v. Moore*, 1 Jones, (N. C.) 275; *House v. State*, 41 Miss. 787; *The State v. Fisher*, 83 Wis. 154; *The State, ex rel., v. Ludington*, 38 Wis. 107.

Counsel for appellant dwell with considerable stress upon the decision in the case of the *City of Emporia v. Volmer*, 12 Kas. 622, and claim, as the ordinance of Cottonwood Falls is a duplicate of the ordinance in force in Emporia upon which Volmer was convicted, a similar ruling in the action under review would protect the defendant, who had complied with the ordinance of the city in which the offense was committed. The conclusion is not tenable. Cottonwood Falls is a city of the *third* class; Emporia is a city of the *second* class; and the dramshop act expressly provides that a city of the second class may by ordinance dispense with the petition mentioned

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in the first section of the act. Like authority is not granted to cities of the third class.

The judgment is affirmed.

All the Justices concurring.

JANE PHILLIPS V. JOHN GEORGE.

1. **FRAUDS; TRUSTS; Title to Lands Acquired Through Fraud, Held in Trust for Equitable Owner.** Where G. sets up a claim to certain lands under article 17 of the treaty of July 19th 1866, between the United States and the Cherokee Indians, which he alleges have been awarded and patented to P. under article 19 of said treaty upon false testimony, and through bribery and corruption of the officials of the United States, the former may come into the courts of the state and litigate the claim, and, upon the proper showing, a patent obtained thus fraudulently by P. will inure to G., if G. be entitled to recover the lands patented.
2. **PLEADING; Petition to Declare a Trust; Necessary Averments.** Where G. files his petition, alleging he was an occupant of certain lands ceded in trust to the United States by the treaty with the Cherokee Indians of 19th July 1866, and sets forth the facts showing he was entitled to buy the same at its appraised value under article 17 of the treaty, and would have obtained a patent therefor, except for the false testimony of P., and the corruption and bribery of the commissioners of appraisal appointed under the provisions of the treaty, as well as the arbitrary action of the Secretary of the Interior, whereby the lands were awarded and patented to P. under article 19 of the treaty, *held*, the petition is fatally defective if it fails to show that G. paid or offered to pay the United States for the lands, and fails to state what proceedings were taken by G. to contest the right of P. to the lands in controversy prior to the issuance of the patent.

Error from Cherokee District Court.

In April 1871, George commenced his action against Phillips, to ascertain and declare a trust, and to compel Phillips, as trustee, to convey certain lands to the plaintiff. The pleadings are sufficiently stated in the opinion, *infra*. Trial at the June

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Term 1872 of the district court. Findings and decree in favor of the plaintiff, as follows:

"The defendant electing to stand by her demurrer, this cause again came on for hearing on the petition of the plaintiff, on consideration of which the court finds, as matters of fact, all the material allegations of the said petition to be true; and as a conclusion of law, that the defendant holds in trust for the plaintiff the land described in the plaintiff's petition, namely, the W. $\frac{1}{2}$ of N.E. $\frac{1}{4}$ and S.E. $\frac{1}{4}$ of N.E. $\frac{1}{4}$ of section 34, in township 33 south, of range 25 east, in the county of Cherokee, state of Kansas, and that the plaintiff is entitled to have the said tracts and parcels of land conveyed to him by the defendant upon plaintiff's paying to the defendant the sum of \$2.50 per acre, the appraised value of said lands as alleged in said petition.

"It is therefore considered, ordered, adjudged and decreed, that upon the said plaintiff John George, within six calendar months from the rising of this court, paying to the defendant Jane Phillips the sum of three hundred dollars, that said defendant convey the said tracts and parcels of land by good and sufficient deed, duly acknowledged, to said plaintiff; and that in case of default of said conveyance being made, that this judgment and decree stand and operate as said conveyance as fully as such deed might or could. And it is further ordered and adjudged, that in case the defendant refuses upon proper and legal tender of said three hundred dollars by the plaintiff to the said defendant and a demand for such deed of conveyance, that then the said plaintiff may pay said sum of money into the office of the clerk of this court, to be by such clerk kept subject to the demand or order of the defendant; and that upon such payment by the plaintiff, this judgment and decree to stand and operate, at law and in equity, as a conveyance of said tracts and parcels of land as fully as if made by the defendant. It is further ordered that the plaintiff pay the costs of this suit."

This decree was made and entered on the 19th of June 1872. The petition in error for review of such decree was filed in this court by defendant *Phillips*, as plaintiff in error, on the 9th of June 1875. It is now submitted on brief of plaintiff in error. (See note, *post*, p. 424.)

L. T. Stephenson, and *Kelso & Barnes*, for plaintiff in error.

The opinion of the court was delivered by

HORTON, C. J.: In March 1868, John George proved that he had the preference of purchase to the lands in dispute under article 17 of the treaty of 19th July 1866, between the United States and the Cherokee Indians, at its appraised value, and a certificate was executed to him, by the commissioners of appraisal appointed by the Secretary of the Interior, of their reception from him "of his declaration of intention to purchase the lands, and that he had filed the required proof in support of the same." Thereafter, said commissioners made a second and other allowance and award of said land to Jane Phillips, under article 19 of the treaty, and a patent was issued to her for the lands by the United States. George alleges in his petition, that Phillips was not entitled to said lands under article 19, or under any other provision of the treaty; that she obtained the award through partiality, corruption and bribery of the commissioners, and upon false testimony; that the award was arbitrarily approved by the secretary, and that Phillips held the lands in trust for George. The petition asks that Phillips be ordered to convey the land in question to George, or in case of refusal, that the decree should stand as a conveyance, etc. The petition does not state that George had ever paid for the land, or offered to pay for the same; and it also fails to set forth the proceedings had by him to appeal from the award and allowance of the lands to Phillips, excepting as it states that "he (George) took steps at Washington City to contest before the proper authorities the right of said Phillips to said lands, and to establish his own, when the Secretary of the Interior instructed the land commissioner to adopt the report of the said commissioners as conclusive, and not to regard or listen to adverse claimants." A demurrer was filed to the petition, as to the jurisdiction of the court of the subject-matter of the action, and that sufficient facts were not stated to constitute a cause of action. The demurrer was overruled, and judgment entered for George, as prayed for.

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We are called upon by Phillips to review the action of the court below.

In *Garland v. Wynn*, 20 How. 6, the general rule is well stated to be, "that where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and the government, regardless of the rights of others, the latter may come into the ordinary courts of justice, and litigate the conflicting claims." It seems also well settled that persons who obtain patents by a suppression of a part of the facts in a case, or through fraud, corruption and bribery of the officials of the United States, will not be permitted, when their claims are questioned in courts of equity, to derive any benefit thereby, and such patents will inure to the parties entitled to recover the lands. *Comegys v. Vasse*, 1 Peters, 212; *Lytle v. The State of Arkansas*, 9 How. 328; *Cunningham v. Ashley*, 14 How. 377; *Bernard v. Ashley*, 18 How. 44; *Garland v. Wynn*, 20 How. 6; *Lytle v. The State of Arkansas*, 22 How. 202. If George had filed a sufficient petition in the court below, he would have been entitled to the judgment decreeing him the land.

We pass to consider the question presented, whether the petition "states facts sufficient to constitute a cause of action." Under the treaty, no person can obtain title to any of the lands ceded to the United States, until a sum of money is paid therefor, except certain Cherokee Indians are entitled to head-rights under article 19. If George had complied in every other respect with the provisions of article 17, except paying or offering to pay for the lands named, he would not have been entitled to receive a patent. The averments that "he is willing and hereby offers to pay to Phillips, or to any other person or party the appraised value, or such other sum or sums as the court may direct, and do all other things in the premises enjoined by equity and good conscience," show no payment or offer of payment to the United States. The allegation that Phillips has paid \$2.50 per acre, the appraised value of the land, does not help the

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matter, because if the land was patented to her under article 19, the payment was voluntary, and without being required by the treaty; indeed, unauthorized by law. If the patent was issued to Phillips under article 19, the officers could not legally have accepted any sum of money from her therefor. Article 19 prescribes that "All Cherokees, being heads of families, residing at the date of the ratification of this treaty on any of the lands herein ceded, * * * if he shall elect to remain on the land now occupied by him, shall be entitled to receive a patent from the United States in fee simple for three hundred and twenty acres of land, to include his improvements; and thereupon he and his family shall cease to be members of the nation." Again, before relief could have been granted to George in the district court, he must certainly have shown in his petition that his remedy before the officers provided for the express purpose of passing upon such questions had been exhausted, and that he had not been guilty of *laches*. The allegations in the petition as to the proceedings to dispute the award of the commissioners, are not merely indefinite and uncertain, but fail to set forth what action was had. It is true, the petition states that George "took steps to contest the right of Phillips to the land before the proper authorities." But when, and how, said steps were taken, is not averred. It is not shown whether these proceedings were had before, or after, the issuance of the patent; nor does the petition affirmatively state that the rules and regulations prescribed by the Secretary of the Interior, under the authority of the treaty, were complied with. We do not mean to say that George was obliged to do any useless or unnecessary thing; but he should have set forth the acts done by him, after the issuance to him of the certificate by the commissioners, so that the court could have ascertained upon what papers or matters presented the Secretary arbitrarily acted, and when such authority was exercised. The only power seemingly granted to the commissioners of appraisal by the treaty is the right to appraise the property mentioned therein.

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The other acts performed by them must have been under the regulations of the Secretary of the Interior. They did not have the full authority of the local land officers of the United States. We therefore conclude the petition is fatally defective; that the demurrer thereto should have been sustained for want of sufficient facts to constitute any cause of action, and that the court below erred in rendering judgment in the case.*

The judgment must be reversed.

All the Justices concurring.

[* THIS case was brought to this court June 9th 1876, almost three years after final judgment in the court below. In May 1876, defendant in error moved to dismiss the petition in error for failure of plaintiff in error to comply with Rule 11, (13 Kas. 7.) This motion was overruled. This opinion was filed January 17th 1877. And thereupon Messrs. *McComas & McKeighan*, counsel for *George*, defendant in error, filed a motion for a rehearing, and for a dismissal of the petition in error, alleging, first, that neither *George* nor his counsel had been advised and did not know that his former motion to dismiss had been overruled; second, that after the decision and judgment of the district court, and on the 20th of December 1872, and within the time limited by said judgment, he (*George*) paid to the clerk of the Cherokee district court, for the use and benefit of Mrs. *Phillips*, \$300, as required by the district court, (statement of case, *ante*, p. 420,) and that Mrs. *Phillips*, subsequently, on the 25th of August 1874, (and before bringing the case to this court,) by her attorney-in-fact, L. T. S., had accepted said money so paid, thereby accepting the judgment and decree of the district court as final and conclusive. These facts were duly proven by affidavit, and on proper notice being given to *Phillips*, and upon the payment of the costs in this court, the judgment of reversal was set aside, and a rehearing was granted. And thereupon, on motion of *George*, and in accordance with the decision in *Babbitt v. Corby*, 13 Kas. 612, and *Hoffmire v. Holcomb*, *ante*, p. 378, the petition in error herein was dismissed.—REPORTER.]

J. C. WALTERS v. T. W. VANDERVEER.

EVIDENCE; Competency of Written Statement; Meaningless until Explained. It is not necessarily a fatal objection to the admission of a writing, that, considered by itself, and without explanation from extrinsic matters, it is wholly unintelligible. If such extrinsic matters interpret its meaning, and show its bearing upon the controversy, it may not only be competent and relevant, but absolutely decisive of the case.

Error from Franklin District Court.

ACTION by *VanDerveer* to recover from *Walters* \$110 alleged to be the balance due for wages as a clerk. Plaintiff's bill was for services from November 23d 1873 to January 10th 1874, at \$15 per month; from 10th January 1874 to 20th August, at \$30 per month; and from 20th August to October 7th 1874, at \$15 per month. Total, \$267, on which he admitted payments to amount of \$157. *Walters* denied all indebtedness. Trial at November Term 1874. Verdict and judgment for \$110, and *Walters* brings the case here on error.

John W. Deford, for plaintiff in error.

Benson & Parkinson, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: But a single question is presented in this case, and that is as to the admissibility in evidence of a certain memorandum in writing. The action was for wages. The matter of dispute was the rate at which *Walters* had agreed to pay *VanDerveer*. And the following quotation from the record presents the alleged error:

In rebuttal the plaintiff testified: "One day in the hotel Mr. *Walters* was speaking about his expenses, and said he must cut them down, and then took paper and pencil and made memorandum of what his help had been costing him. He left the memorandum on the desk. I picked it up, and have kept it ever since. It is all in his handwriting. This is

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the paper. The names written thereon are the names of various employes in the hotel, and the figures opposite are the wages he was paying. No other employé than myself was receiving \$80 per month at that time." The plaintiff offered in evidence a slip of paper upon which was written in pencil marks the following, to-wit:

"Van, . . . 30.	Jordon, . . . 15.	Wash, . . . 17.
Cook, . . . 22.	Mollie, . . . 17.	Carrie, . . . 10.
Jerry, . . . 12.	Ben, . . . 12.	
		135."

To which the defendant objected on account of its incompetency, irrelevancy, and immateriality, the plaintiff not having shown any connection therewith to his employment by said defendant. The court overruled the objections of the defendant, to which ruling defendant duly excepted.

We see no error in the ruling. The testimony was the written statement of the defendant, and therefore competent. Interpreted by the accompanying testimony, it referred to the exact matter of dispute, and was therefore both relevant and material. That standing alone, and unaided by extrinsic facts, it is comparatively unintelligible, does not necessarily destroy either its competency or its value. Statements, both oral and written, are daily admitted in evidence in trials, which have meaning and value as testimony only in the light of and as explained by extrinsic matters. The monosyllable, "yes," standing by itself may be wholly destitute of signification; but when shown to have been the answer to a question, may be absolutely decisive of the controversy. So here this row of figures opposite to certain names by itself may be, in the language of counsel, "as devoid of meaning as the picture-writing on the rocks of Mexico;" but read in the light of VanDerveer's testimony, it is impossible not to perceive that it is both intelligible and significant. Indeed, an examination of the evidence given in this case almost justifies the assertion that it was the pivotal fact.

This being the only matter presented by counsel in his brief, the judgment will be affirmed.

All the Justices concurring.

LEWIS C. WEATHERWAX V. THE STATE OF KANSAS.

1. MINORS; *Personal Liability on Recognizance; Non-consent of Guardian.* An action on a forfeited recognizance may be maintained against a person who executed the same to procure his own personal liberty, although such person may have been a minor at the time he executed the same, having a guardian for his property, and although he may have executed the same without the consent of his guardian. [*State v. Weatherwax*, 12-463.]
2. PARDON FOR CRIMINAL OFFENSE, *No Release on Forfeited Recognizance.* And such action may be maintained, although the governor may have pardoned the defendant after sentence in the criminal action, and before final judgment on the forfeited recognizance. [*Brown v. U. S.*, McCr-229.]

Error from Franklin District Court.

ACTION on forfeited recognizance. The case was here in January 1874; (12 Kas. 463.) On being remanded to the district court, *Weatherwax*, on leave, amended his answer, setting up two additional defenses: first, that one H. F. S. was, on the 15th of January 1866, duly appointed guardian of the property of the defendant, by the probate court of said Franklin county, and continued to act as such from that day until defendant reached his majority on the 28th of May 1869; and second, that on the 19th of October 1871, a pardon of the original offense, to appear and answer to which the pretended recognizance herein sued on was entered into, was duly issued to defendant by the then governor of Kansas—setting forth the pardon in full. The recognizance was executed in 1868, and *Weatherwax* was tried and convicted in the criminal action in August 1871. To said amended answer, *The State* demurred. The district court, at the August Term 1874, sustained the demurrer, and gave judgment for the amount of the recognizance. *Weatherwax* brings the case here on error.

John W. Deford, for plaintiff in error.

H. C. Meechem, for The State.

The opinion of the court was delivered by

VALENTINE, J.: This was an action on a forfeited recognizance. This is the second time that the case has been brought to this court. (*The State v. Weatherwax*, 12 Kas. 463.) When the case was first brought to this court the only question involved therein was, whether a minor who was a defendant in a criminal action could bind himself personally by a recognizance entered into by himself and sureties for his personal appearance at the next term of the district court to answer to a charge in such criminal action, of committing a criminal offense. We then answered said question in the affirmative. There are now two new questions raised in the case. First: If said minor had, at the time he executed said recognizance, a guardian, who had previously been appointed by the probate court to manage the property of said minor, and if said guardian did not give his consent to said minor's executing said recognizance, would the want of such consent render said recognizance invalid as to said minor? Second: And if, after said recognizance had been forfeited, and after said minor had been rearrested, tried, convicted and sentenced in said criminal action, the governor had then granted a full pardon to said minor for the offense of which he was convicted, would such pardon release said minor from all liability on said forfeited recognizance? We must answer both of these questions in the negative. We cannot see that the fact that Weatherwax had a guardian at the time that he entered into said recognizance, and that said guardian did not give his consent thereto, can make any material difference in this particular case. It does not appear that the guardian was ready or willing to furnish his ward with that personal liberty necessary for his growth and development, nor does it appear that the guardian could have done so even if he had so desired. Nor can we see how a pardon could reach a matter wholly independent of the criminal offense charged, or of the punishment therefor. Even if the defendant had been acquitted on the criminal charge, still

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this action on the forfeited recognizance might be maintained.

The judgment of the court below must be affirmed.

All the Justices concurring.

ELISHA HADDEN v. JOHN L. RODKEY.

PROMISSORY NOTES, Payable to "Order;" What Defenses Allowed, if Note is not "Indorsed." Where H. executes a promissory note payable to S. or order, and afterward R. commences an action thereon against H., alleging that he (R.) purchased said note before due for a valuable consideration, and that he is now the owner and holder thereof, but does not allege or show in his petition or elsewhere that said note was ever indorsed, or was ever transferred by indorsement, and the defendant sets up in his answer, and afterward proves on trial, that said note was given for usurious interest, *held*, that said defendant set up and proved a good defense to the note; that a note payable to order can be transferred freed from all equities only by indorsement, and that a transferee of such note must allege and prove that the note was transferred by indorsement, if he desires to avoid such equities or defenses as may be set up against it. [*McCrum v. Corby*, 11-465; *State v. Lee*, 32-363.]

Error from Sumner District Court.

THE only question here, and all necessary facts, will be found fully stated in the opinion. *Rodkey* had judgment at the April Term 1875, and *Hadden* brings the case here.

John G. Tucker, for plaintiff in error, contended that the mere transfer by delivery only, of negotiable paper payable to order, does not prevent the maker from setting up any defense that he might have pleaded in an action brought by the payee; 11 Kas. 464; 100 Mass. 18; 50 N. H. 474; and as the note in controversy was not "indorsed" by the payee, it was competent to show by parol, that the consideration was an unlawful one; 1 Greenl. on Ev., §284; 8 R. I. 389.

J. Wade McDonald, for defendant in error, submitted, that the only issues presented by the record were—1st, was the note executed by Hadden to Sanders, for a consideration wholly or in part usurious? and if so, then, 2d, had Rodkey notice of such fact at or prior to the date of his purchase of said note? The trial court very properly required Hadden to bring such notice home to Rodkey, and upon his failure to do so, the demurrer to his evidence was properly sustained.

The opinion of the court was delivered by

VALENTINE, J.: This was an action on two promissory notes, and a mortgage. The only questions however involved in the case are such as arise in connection with the second note set forth in the plaintiff's petition. This note was given by Elisha Hadden to Wm. D. Sanders for the sum of \$72, and made payable to said Sanders or order. The action was commenced by John L. Rodkey, defendant in error, plaintiff below. Rodkey alleged in his petition below, among other things, that, "before the note last aforesaid became due and payable, the plaintiff, for a valuable and lawful consideration, became the owner and holder of the same, * * * and is now the owner and holder of said note." But he did not allege in his petition or elsewhere that the note had ever been *indorsed* to himself, or to any one else, and the copy of the note given by him does not show that it had ever been indorsed. The defendant below in his answer admits the execution of the note, but does not admit or deny that the plaintiff below was the owner or holder thereof. In legal contemplation therefore the defendant admitted that the plaintiff was the owner and holder of the note, but he did not admit that the note had ever been *indorsed*. The defendant also alleged in his answer, among other things, that said note was given wholly and entirely for usurious interest, and that the plaintiff had full knowledge of such fact. The plaintiff in reply to the answer filed a general denial. Upon these pleadings the parties proceeded to trial,

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before a jury. The plaintiff in his own behalf testified that he purchased said note of W. C. Woodman without any knowledge that it had been given for usurious interest; but when he so purchased it, whether before or after maturity, or what authority Woodman had to sell it, or to transfer it, the evidence does not show. There was no evidence introduced or offered tending directly to show whether said note had ever been indorsed or not. The circumstances however would seem to indicate that the note had not been indorsed. The plaintiff never saw the note. The defendant's evidence showed that said note was given wholly for usurious interest, but there was no evidence introduced or offered tending to show that the plaintiff had any knowledge of such fact. The defendant rested, and the plaintiff then demurred to the defendant's evidence. The court below sustained the demurrer, and discharged the jury, and then rendered judgment in favor of the plaintiff and against the defendant for the full amount of said note. Was this ruling of the court below erroneous? We think it was. For, while under the pleadings, and the evidence, we must assume that the beneficial interest in the note was in some way transferred from the payee, Sanders, by the third person, Woodman, to the plaintiff Rodkey, yet we cannot assume that the note was transferred by indorsement so as to render it free from all outstanding equities which might be set up against it. There is no pretense that the record shows that the note was transferred by indorsement. And unless it was so transferred before due, the defendant has a right to set up his defense of usury, or any other defense which he may have. (*McCrum v. Corby*, 11 Kas. 465, 470.) If said note was in fact indorsed, the plaintiff should have alleged it either in his petition, as one of the facts constituting his cause of action, and giving such cause of action a more extended and comprehensive scope, or in his reply, as one of the facts defeating any previously existing defense set up by the defendant. The indorsement of the note is not a fact constituting any part of the defendant's defense, and it has no connection therewith. The only connection it has with the case is with the plaintiff's

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cause of action, being in fact the starting point, the foundation thereof, and enlarging and extending its operation and effectiveness. Therefore, if the plaintiff in such a case should desire the benefit that an indorsement of the note would give him, he should plead and prove such indorsement. Otherwise the defendant may set up and prove any defense that he may have to the note.

The judgment of the court below must be reversed, and cause remanded for a new trial.

All the Justices concurring.

J. B. SNIDER *et al.* v. CHARLES M. KOEHLER.

1. DEFENSE TO NOTES; *Sales of Liquors without License; Failure of Proof.*

Where an action is brought upon three promissory notes, and the only defense made is, that the notes were given for intoxicating liquors sold in this state without a license, and the evidence does not tend to prove the defense, the trial court commits no error in instructing the jury to return a verdict for the principal and interest of the notes sued on.

2. ——— The cases of *McCarty v. Gordon*, and *Gill v. Kaufman & Co.*, 16 Kas. 35, 571, *Haug v. Gillett*, and *Williams v. Feiniman*, 14 Kas. 140, 288, cited as decisive of the questions presented in the case.

Error from Washington District Court.

ACTION by *Koehler* on three promissory notes of \$91.63 each, dated 11th December 1872, executed by *J. B. Snider*, *F. M. Lavering*, and *A. J. Lavering*, payable two, four, and six months respectively after the date thereof. Judgment was given for *Koehler*, at the April Term 1875, for \$338.56, and costs, and the defendants bring the case here.

T. J. Humes, for plaintiff in error.

The opinion of the court was delivered by

HORTON, C. J.: This was an action on three promissory notes. The defense was, that the notes were given for intoxi-

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ating liquors sold in this state, without a license. A jury was impaneled by the court. Upon the completion of the evidence the court charged the jury "to figure up the amount of principal and interest due on the notes, and to find a verdict for plaintiff for that amount." The evidence produced by the plaintiffs in error in the court below, and the undisputed facts, bring the case clearly within the decisions heretofore rendered by this court in *Haug v. Gillett*, and *Williams v. Feiniman*, 14 Kas. 140, 288, *McCarty v. Gordon*, and *Gill v. Kaufman & Co.*, 16 Kas. 35, 571. The court below committed no error in instructing the jury to return the verdict stated in the record, as the evidence did not tend to establish any defense to the notes sued on.

The judgment will be affirmed.

All the Justices concurring.

H. H. MCCARDELL *et al.* v. H. W. McNay.

TRIAL BY JURY; *When a Matter of Right, and When Not.* In civil actions a jury can be claimed as a matter of right only for the trial of "issues of fact arising in actions for the recovery of money, or of specific real or personal property." Therefore, in an action to have a certain deed set aside, and to have the land mentioned in such deed made subject to the payment of a certain judgment previously rendered in favor of the plaintiff and against one of the defendants, the defendants were not as a matter of right entitled to have the issues tried by jury. [*Clemenson v. Chandler*, 4-558; *Gillespie v. Lovell*, 7-424; *Carlin v. Donegan*, 15-495; *Hixon v. George*, 18-253; *Houston v. Comm'rs*, 19-396; *Woodman v. Davis*, 32-344, 347; *Williams v. Elliott*, post, 523.]

Error from Morris District Court.

THE only question submitted upon the record here, is, whether plaintiffs in error were entitled to a trial by jury. The facts upon which the question arises are fully set forth in the opinion. The district court, at the October Term 1874,

²⁰⁻¹⁷ Kas.

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refused to impanel a jury, and thereupon tried the case, and gave judgment for *McNay*, plaintiff. The defendant brings the record here for review.

Bradley & Nicholson, for plaintiffs in error.

Sharp & Johnston, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: On the 9th of September 1874, defendant in error filed his petition in the district court of Morris county, against plaintiffs in error and one F. M. Chase, alleging, that he had obtained a judgment against H. H. McCardell (one of the plaintiffs in error) for a certain sum, before a justice of the peace; that the justice before whom said judgment was obtained was legally qualified, etc.; that he (defendant in error) filed a transcript of said judgment in the office of the clerk of the district court, according to law, on the 30th of July 1874; that said judgment was wholly due and unpaid; that the debt upon which said judgment was obtained, was, upon the 20th of February 1874, in whole, or in part, an existing subsisting debt; that upon said 20th of February 1874, H. H. McCardell was the owner in fee simple of certain real estate (described in the petition,) and that said real estate was at that time of the value of \$3,000; that at that time (20th February 1874,) H. H. McCardell was deeply indebted to sundry and divers persons, including the defendant in error, of which fact F. M. Chase and Matilda McCardell had full knowledge; and that said H. H. McCardell, F. M. Chase and Matilda McCardell, at said time (20th February 1874,) unlawfully and fraudulently conspired together to cheat, defraud, hinder and delay the creditors of said H. H. McCardell, and, to prevent said real estate from being applied to the payment of his just debts, and keep the same to the use of the said H. H. McCardell in fraud of the rights of his said creditors, that a deed was made to said Chase for said premises, without any consideration therefor. Such petition closes by asking that said deed be set aside, and that said real estate be subjected to the satisfaction of the judg-

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ment set forth in said petition, etc. H. H. McCardell and Matilda McCardell answered, traversing the petition by general denial. F. M. Chase filed a demurrer, which was overruled, and then by leave of court filed a general denial. When the said cause came on for trial, the defendants demanded a trial by jury, which was refused by the court, and defendants duly excepted. The court gave judgment for the plaintiff, and H. H. McCardell and Matilda McCardell bring the case to this court.

The only question in the case in this court, is: Did the court below err in refusing the defendants, plaintiffs here, a trial by jury? This question must be answered in the negative. This is not one of the actions in which a party is entitled to demand a jury as a matter of right. In civil actions, a jury can be claimed as a matter of right only, for the trial of "issues of fact arising in actions for the recovery of money, or of specific real or personal property." (Gen. Stat. 680, § 266.) Now this is not an action for the recovery of money. Neither is it an action for the recovery of real property. Nor is it an action for the recovery of personal property. The plaintiffs in error do not claim that this is either an action for the recovery of money, or for the recovery of personal property, but they seem to claim that it is an action for the recovery of real property. Now the only action that could be brought for the *recovery* of real property would be action in the nature of ejectment, such as is provided for by § 595 of the civil code; (Gen. Stat. 747.) This is clearly not that kind of an action.

The judgment of the court below must be affirmed.

BREWER, J., concurring.

HORTON, C. J., not sitting in the case.

SAMUEL COMER V. GEORGE W. KNOWLES.

1. *PRACTICE; Division of Court; Affirmance of Judgment.* After this cause was argued and submitted, and before a decision was reached, the Chief Justice resigned. When brought on for decision, the other two Justices before whom the case was tried being divided in opinion, and a reargument not being ordered, and the present Chief Justice taking no part in the decision, *held*, that the judgment should be affirmed.
2. *FALSE IMPRISONMENT; Evidence in Mitigation of Damages.* In an action to recover damages for false imprisonment, evidence offered to show that the defendant, in committing the acts complained of, acted in good faith, and without malice, is not admissible for the purpose of diminishing the general and actual damages which the plaintiff has sustained. But where the plaintiff claims exemplary damages on account of willfulness or malice on the part of the defendant, such evidence is admissible in mitigation of such damages. [Per VALENTINE, J.] [*Mayberry v. Kelley*, 1-117; *Prell v. McDonald*, 7-428.]
3. ——— *Pleading; Allegation of Special Damages.* False imprisonment may be committed without the slightest injury to character or reputation. Where by illegal arrest and false imprisonment, the character or reputation of the party arrested is injured, and special damages are claimed for such injury, the facts with reference thereto should be pleaded specially and in detail. [Per VALENTINE, J.]

Error from Montgomery District Court.

ACTION by Knowles to recover damages for an alleged false imprisonment. The petition, after the caption and title, is as follows:

"The plaintiff George W. Knowles shows to court and alleges, that he is a married man, and head of family, and is a citizen of the county of Montgomery, in said state, and has been a citizen of said county for two years past; that his occupation and trade is that of a brick-mason; that on or about 8th of December 1873, and while he was peaceably pursuing his business at Rock Creek, in the Indian Territory, he was assaulted by the defendant, Samuel Comer, who then and there, with force and violence, did unlawfully, and without cause, arrest and compel the said plaintiff to leave his business, and while under arrest as aforesaid compelled the said plaintiff unlawfully and against his will to go from said Rock Creek, a great distance, to-wit, twelve miles, to Osage Agency, also in

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said Indian Territory, and then and there imprisoned the plaintiff, and detained him in custody and in prison, without any reasonable or probable cause or lawful authority for a long time, to-wit, ten days, and then and there detained and prevented the said plaintiff from pursuing his business, and depriving him of his liberty, and of the comfort and society of his friends and of his family, with force and against the will of the said plaintiff, and without lawful authority, for the space of ten days as aforesaid; and plaintiff alleges that he was then and there injured in and about his business and circumstances, and in his credit and reputation. By means whereof the said plaintiff was injured, and sustained damages on account of the said unlawful arrest and imprisonment in the sum of five thousand dollars. Wherefore," etc.

Comer answered, first, a general denial; and for a second defense, he alleged that shortly before the alleged arrest and false imprisonment of plaintiff, a pocket-book containing \$125 had been stolen from one S. W. Pennell, and a lot of tools and property belonging to the government had also been stolen from the Indian Agent; that plaintiff's conduct, and speech, when said larcenies were talked about created a general suspicion that plaintiff had stolen said money and property, and that the defendant was told all the facts and circumstances upon which the suspicion of plaintiff's guilt was grounded, etc. The answer then further alleges, that—

"The said Pennell having reasonable and probable cause to suspect the plaintiff of having committed the felony aforesaid, went before one Isaac T. Gibson, a United States Indian Agent for the Osage tribe of Indians, and made affidavit charging the plaintiff with the commission of the felony aforesaid, whereupon a warrant was issued by said Gibson, directed to this defendant, whereby he was commanded to arrest the plaintiff and bring him forthwith before the said Gibson, then to answer the charge of having feloniously stolen and carried away the money and property aforesaid. Said warrant was delivered to defendant, and in obedience to the directions of said warrant, and in good faith, and without malice, and having reasonable and probable cause to suppose the plaintiff was guilty of having committed the felony aforesaid, defendant did arrest the said plaintiff and take him to the office of said Gibson, at the Osage Indian Agency, but the said Gibson was at the time ab-

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sent from the said Agency. Defendant also says that at the time he arrested the plaintiff he made a search of the person and valise of said plaintiff, and found in said valise the hand-saws, files and coffin hinges stolen as aforesaid, and defendant having good and probable cause to suspect and greatly suspecting the plaintiff of having stolen all the money and goods aforesaid, detained the said plaintiff at the Osage Indian Agency for space of five days, when he released him. Immediately upon the arrest of the plaintiff defendant communicated the facts above set forth to a United States marshal at Coffeyville, Kansas, requesting said marshal to come and take the custody of plaintiff, but said marshal not doing so within five days after the arrest of the plaintiff, he was discharged as aforesaid. And defendant says that the above facts are the same of which plaintiff complains."

Reply, a general denial. Trial at the September Term 1874. Defendant *Comer*, to maintain the issue on his part, introduced evidence tending to show that a felony had been committed at the Osage Agency, Indian Territory, and also tending to show probable cause to suspect that plaintiff had committed such felony. Defendant then offered to prove that, prior to the arrest of plaintiff, he (defendant) had, without warrant or process, made arrests of different parties suspected of criminal acts, and delivered such parties to the U. S. marshal—which testimony, on plaintiff's objection, was excluded. Defendant then offered to prove, that it was believed by many persons, and strongly suspected by many persons, residing at the Osage Indian Agency, Indian Territory, immediately prior to the arrest of the plaintiff by defendant, that plaintiff had been guilty of stealing a pocket-book belonging to S. W. Pennell, and containing \$125 in money. Plaintiff objected, and the testimony was not received. Among other matters the court instructed the jury that—

"In case they should find for the plaintiff, they may, in assessing his actual damages, consider and award damages for injury to his character and reputation."

The defendant requested the following special instructions, to-wit:

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"6th. The jury are instructed that, in case of the actual commission of a crime in the Indian Territory by a white person, which crime is punishable by fine and by imprisonment in the penitentiary, a private person may, without warrant, upon probable cause, and without malice, arrest a party reasonably suspected of being guilty thereof.

"7th. The party making such arrest may detain the suspected person for a reasonable time; and in case of a private person making the arrest under the above circumstances, a detention for the period of five days is not an unreasonable time, provided the party making the arrest immediately proceeds to notify the nearest United States marshal of the arrest, and requests his attendance to take charge of the prisoner, and provided also that said period of time is required to procure the presence of such marshal, he acting with diligence and promptitude.

"8th. The jury are instructed that it is not sufficient to establish the want of probable cause, that the defendant might by the use of proper deliberation, care, and inquiry, have ascertained that the crime alleged had not been committed by plaintiff."

These instructions were refused. Defendant excepted to the excluding of the evidence offered, to the instructions given, and to the refusing of his instructions. Verdict for plaintiff, assessing his damages at \$150. New trial refused, and judgment on the verdict. Defendant *Comer* brings the case here.

The cause was set for hearing, and was argued and submitted at the January Term of this court 1876, while Chief Justice KINGMAN, and Associate Justices VALENTINE and BREWER were on the bench. It was under advisement, and undecided, when Chief Justice KINGMAN resigned, in December 1876.

Nathan Cree, for plaintiff in error.

Wm. Dunkin, for defendant in error.

The following order and judgment were made and entered on the 18th of January 1877:

"This cause came on for decision, and HORTON, C. J., not

sitting with the court in this case, and taking no part in its decision, the same having been submitted to the court prior to his becoming a member thereof, and Associate Justices VALENTINE and BREWER being divided in opinion as to the judgment which ought to be rendered herein—therefore it is ordered that the judgment of the court below be affirmed, with costs.”

The only opinion filed is the following:

VALENTINE, J.: This was an action for “false imprisonment.” Judgment was rendered in favor of the plaintiff below, and against the defendant below, and the defendant now brings the case to this court for review. The defendant below raises three questions in this court: *First*, may the defendant below, for the purpose of mitigating the damages, introduce evidence, on the trial, to show, that in committing the acts complained of, he acted in good faith, and without malice? *Second*, may the plaintiff below recover for injuries to his character and reputation, although he has not pleaded any special facts showing any pecuniary loss on account of such supposed injuries to his character and reputation? The *third* question (entry of judgment before payment of jury fee,) was substantially decided in *Topeka v. Tuttle*, (5 Kas. 812, 824,) and I do not choose to further consider the same.

I shall now consider the first two questions; and in order to consider them intelligibly, it will be necessary to consider to some extent the nature and character of the action of false imprisonment. False imprisonment is necessarily a wrongful interference with the personal liberty of an individual. The wrong may be committed by words alone, or by acts alone, or by both, and by merely operating on the will of the individual, or by personal violence, or by both. It is not necessary that the individual be confined within a prison, or within walls; or that he be assaulted, or even touched. It is not necessary that there should be any injury done to the individual's person, or to his character, or reputation. Nor is it necessary that the wrongful act be committed with malice, or ill-will, or even with the slightest wrongful intention. Nor

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is it necessary that the act be under color of any legal or judicial proceeding. All that is necessary is, that the individual be restrained of his liberty without any sufficient legal cause therefor, and by words or acts which he fears to disregard. It will therefore be seen that the wrong constituting false imprisonment differs essentially from the wrongs constituting malicious prosecution, malicious arrest, assault, and assault-and-battery, though all of these wrongs may sometimes be united in one comprehensive and aggregated wrong. It also differs from libel and slander, and indeed from every other wrong for which an action is given. Therefore a rule of law found to be applicable to some other class of cases may not have any application whatever to an action of false imprisonment. As we have before stated, malice and willfulness are not essential elements of false imprisonment; and in this the action of false imprisonment differs from that of libel, slander, malicious prosecution, and perhaps from some others. It is true however, that malice and willfulness may belong to any particular case of false imprisonment; but when they do so belong to such particular case, they belong to it as a portion of the *special* facts of that case, for which special or exemplary damages may be awarded, and do not belong to the case as a portion of the general and essential facts of the case for which general damages may be awarded. In the present case I should think that the plaintiff below did not claim that the defendant below acted willfully or maliciously, and did not claim that he the plaintiff had any right to recover enhanced damages on account of any willfulness or malice. If I am correct in this, then the court below did not err in excluding the defendant's evidence. For all that such evidence tended to prove was, that the defendant acted honestly and in good faith in temporarily depriving the plaintiff of his liberty. Such evidence did not tend to prove that the defendant acted legally; and it could not be introduced for the purpose of diminishing the general and actual damages which the plaintiff sustained. Now, if the plaintiff had claimed enhanced damages, or, in other words, exemplary damages, on account of

any willfulness or malice on the part of the defendant, then said evidence would have been admissible in mitigation of such damages, and the court below in that case could not rightfully have excluded the evidence. But as the plaintiff did not claim any such damages, as we infer, nor in fact any damages except general compensatory damages, I think the court below did not err in excluding said evidence.

The next question is, whether the court below erred in instructing the jury that they might assess damages in favor of the plaintiff for injuries to his character and reputation. And this question, like the one we have just considered, also depends upon the special facts of each particular case. Where the false imprisonment is willful and malicious, the jury may consider injuries affecting the character and reputation of the plaintiff as a foundation for awarding exemplary damages. And if the present case had been that kind of case, then the said instruction could be sustained upon that ground. But in order to sustain the ruling of the court below in excluding the defendant's evidence, we have inferred from the somewhat obscure record that exemplary damages were neither claimed nor allowed in this case. Hence said instruction cannot be sustained upon any theory of this kind. Exemplary damages are never allowed in any action where the wrongful act was done innocently, in good faith, and without malice. If there could be a case of false imprisonment where the resulting injuries to the character and reputation of the plaintiff would produce some pecuniary loss, and this loss was not too remote from the wrongful act, and the special facts concerning such injuries and such loss were properly set forth in the plaintiff's petition, and were then proved, the plaintiff would unquestionably be entitled to recover for such loss. But that is not this case; for no facts showing any pecuniary loss from any injuries to character or reputation have been set forth in the plaintiff's petition in this case. Therefore, said instruction cannot be sustained upon this ground. Indeed, I think it cannot be sustained upon any ground. False imprisonment is not like libel or slander where the injuries to the character and

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reputation are the gist of the action, and where malice is a necessary ingredient of the action. In these respects it is wholly unlike those actions. Injury to character and reputation are not essential ingredients of false imprisonment. They do not necessarily belong to the action. Indeed, they do not belong to the action at all. It is true, they are sometimes found in particular cases of false imprisonment. But then they do not belong to such cases as necessary and essential facts thereof. It would not be necessary to allege them or prove them in order to recover the ordinary and essential damages in such cases. Indeed, wherever injuries to character or reputation exist in a case of false imprisonment, they belong to such case merely as a portion of the incidental and special facts of that particular case. Now in libel and in slander, damages may be awarded for injuries to character and reputation, not only as exemplary damages because of the malice of the defendant essentially necessary in such actions, but such damages in such cases may also be awarded as *general compensatory* damages necessarily and proximately resulting from the necessary and essential facts of the action. This cannot be so in false imprisonment, for injuries to character and reputation are not necessary and essential facts of the action. False imprisonment may be committed without the slightest injury to character or reputation. Hence, in cases of false imprisonment, where the character or reputation is injured, the facts with reference thereto should be pleaded specially, and in detail. The only manner in which they are attempted to be pleaded in the present case is as follows: The false imprisonment is first stated, which shows no injury to character or reputation, and then comes the following statement, to-wit, that the said "plaintiff was then and there injured in and about his business and circumstances, and in his credit and reputation." This is hardly sufficient. Even in an action of libel, or slander, damages for injuries to character or reputation could hardly be recovered upon such a scanty statement of facts. As before stated, there are three questions raised in this case—three grounds upon which a reversal of the judg-

ment below is asked; and I think the judgment should necessarily be reversed, either upon the first, or upon the second ground. If with reference to the first ground, the ruling of the court below should be sustained, (as I think it ought to be,) then with reference to the second ground the ruling should be reversed. And *vice versa*; if with reference to the second ground, the ruling of the court below should be sustained, (which I do not think it should,) then with reference to the first ground the ruling should be reversed. The two rulings cannot both be sustained. In principle they are conflicting. I think the first ruling should be sustained, and the second overruled; and therefore, because of the second ruling the judgment of the court below should be reversed. But my brethren to whom the case was submitted have differed with me, and therefore the judgment must be affirmed.

The present Chief Justice has taken no part in the case.

Judgment affirmed.

WILLIAM O. GLASS V. STEPHEN ALT.

NOTE GIVEN IN PAYMENT FOR INTOXICATING LIQUORS, *Sold Without License, When Not Collectible*. Where intoxicating liquor is sold in violation of the laws of Kansas, and a promissory note is given by the vendee to the vendor for the amount agreed to be paid for such liquor, the collection of such note cannot be enforced by the vendor against the vendee under the laws of Kansas. And it can make no difference that the vendor sold the liquor on a month's credit, and that the note was not given until the end of such month, and was then given on an extension of the time for payment still another month; nor can it make any difference that the note was dated "Kansas City, Mo.," (being in fact executed in Kansas,) and made payable "at Kansas City Savings Bank." [See cases cited, *ante*, 432; also, *Dolson v. Hope*, 7-161.]

Error from Wyandotte District Court.

ACTION by *Glass*, on a promissory note for \$50. Trial at the September Term 1874. Verdict and judgment for defendant. The opinion contains a full statement of the facts. Plaintiff *Glass* brings the case here.

Scroggs & Bartlett, for plaintiff.

Cobb & Alden, for defendant.

The opinion of the court was delivered by

VALENTINE, J.: This was an action on a promissory note. The defendant *Alt* set up as a defense that the note was given by him to the plaintiff *Glass* in consideration for intoxicating liquor sold by the plaintiff to the defendant in violation of the dramshop act. The evidence upon this subject, so far as it is necessary to state it, is as follows: The note is dated, "Kansas City, Mo., March 13th 1874," and is made payable in thirty days "at Kansas City Savings Bank." The plaintiff testified "that the note in suit was taken by him in full payment for a certain credit given to said defendant by him upon the purchase of a barrel of whisky on the thirteenth day of February 1874;" and "that the barrel of whisky sold by plaintiff to defendant was delivered by plaintiff to defendant in the city of Wyandotte, Kansas." The defendant testified "that the consideration for the note sued upon was one barrel of whisky;" "that the contract for the purchase of the barrel of whisky was made at defendant's place of business in the city of Wyandotte, Kansas, and that the note in suit was actually signed by him at the same place." The plaintiff offered to prove "that he held a license from the United States government, and from the City of Kansas, state of Missouri, as a wholesale liquor-dealer in said City of Kansas," but the court excluded the evidence. There was no claim or pretense that the plaintiff ever had any license to sell intoxicating liquors in Kansas, and there was no evidence tending to show that said

barrel of whisky had ever been anywhere else except in Wyandotte, Kansas. The jury found a general verdict in favor of the defendant and against the plaintiff; and also, in answer to the following interrogatory, responded in the affirmative, to-wit:

"Was the consideration of the note sued on, a sale made within this state of a quantity of whisky by said plaintiff to defendant previous to the giving of said note without said plaintiff first taking out and having a license as grocer, dramshop-keeper, or tavern-keeper, as provided by the statutes of the state of Kansas in cases made and provided?" *Answer*, "Yes."

It will be seen from the foregoing, that this case falls within the decision made in the case of *Dolson v. Hope*, 7 Kas. 161, and not within the decisions made in the cases of *Haug v. Gillett*, 14 Kas. 140; *Williams v. Feiniman*, 14 Kas. 288; *McCarty v. Gordon*, 16 Kas. 85; *Gill v. Kaufman*, 16 Kas. 571, and *Snider v. Koehler*, ante, 432. The sale in this case was clearly a Kansas sale, and the plaintiff had no license to sell intoxicating liquors in Kansas, and therefore the plaintiff cannot recover. And it can make no difference that the plaintiff sold the liquor on a month's credit, and that the note was not given until the end of such month, and was then given on the extension of time for the payment of the debt still another month; nor can it make any difference that the note was dated "Kansas City, Mo.," (being in fact executed in Kansas,) and made payable "at Kansas City Savings Bank." The debt for which it was given was, according to the evidence and findings, created in violation of the laws of Kansas, and therefore the courts of Kansas cannot be invoked to aid in its collection. Such note cannot be collected under the laws of Kansas.

The judgment of the court below must be affirmed.

BREWER, J., concurring.

HORTON, C. J., not sitting in the case.

DEXTER *et al* v. SAMUEL COCHRAN *et al*.

1. **SUMMONS; *Must be Under Seal.*** A summons issued without a seal from a district court is void.
2. **FINDING OF "DUE SERVICE," *Prima Facie Evidence of Valid Summons.*** In a case in the district court, where a judgment is rendered upon default, and such judgment is assailed in the supreme court, because the court below had no jurisdiction of the defendants, for the alleged reason that the summons was not attested with the seal of the court, and nothing is presented to the supreme court to sustain the said claim except the transcript of the record of the court below, which fails to show on the copy of the summons set forth any seal annexed thereto, but the journal entry of the judgment states the court found, "that due personal service of summons was made upon the said defendants as required by law," *held*, that such finding and adjudication of the court are *prima facie* evidence of the legal authentication of the summons with the seal. [*Brown v. Tuppeny*, 24-31; *Arn v. Hoppin*, 25-708; *R. R. v. Shoemaker*, 27-682.]

Error from Clay District Court.

COCHRAN and two others, as partners, filed their petition against *A. F. Dexter, John Dexter, and Emma Dexter*, counting upon a note given to plaintiff by said *A. F.* and *John*, and a mortgage executed by said *A. F.* and *Emma*, his wife. The note was for \$1,676.67, and the mortgage was upon the north half of sec. 28, and east half of northeast quarter of sec. 22, in township 7 south, of range 2 east, in Clay county. Both note and mortgage were dated 26th November 1872. The petition was filed, and summons issued, 23d December 1873. The summons was personally served on each of the three defendants, 24th of December. The defendants made default. At the May Term 1874, judgment was given against *A. F.* and *John Dexter* for \$1,949.87, and costs, and a decree of foreclosure and for the sale of said mortgaged premises was entered against said *A. F.* and *Emma*. An order of sale was issued 23d June, and returned by the sheriff without any indorsement of service, 22d August 1874. Nov. 9th, the sheriff filed "an appraisement" of the mortgaged premises, made June 23d 1874, by J. W. K., C. E. L. and W. M., under an

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appointment made by the sheriff. Said mortgaged premises were appraised at \$8,600. An *alias* order of sale was issued July 13th 1874, (in the life-time, and before the return of the order of 22d June.) This order was received by the sheriff the day of its date, and was returned Sept. 9th 1874, accompanied by proof of publication of notice of sale to take place August 21st. No sale was made. Sept. 9th, a *pluries* order of sale was issued, which was received by the sheriff on that day, and returned on the 9th of November, with proof of notice of sale to take place October 17th, and indorsed, "Not sold for want of bidders." Nov. 16th, plaintiffs moved for an order for a reappraisement of the real property described in the mortgage and decree, which order was allowed. A second *pluries* order of sale was issued December 8th 1874, and delivered to the sheriff that day. On the 16th he appointed new appraisers, and they appraised the real property described in the decree, at \$2,000. The sheriff advertised said property to be sold January 15th 1875, and at that time sold the same to *Orrin B. Taylor*, one of the plaintiffs, for \$1,394.38. Due return of the last-mentioned order of sale, with the proceedings of the sheriff thereunder indorsed thereon, was made on the 20th of January. At the May Term 1875 of the district court, the plaintiffs filed their motion for a confirmation of said sale, and said sale was confirmed, and the sheriff ordered to make a deed to the purchaser, etc. The defendants did not file a motion to set aside the sale, nor appear and resist the motion to confirm; nor did they at any time appear in said cause in the district court, for any purpose whatever. It appears from the record, that the appraisers, at each appraisement, valued and appraised the two parcels or tracts described in the petition together, (as one parcel,) and not separately. And it also appears that the sheriff sold said two tracts together, and not separately. The *Dexters* now bring the record here for review.

C. M. Kellogg, for plaintiffs in error, contended, first, "that the court did not have jurisdiction of the persons of these

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plaintiffs, as the summons issued and served was not under the seal of the court; second, the court erred in setting aside the levy and appraisal, under the order of sale July 18th 1874; third, the court erred in confirming the sale."

Clough & Wheat, for defendants in error, submitted, that the presumption is, that the summons served was properly sealed; (1 Kas. 167;) but if not, then as the district court acted on the summons, it should be considered as amended, (code, § 189; 16 Kas. 551,) or the error should be disregarded as not affecting any substantial right of plaintiffs in error, (code, § 140,) and this court ought not now to consider such question, because it was not presented to the district court; 8 Kas. 112, 120; 3 Kas. 212. The property having been twice advertised and offered for sale, and not sold, the appraisal was set aside, and a new appraisal ordered, in pursuance of § 468 of the code.

The opinion of the court was delivered by

HORTON, C. J.: This action was brought in the court below to recover judgment on a promissory note, and to foreclose a mortgage given to secure the same. A summons in ordinary form in every respect, (unless as plaintiffs in error claim, the seal of the court was not thereto attached,) was issued in the action, and served upon the plaintiffs in error. Judgment was rendered on the note sued on, and a decree of foreclosure and sale allowed. Various orders of sale were issued, two appraisements were had, and the mortgaged premises sold to Orrin B. Taylor for \$1,334.83. The defendants in the court below made no appearance; but they now allege error apparent in the record, and bring the case here for review. As this court has decided "that any error apparent in the final judgment of a district court may be corrected by suit in error in this court, although no exception was taken thereto by the party complaining, and no appearance by him at the trial and judgment, and no motion made to set aside the judgment," the case is properly here for the decision of this court. *Woolley*

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v. Van Volkenburgh, 16 Kas. 20; *Zane v. Zane*, 5 Kas. 182; *Lender v. Caldwell*, 4 Kas. 339; *Koehler v. Ball*, 2 Kas. 160.

The first error alleged is, that the court below had no jurisdiction of the parties defendant in said court, because the seal of the court was not attached to the original summons. Of course, if the summons was issued without a seal, it would be void, and a judgment founded thereon a nullity. Const., §1, art. 3; §59, code of civil procedure; §3 of act relating to district courts, Gen. Stat. 304; *Lessee of Boal v. King*, 6 Ohio, 11. But we are not satisfied from the record that the summons was not duly authenticated with the seal of the court at its date of issuance. It appears from the journal entry of the judgment that the court found "that due personal service of summons was made upon said defendants, as required by law." This finding and adjudication cannot be ignored. Courts of general jurisdiction are presumed to have had jurisdiction until the contrary clearly appears; and every presumption is in favor of jurisdiction. *Haynes v. Cowen*, 15 Kas. 637; *Butcher v. Bank*, 2 Kas. 70. The finding and adjudication are *prima facie* evidence of the due and legal authentication of the summons, and the presumption thus raised is not overthrown by the fact that in the record presented no copy or mark of a seal is annexed to the summons therein set forth. Nothing is brought to this court but a transcript of the judgment and proceedings had in the cause below; and for aught that appears, the impression of the seal on the summons when affixed thereto may have been so slight as to have disappeared between the date of its issuance, Dec. 23d 1873, and the time the transcript was prepared and certified to, on September 2d 1875. We have not the same opportunity to ascertain whether the writ was issued with a seal as the district court had. Personal inspection of the summons at the time of the hearing and determination of the matter may have established conclusively the fact that it had the seal of the court attached from which it issued. Upon the finding and adjudication of the court below, and an examination of the record, we must presume that the summons served was properly sealed. The grounds for

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the allegation of the other alleged errors in the case, seem to us trivial and unimportant.

There seems to have been some irregularity as to the return of the order of sale issued June 22d 1874, and the issuance of the *alias* order of sale of date of July 13th 1874. But as the sale was not made under either of these orders, no error is manifest in the confirmation of the sale made on January 15th 1875. If we properly understand the record, the property was advertised for sale August 21st 1874, and again, October 17th 1874; and having been twice advertised and offered for sale, and not sold, said appraisement was properly set aside and a new appraisement ordered, in pursuance of § 468 of the civil code. If it be contended however, that the appraisement of June 23d 1874 was not valid, because it was not filed until November 9th 1874, then the court had a still better reason for the order directing the reappraisement of the property on November 16th 1874.

The land sold consists of four hundred acres — being three hundred and twenty acres in one section, and eighty in another. But as these two pieces of land are contiguous to each other, and the judgment debtors owned the entire interest in the premises, the sale of the same in gross is not void, and the court below committed no error in its rulings. *Bell v. Taylor*, 14 Kas. 277.

The judgment of the court below is affirmed.

All the Justices concurring.

NATHAN DRYFOOS *et al.* v. THOMAS A. CULLINAN, *as Ad'mr, &c.*

1. **ADMINISTRATOR'S COMMISSIONS; Not Allowed Where Administrator is Removed, and Refuses to Account.** In an action brought upon the official bond of an administrator, whose letters have been revoked, where such administrator has failed to make any settlement as required by law, has refused to account for the moneys collected, and compels his successor of the trust to resort to litigation to protect the rights of the estate, neither such administrator nor his sureties can reduce the amount due from him to the estate by the commissions of six per centum allowed administrators for their services under §162 of ch. 37, Gen. Stat. 1888. [*Sumner v. Reicheniker*, 9-320.]
2. ——— **Claim for Fees, Not Allowed, unless Valid, and Paid.** In an action brought upon the official bond of an administrator to recover money due an estate, where the defendants attempt to reduce the amount sued for by a claim for fees in a suit in the district court, but fail to show that the same is a valid charge against the estate, and fail to show its payment, it is not error for the court below to reject the claim.

Error from Davis District Court.

ACTION by Cullinan, as administrator, against Dryfoos and three others, on an administrator's bond given by Dryfoos as principal, and his co-defendants as sureties. The plaintiff claimed \$1,415, and interest thereon. Dryfoos answered separately, first, "that said John Sanderson, deceased, left no personal property at the time of his death belonging to his estate, nor since that time has any personal property belonging thereto come to the hands or knowledge of defendant; while all sales of real property of said estate, which at any time have been made were made by one Wm. Sanderson, a co-administrator, and the moneys received therefrom were disbursed by him, and not by defendant, and under the order of the probate court;" and second, that there was due defendant from the estate of said John Sanderson the sum of \$446.08, for which he claimed judgment. The sureties answered, alleging the same matters set forth in the answer of Dryfoos. There was annexed to each answer, as a part thereof, a "statement of

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administrator's account," between the estate of Sanderson and Dryfoos, which statement admits the receipt by Dryfoos of \$995 in money, and alleges payments to amount of \$1,005.74—claiming \$10.74 as due to Dryfoos, to which are the added claims of \$60.34 as "commissions and percentage," and \$875 as "a reasonable allowance as administrator in charge of said estate, and for collecting and preserving the same until the revocation of his letters of administration." Total, \$446.08. Plaintiff replied, a general denial. Trial at the May Term 1875. The evidence was mainly documentary, being records of the probate court. The defendants claimed certain allowances which are mentioned in the opinion, *infra*. Finding and judgment in favor of plaintiff for \$1,036 16. Dryfoos and his co-defendants bring the case here on error.

C. G. Cox, and James Ketner, for plaintiffs in error.

McClure & Humphrey, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: This was an action brought by Cullinan in the court below, as administrator *de bonis non* of the estate of John Sanderson deceased, against Dryfoos and others on the official bond of said Dryfoos, as administrator of said estate, to recover moneys received by Dryfoos as such administrator. The petition charged that said Dryfoos was guilty of waste and unfaithful administration. Dryfoos was appointed administrator August 17th 1870, and his letters of administration were revoked by the probate court August 1st 1874. Cullinan was thereupon appointed administrator *de bonis non* of the said estate of Sanderson deceased. The record shows that no settlement, annual or otherwise, was ever made by Dryfoos as such administrator, and no statement or voucher for any disbursements by Dryfoos for the benefit of the estate was ever filed in the office of the probate court. The only report or statement of the assets and liabilities of the estate filed by Dryfoos was the inventory provided by the statute, and a paper showing the alleged

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indebtedness of the estate, of date August 14th 1871. The plaintiffs in error claim the court below erred in refusing to allow Dryfoos for his services as administrator six per centum on the whole amount of personal estate and on the money arising from the sale of lands of the estate. The question is presented, whether in an action to recover on an administrator's bond, when there has been unfaithful administration, the administrator guilty of dereliction of duty, is entitled to reduce the amount of money wrongfully detained by him after his removal from administratorship, by the commission prescribed in § 162, of the act relating to executors and administrators. We think not. Such a construction of § 162 would be grossly unjust. When a person is unfaithful to a trust confided in him, and compels the parties interested therein to resort to litigation to protect their rights, he forfeits his right to compensation for his services. *Sumner v. Reicheniker*, 9 Kas. 320. The section relied upon to give Dryfoos compensation was evidently intended to recompense an executor or administrator who performed beneficial services to an estate, or, in other words, who complied with the provisions of law regulating the discharge of his duties. To allow the six per centum claimed, as a valid reduction from the moneys wrongfully detained by Dryfoos, after his removal from his trust, would distort the evident object of the law. The compensation provided, is for the *services* of executors and administrators; and to construe the section as contended for by the counsel of plaintiffs in error would make such compensation equally applicable for the payment of intentional or willful neglect of duty, as for services actually performed. As the record shows that Dryfoos failed to discharge his trust; as he was guilty of neglect of duty; as he failed to make his settlements as provided by law, and wrongfully refused to account for moneys collected belonging to the estate, the court below committed no error in disallowing the claim for six per centum commission. The services to justify such compensation had not been fully rendered. As Dryfoos was not entitled to his claim for commis-

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sion, his sureties on his bond could not be entitled to any deduction from the money due therefor.

The only other alleged error is that the court below refused to credit the account of Dryfoos with \$39.80 due one A. T. Owens for "fees in the district court in the case of the heirs of John Sanderson, deceased, against W. H. Moore." The court properly rejected this claim, as the record does not show said amount to have been a valid charge against the estate of Sanderson, and fails to show that the same had been paid by Dryfoos, or by any one for him.

No error appearing in the record, the judgment of the court below must be affirmed.

All the Justices concurring.

J. H. BLAKE *et al.* v. COMM'RS OF JOHNSON COUNTY.

COUNTY TREASURER; *Fees; Percentage on Redemption Moneys.* Under the laws of 1868 the county treasurer was not authorized to charge the county three per cent., or any other sum, on moneys received for the redemption of real estate sold on tax sale to individuals.

Error from Johnson District Court.

BLAKE was treasurer of Johnson county from July 1870 to July 1872, during which time there was paid to him as treasurer, and for the redemption of lands which had been sold for taxes, the sum of \$23,099.58. Said moneys were paid by divers individuals who redeemed their individual lands, such moneys being usually called and denominated "individual redemptions." Blake claimed that there was due him on such redemptions a "commission" of three per centum on the aggregate amount of such redemptions, amounting to the sum of \$692.87, which sum he retained in his possession as being due him from the county. The *Board of County Commissioners* denied their liability to Blake for said commission, and denied

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Blake's right to retain or to recover the same. An amicable action was thereupon instituted by the *Board of County Commissioners* as plaintiff, against *Blake* and the sureties on his official bond as treasurer, to recover the sum so retained. The action was tried upon an agreed statement of facts, at the August Term 1878. Judgment in favor of plaintiff for \$692.87, and for costs, and the defendants bring the case here.

A. Smith Devenney, for plaintiffs in error.

J. W. Green, county-attorney, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: Was a county treasurer, under the laws of 1868, entitled to receive from the county a commission of three per cent. on those redemptions commonly called "individual redemptions," that is, those cases in which the owner redeems from a tax sale to an individual? The treasurer was entitled to such fees and compensation as the law allowed, and no more. Sec. 7 of ch. 39, Gen. Stat. 479, prescribed his compensation. It reads, "The county treasurer shall be entitled to receive the following fees: For collecting taxes, * * * on moneys received other than taxes, three per cent.; * * * for certificate of redemption, .25." It is claimed under the clause quoted, that he is entitled to three per cent. on the moneys received from these individual redemptions. It is argued that when property is sold at a tax sale to an individual, the taxes are paid, the state receives its share, and the county, township, and school districts, theirs. When therefore the owner redeems, this redemption is in no sense a payment of taxes—that it is simply the removal of an incumbrance, like a mortgage held by an individual. The money therefore is "money received other than taxes," within the very letter of the statute. We cannot concur in these views. We understand the sections as prescribing the commissions to be paid on moneys received by the public, and for its benefit, and not as authorizing the treasurer to charge the county three per cent. on all moneys passing through his hands whether the

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public be interested in them or not. It must be borne in mind, that the question presented is, whether the *county* is chargeable with this commission; and not simply, whether the treasurer is entitled to receive it. The statute nowhere says in terms, that the county shall pay any of these fees allowed the treasurer. It says certain commissions shall be paid on taxes collected, and other commission on moneys other than taxes. *Prima facie* therefore, these commissions would be charged upon the amount received, and against the party for whom they were received. Before such fees could be charged against a party who has no interest in the money received, there must be plain warrant of the statute for such charge. Ordinarily it would seem strange if A. was compelled to pay an officer for services in which B. alone was interested. And the fact that the officer is entitled to the fees, would not of itself establish A.'s liability therefor. In the case at bar, the county has no interest in the money received. It belongs exclusively to the holder of the certificates. The county received the full taxes when the sale was made, and the treasurer received from the county his commission on such taxes. Thenceforward the county had no interest in the property. It was a matter purely between the land-owner, and the holder of the certificate. The sale might ripen into a deed, or the owner might redeem. Either way, it was a question between individuals, and not one whose determination enriched the treasury of the county in the slightest degree. We think therefore that the county was not chargeable for such fees, and the judgment must be affirmed.

All the Justices concurring.

THE STATE OF KANSAS V. JACOB GREBE.

1. **CRIMINAL LAW; Knowledge of Accused; Instruction.** An instruction in a criminal case, that, "where evidence which would rebut or explain certain facts and circumstances of a grave and suspicious nature, is peculiarly within the defendant's knowledge and reach, and he makes no effort to procure it, the jury may properly take such fact into consideration in determining the prisoner's guilt or innocence; but no inference of guilt is to be drawn from the omission of the defendant and his wife to testify"—is not erroneous; and if applicable to the facts in the case furnishes no ground of reversal.
2. **LARCENY; Circumstances and Conduct of Accused, When Competent, as Tending to Show Guilt.** On the trial of a party charged with the larceny of a large sum of money, and in which the evidence is mainly circumstantial, evidence that prior to the larceny the defendant's family were in very straitened circumstances, and that subsequently it displayed considerable means, and evidence that subsequently to the larceny a creditor in seeking to collect his claim charged him in the presence of several witnesses with having had and used considerable sums of money, and with having lost many dollars in gambling, and referred him to the records of the county and to the bystanders for proof of such charges, and that defendant in reply thereto denied none of such charges, except that he had lost any amount of money in gambling, is competent to go to the jury. [*Horne v. State*, 1-42; *Ballou v. Humphrey*, 8-219; *State v. Adams*, 20-328; *Gannon v. Stevens*, 18-447.]
3. ——— Upon examination of the testimony in this case, it is held, that the judgment cannot be set aside in this court on the ground that the verdict is against the evidence.

Appeal from Leavenworth District Court.

GREBE was tried and convicted of the crime of grand larceny. The information charged the defendant with the stealing of \$25 in gold, \$26 in silver, and \$2,500 in treasury notes and national bank notes, belonging to John Sass, and from the dwelling-house of Sass, on the night of 17th January 1875. Trial at the March Term 1876. Verdict of guilty, and defendant was sentenced to imprisonment in the penitentiary for five years. From such judgment of conviction *Grebe* appeals.

F. P. Fitzwilliam, for appellant.

L. M. Goddard, county-attorney, for The State.

The opinion of the court was delivered by

BREWER, J.: Appellant was convicted in the district court of Leavenworth county of the crime of grand larceny in the stealing of \$2,551 in money, and from such conviction appeals to this court. He alleges error in three respects—that the verdict was against the evidence, that improper testimony was admitted, and that the court erred in one of its instructions. The instruction complained of was as follows:

“The jury should not find the defendant guilty because he may have no evidence to show his whereabouts at the time the offense charged is alleged to have been committed, nor to show where or from whom he received any of the money spoken of by witnesses. Nor will they presume that his character is bad, simply because he has offered no testimony of his good character. But where evidence which would rebut or explain certain facts and circumstances of a grave and suspicious nature, is peculiarly within the defendant’s knowledge and reach, and he makes no effort to procure that testimony, the jury may very properly take such fact into consideration in determining the prisoner’s guilt or innocence. But no inference of guilt is to be drawn from the omission of the defendant and his wife to testify.”

The special objection of appellant is, of course, to the next to the last sentence. It seems to us that that clause is only a recognition of a well-understood principle of human action.

1. Effect of absence of accused.

The instinct of self-preservation impels one in peril of the penitentiary to produce whatever testimony he may have to deliver him from such peril. Every man will do what he can to shield himself from the disgrace of a conviction of crime, and the burden of punishment. We all know this. We all expect it. Whenever therefore a fact is shown which tends to prove crime upon a defendant, and any explanation of such fact is in the nature of the case peculiarly within his knowledge and reach, a failure to offer an explanation must tend to create a belief that none exists. Will not a man who can, explain that which unexplained will stamp him a criminal and consign him to the felon’s cell? The criminal law furnishes in its rules more than one illustration

of this principle. The possession of recently-stolen property casts upon the possessor the duty of explaining such possession. Why? Because the fact and manner of acquiring that possession are peculiarly within his knowledge and reach, and the instinct of self-preservation will compel him to give an explanation thereof consistent with his innocence, if any such explanation exists. Other illustrations might be cited, but it is scarcely necessary. The principle itself rests in the common knowledge and conviction of all. We think the proposition as stated is abstractly correct. Its applicability to the case at bar will be evident when we come to notice the testimony.

A second alleged error is in the admission of testimony. The larceny charged was of a large amount of money. The court permitted testimony tending to show that prior to the

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and conduct
of accused.
Evidence.

larceny the defendant's family were in very straitened circumstances, and that subsequently they displayed considerable means; and the court also permitted a creditor of Grebe's to testify to a conversation had with him after the larceny, in which, to induce payment of his claim, he charged Grebe with having gambled away some hundreds of dollars, and with having had and used considerable money, and referred him to the county records, and to certain parties who were present as having given the information, and a part of which charges only Grebe denied. We think both these items of testimony competent. True, the testimony was not direct proof of Grebe's guilt. And indeed there was no direct testimony as to who committed the crime. But there were circumstances which might well tend, in connection with other facts, to induce a belief in his guilt. A change in one's pecuniary condition may often be very significant. At least, it is a circumstance which the jury have a right to consider. So also, conversations with the defendant as to his pecuniary condition, although not had in reference to the alleged larceny, may yet throw light upon such condition, and for the same reason are proper for the consideration of the jury.

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But the principal question in the case is, it seems to us, whether the verdict was against the evidence. As already intimated, there was no direct proof of defendant's guilt. It was a case of circumstantial testimony. And the question therefore is, whether these circumstances were such as to exclude every other reasonable hypothesis than that of defendant's guilt. *Horne v. The State*, 1 Kas. 42. After giving the testimony a careful review, we are constrained to hold that the verdict must be sustained. The case against the defendant, it must be admitted, is not as strong as some that are brought here. The inference of guilt does not flow from the circumstances with such absolute and irresistible certainty as we sometimes find. But still the evidence was sufficient. It will be unnecessary to notice it in detail. It will be sufficient to mention a few of the more salient facts. Sass and his wife, from whom the money was stolen, lived across the alley from Grebe, and had so lived for years. They went out to spend the evening with a neighbor, and returning about ten o'clock found the money gone. The chief of police was summoned, and the premises examined. A light snow had fallen during the evening, and a single track was found leading through the back yard and across the alley in the direction of Grebe's house. About midnight the officer went to Grebe's house, and found him in bed. His shoes were on the floor, and still wet. He said he had been out in the evening about seven o'clock to take a glass of beer with a friend. The track was not measured, but was shown to have been made by a small foot, and that Grebe had such a foot. Prior to this time, Grebe, who was a shoemaker, had been away in Great Bend. While away his family was apparently in great destitution. After his return he remained in Leavenworth some weeks after the larceny, and then again went to Great Bend. There he paid off a mortgage on a lot he had bought, of \$265. His family also seemed to have plenty of money, and his wife displayed a large pocket-book. The afternoon before he left Leavenworth the second time, for Great Bend, he and his wife were seen to

a Circumstan-
tial evidence.
Weight of
testimony

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go out in the yard, back of their house, and there dig into the ground with a shovel, and uncover something which his wife picked up and wrapped in her apron and carried into the house. These are some of the more important items of the testimony; and taken in connection with the more minute details, as described by the various witnesses, we hold, as we have stated, that the verdict must be sustained.

It may not be out of place to state in this connection, that we have been informed that since the trial Grebe was called as a witness in a civil suit brought for this money, and in that admitted his connection with the crime here charged, while at the same time implicating others in the offense.

The judgment will be affirmed.

All the Justices concurring.

THE STATE OF KANSAS V. JOHN BYBEE.

1. **AGREEMENT OF JURY; *Motives, and Considerations.*** No juror should be induced to agree to a verdict by a fear that a failure to so agree will be regarded by the community as reflecting either on his intelligence, or his integrity. Personal considerations should not influence his conclusions; and the thought of them never should be presented to him as a motive for action.
2. ——— ***Error for Court to Coerce an Agreement.*** Where upon a charge of assault with intent to kill, the testimony runs in two lines, one tending strongly to prove the full crime charged, and the other to prove an *alibi*, and that the defendant was innocent of any offense, and where it appears that for a long time the jury were unable to agree, and that after having been unable to agree for many hours they are brought into court, and the duty of agreement is strongly urged upon them by the court, who intimates, that it would be a reflection on them not to agree—that there should be concession in matters of detail and minor importance—that they should bring their minds together as an apothecary mixes different ingredients and ascertains the product, and that they need not hope to be discharged for a long time; and where the whole tendency of this instruction is to impress too strongly upon the jury the duty and necessity of coming to some agreement, and thereafter the jury return a

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verdict of guilty of assault only, *held*, that such verdict ought not to be permitted to stand; that it is too apparently a compromise between those believing defendant guilty of the crime of assault with intent to kill, and those believing him guiltless of any offense, induced wholly or in part by the urgent instructions of the court upon the duty of agreement. [*State v. Furbeck*, 37-529.]

Appeal from Chautauqua District Court.

INFORMATION, charging that defendant *Bybee*, "on the 4th day of July 1876; at Chautauqua county, in and upon one Jesse Peterson, then and there being, feloniously did make an assault with a certain gun loaded with powder, balls and caps, which he the said John Bybee in his hands then and there had and held, the said gun being a deadly weapon, and the said Bybee then and there, and with the said gun, so loaded as aforesaid, feloniously did shoot at and toward the said Jesse Peterson, with intent him the said Peterson then and there feloniously and willfully to kill and murder, contrary," etc. Plea, not guilty. Trial at the September Term 1876. Verdict, "guilty of an assault only." The judgment and sentence of the court was, "that said defendant pay to the state of Kansas a fine of \$500, together with the costs of this prosecution, and that said defendant be committed to the jail of Chautauqua county until said judgment be complied with." *Bybee* appeals. The principal matters complained of are fully stated in the opinion.

W. C. Webb, R. J. Hill, and C. J. Peckham, for appellant.

J. D. McBrian, county-attorney, for The State.

The opinion of the court was delivered by

BREWER, J.: Defendant was convicted of an assault in the district court of Chautauqua county, and from that conviction appeals to this court. He insists that the information is insufficient in not specifically alleging that the offense was committed within the state of Kansas. The very question has already been presented to and decided by this court, and a similar information adjudged sufficient. *The State v. Walter*, 14

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Kas. 875. We see no reason to alter the views therein expressed. The principal question however, is presented by the following bill of exceptions:

(*Title.*) *September Term 1876.* Be it remembered, that after this case had been submitted to the jury, and after the jury had deliberated upon their verdict several hours, they were brought into court, and asked by the court if they had agreed upon a verdict. The jury having answered in the negative, the court addressed them in substance as follows:

"Gentlemen of the Jury: I am led to infer from the character of your communications to me that you think it impossible to agree, and desire to be discharged. You have heard the evidence, and the case has been ably argued by counsel, and the court has afforded every facility to enable you to understand the case. The trial has been very expensive to the public, and has occupied a great deal of time and attention, and it is not possible that it will ever be more clearly presented than it has been in this its first presentation to a jury. I do not desire to try the case again. It is often considered a reflection on the court, and upon you, as jurors, should you not agree. You have been impanneled to come to an agreement, not to wrangle over pet ideas and theories. It is the duty of the jury to agree if possible. The theory of an agreement by the jury is, that twelve minds are brought as nearly together as it is possible for twelve minds to come. To bring about this result, it is necessary for the individual juror (in matters of detail, and on questions of minor importance,) to defer to some extent to his fellow jurors, and to surrender some of his own ideas and opinions to what seems to be an overwhelming sentiment against him. None of us are infallible. And in your deliberations you should realize this, and mutually depend upon each other. And in the consideration of the details of the case, you should meet the questions as they arise, in a spirit of mutual concession and forbearance, and thus gradually as you proceed step by step to arrive at a conclusion to which you can all assent, although if left to yourselves you would probably come to a different conclusion. You should bring your minds together like the mixing of different ingredients by an apothecary, and ascertain what is the product. In a case of this importance I feel it to be my duty to afford you the most ample opportunity to agree. It is not my purpose to force you to a verdict not in accordance with your convictions. My experience with juries has taught me that they often agree after they

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have imagined it impossible to do so, and after the agreement they have been surprised that they ever disagreed. I hope this will be your experience. I therefore urge upon you to make another effort, in a spirit of reconciliation, and fairness to each other, to the accused, and to the public, and if possible agree upon a verdict; and I warn you not to think of being discharged for some time to come."

To the giving of which charge or instruction, and each and every part thereof, defendant at the time duly excepted—first, because said instruction was not in writing. [This objection was entered after the delivery of the foregoing to the court, but counsel for the defendant had no intimation that the court intended to address the jury as above until after the address was delivered.] Second, because said instruction, and each and every part thereof, is error in law; third, because the giving of such instruction, after the retirement of said jury for deliberation upon their verdict, is erroneous, and unauthorized. But the court overruled such objections, and each of the same, to which the defendant at the time duly excepted, and still excepts, and asks the court to sign this his bill of exceptions, and make the same part of the record, which is done accordingly, this 15th of September 1876. W. P. CAMPBELL, Judge.

We are constrained to believe, after a careful examination of the record, that the jury were misled by this instruction, and that there ought to be a retrial. The testimony impresses us forcibly with the conviction, that the defendant was either guilty of an offense higher than that of which he was found guilty, or guiltless of any offense. The prosecuting witness, and his wife, testified that defendant and another party came to their house in the night-time, and standing within twenty feet, fired several shots into the building. The building was a log house, one story, and one room, and the chinking between the logs had dropped out so that the cracks between the logs were open, from the width of a hand, up. Some of the bullets passed through the bedtick upon which prosecuting witness and his wife were sleeping. There was testimony also of a previous quarrel, and ill-feeling between the parties. The defendant denied the shooting, or being present at or near the house of the prosecuting witness that night, and testified that

he was at his own home all the night. There was also corroborating testimony, but there were distinctly the two lines of evidence. Now had the jury credited the defendant's testimony, they could not have done otherwise than acquit; and it seems to us, that had they credited the testimony of The State, they must have found the defendant guilty of something more than a mere assault. And the punishment which the court imposed, a fine of five hundred dollars, indicates its judgment as to the aggravated character of the offense. It also appears, both from the bill of exceptions and from other parts of the record, that the jury were for a long time unable to agree; and if we may credit some of the affidavits filed upon the motion for a new trial, were evenly divided. It seems to us under these circumstances, that the remarks of the learned court were calculated to exert too strong a pressure upon the jury in favor of the agreement. It may not perhaps be possible to single out any particular sentence, and say that this is, strictly speaking, and taken by itself, erroneous, and sufficient to justify a reversal, though there are some that seem to trespass a good deal on the right and duty of each juror to the free exercise of his individual judgment. Yet the general impression of these instructions, as we read them, and as it seems to us must have been received by the jury, is, that the jury ought, by compromise, and surrender of individual convictions if necessary, to come to an agreement, and that a failure to do so would be an imputation upon both jury and court. Now while a court may properly call the attention of the jury to many matters which increase the desirability of agreement, such as the time already taken, the improbability of securing additional testimony, the general public benefit in a speedy close of a litigation, and, at least in cases where the matters at stake are of minor importance, the question of the expense to the parties and the public, yet no juror should be influenced to a verdict by a fear of personal disgrace, or pecuniary injury. No juror should be induced to agree to a verdict by a fear that a failure to so agree would be regarded by the public as re-

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flecting upon either his intelligence, or his integrity. Personal considerations should never be permitted to influence his conclusions; and the thought of them should never be presented to him as a motive for action. Nor do we think the illustration given by the learned judge a happy one. A verdict is the expression of the concurrence of individual judgments, rather than the product of mixed thoughts. It is not the theory of jury trials, that the individual conclusions of the jurors should be added up, the sum divided by twelve, and the quotient declared the verdict, but that from the testimony each individual juror should be led to the same conclusion; and this unanimous conclusion of twelve different minds, is the certainty of fact sought in the law. Especially is this true in criminal trials. Here should no thought of compromise be tolerated. Before the state can fairly demand the conviction and punishment of an alleged criminal, the twelve jurors should each be led from the testimony to a clear conviction of his guilt; and where six jurors believe a defendant guilty of murder, and six believe him innocent of any offense, it is an outrage for the twelve to bring in a compromise verdict of guilty of manslaughter. We fear that something of this kind occurred in this case, and that the charge above quoted was mainly instrumental in producing this result. At any rate, it seems to us clear, that such would be the tendency of those instructions; and it is not apparent that it did not have that effect. For this error the judgment must be reversed, and the case remanded with instructions to grant a new trial.

All of the present members of this court have had experience as district judges, and know what is their solicitude for the agreement of juries, and their repugnance to see the labors of a trial prove abortive through the failure of the jury to agree. We therefore fully appreciate the considerations which induced these instructions from the learned judge, and fully sympathize with the spirit which controlled him, but are nevertheless constrained to believe that he passed beyond the line which should limit the counsels and instructions of a court to

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a jury, and that thereby the material rights of the defendant were prejudiced.

All the Justices concurring.

JOHN T. BRAIDY V. FRANK THERITT.

OFFICE, AND OFFICER; Person in Possession, not Ousted by Strategy. Where an office is in dispute between two persons, and the one in actual possession of the office steps out of the place where the business is usually performed, but with no intention of abandoning the office, or of giving it to the other person, and such other person with full knowledge of the facts steps in and immediately proceeds to do business as though he was in fact the officer, *held*, that, as between such two persons, the one previously in possession must be considered as the officer *de facto*. [*State v. Durkee*, 12-308; *Hunt v. Assoc'n*, 27-787; *Morton v. Lee*, 28-288.]

Error from Doniphan District Court.

ACTION brought by *Frank Theritt*, A. J. Selover, and Henry Dockhorn, to enjoin and restrain *John T. Braidy*, Peter Deiter, and Benjamin Harding, who claimed to be councilmen of the city of Wathena, from acting together as the city council of said city, and to enjoin and restrain Christopher Nahrung, the mayor of said city, from recognizing said *Braidy* as such councilman. It was admitted by both parties that Selover, Dockhorn, Deiter and Harding, were councilmen, and that Nahrung was the mayor of Wathena. The contest was, whether *Theritt*, or *Braidy*, was the other councilman. Selover and Dockhorn recognized *Theritt*; the mayor, and Deiter and Harding, recognized *Braidy*. The petition for the injunction was filed May 3d 1875, and the motion for a temporary injunction was heard before the district judge, at chambers, May 17th. The district judge granted the temporary injunction, as prayed for by the plaintiffs, and the defendant *Braidy* appeals from such

order, and brings the case here for review. The material facts are stated in the opinion.

W. D. Webb, for plaintiff in error.

Price & Heatley, and *A. Perry*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by Frank Theritt and others, against John T. Braidy and others, to restrain the latter from interfering with Theritt while discharging his duties as a member of the council of the city of Wathena. Said city was a city of the third class, and therefore its council consisted legally of five members. (Laws of 1871, page 122, §15.) A. J. Selover, Henry Dockhorn, Peter Deiter, and Benjamin Harding, are admitted to have been four of such members. Who the other member was, is a disputed question. The office however belonged to Theritt, or to Braidy. Both claimed it. Both claimed to be entitled to the office, and both claimed to be in the actual possession thereof. And which was in the actual possession thereof, is really the only question that is now involved in this case. Or rather, the only question that is now involved in this case is, whether Theritt was in the actual possession of said office at the time that this action was commenced; for if he was not in such possession at that time, then he cannot maintain this action. All other questions have been settled and adjusted by the pleadings and the evidence, leaving only this one question for our consideration.

It is admitted that for the year previous to the election held on April 5th 1875, Theritt was a member of the council, and had the actual possession of said office. And it is also admitted that Theritt continued in the actual possession of said office until April 30th 1875, when it is claimed by Braidy that he (Braidy) was duly qualified as the successor of Theritt, and that he (Braidy) took the actual possession of such office. Under the law, Theritt would have continued to hold said office until his successor was duly elected and qualified. (Laws of

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1871, page 120, § 5.) Theritt claims that he was his own successor, and that he not only held the office up to April 20th 1875, but that he still continues to hold the same. Theritt and Braidy were opposing candidates for said office at said election. Theritt claims that he received a majority of all the votes cast, and that he was therefore duly elected, but Braidy on the other hand claims that the vote was a tie as between himself and Theritt, and that the judges of the election under the law by lot decided in his (Braidy's) favor. (Laws of 1871, page 120, § 5.) Theritt however received the certificate of election, and qualified under the same, as his own successor, by taking the proper oath of office on April 13th 1875. On April 20th 1875, the council met in regular session—present, Councilmen Selover, Dockhorn, Deiter, Harding, and Theritt. There can be no question but that Theritt was at that time in the actual possession of the office. Braidy was also present. The mayor was also present, and presided at the meeting. On the first vote being taken, the mayor refused to recognize Theritt as a member of council, claiming that Braidy was elected to fill Theritt's place, whereupon Councilmen Selover, Dockhorn, and Theritt, retired from the meeting. Braidy was then sworn in as a councilman, and he with Councilmen Deiter and Harding proceeded to do business as a city council, and the mayor recognized them as such. Now evidently, Theritt, Selover, and Dockhorn had no intention of abandoning their offices when they retired from the council meeting. They did not intend to create vacancies in their offices, whereby Braidy or any one else could step in and become a member of the council, *de facto*, or otherwise. They simply intended to leave the council without a quorum, so that the mayor and the two members of the council who recognized Braidy's claims could not do any business. Theritt has never abandoned his office. He has never created such a vacancy in his office that any other person could step in and become an officer *de facto*; and therefore Braidy has not become a councilman *de facto*. Or at most, we do not think that he has become such an officer *de facto* that he can receive any benefit therefrom as against the

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person whom he has illegally attempted to oust from office. As between Braidy and Theritt, Theritt must be considered as the officer *de facto*. It would be strange doctrine to announce, that whenever an officer steps out of the place where he usually does business, that any person who may choose to claim the office may at once step in, and become immediately an officer *de facto*. Such a short road to obtain a contested office has never yet been opened. This is not the legal way to obtain the possession of a disputed office. The only legal remedy in such a case for the party out of office to obtain possession of the same is by a civil action in the nature of *quo warranto*. We have already held that two persons cannot be officers *de facto* for the same office at the same time. (*McCahon v. Leavenworth Co.*, 8 Kas. 437.) And we have also held that the officer *de facto* is the proper person to hold the office pending any contest therefor. (*The State v. Durkee*, 12 Kas. 308, 314.) In the present case we have this state of facts, briefly stated: On April 20th 1875, Theritt had been acting as councilman for over a year, and was then attempting to act under a certificate of election for another year. Braidy had never (so far as this record shows) acted as councilman, and had no certificate of election. Theritt steps out of the place where the council did their business, and Braidy steps in. Theritt had no intention of abandoning the office, and Braidy well knew that Theritt claimed the office. Do these facts take the office away from Theritt, and give the same to Braidy? We think not. Certainly not as between Braidy and Theritt.

The order of the court below will be affirmed.

BREWER, J., concurring.

HORTON, C. J., not sitting in the case.

IRA L. CARVER V. JAMES SHELLEY & Co.

1. **APPEARANCE; JURISDICTION; What is General Appearance.** A voluntary appearance of a party to an action, which recognizes the general jurisdiction of the court, or which is not made for the special purpose of contesting the jurisdiction of the court, or for any other special purpose, will be construed to be general appearance in the case, and will be held to give the court general jurisdiction in the case over such party. [*McBride v. Hartwell*, 2-411; *Cohen v. Trowbridge*, 6-385; *Shuster v. Finan*, 19-117; *Bury v. Conklin*, 23-464; *Freeman v. Waynant*, 25-280; *Meixell v. Kirkpatrick*, 29-683; *Bentz v. Eubanks*, 32-324.
2. **DAMAGES IN ATTACHMENT PROCEEDINGS; Set-Off; Attachment-Bond.** Where a plaintiff at the commencement of an action obtains an order of attachment, which order is afterward levied on the defendant's goods, and then the attachment is dissolved on motion of defendant, the defendant cannot, in the same suit, and without mentioning the attachment-bond in his pleading, have any damage sustained by him on account of said attachment set-off against the plaintiff's claim. [*Powell v. Geisendorff*, 23-538.

Error from Saline District Court.

SHELLEY & Co., as plaintiffs, had judgment against Carver, at the June Term 1875 of the district court, for \$234.15, and costs. Carver brings the case here on error.

John Foster, and *Gill & Reed*, for plaintiff in error.

T. F. Garver, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action on an account for goods sold and delivered. The action was commenced before a justice of the peace, where judgment was rendered in favor of the plaintiffs, (defendants in error.) The defendant (plaintiff in error,) took the case to the district court on petition in error, where the judgment of the justice was affirmed. The defendant now as plaintiff in error brings the case to this court, and asks to have both the judgment of the district court and the judgment of the justice reversed. Only two questions are presented in this court: 1st, Was the judgment of the justice rendered without that court having sufficient jurisdiction of

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the defendant? 2d, Did the justice err in refusing to allow the defendant to plead and prove his set-off?

1 The action was commenced on February 5th 1875. A summons and order of attachment were issued, and both served on that day. The service of both would seem to be regular, from the face of the returns made by the officer. As to the summons, the officer returns that he served the same "by delivering a certified copy of the same to the defendant on the 5th day of February 1875, with all the indorsements thereon." On the same day the defendant appeared in the case, and moved the court to dissolve the attachment. The grounds for this motion were, that the matters and things set forth in the plaintiffs' affidavit as grounds for their attachment were not true in fact. On the next day this motion was heard by the court, on oral testimony, both parties appearing, and the justice found that the grounds set forth in the plaintiffs' affidavit for the attachment were not true in fact, and thereupon the justice dissolved the attachment. On the day set for the trial of the cause the defendant appeared specially, and moved the court *to dismiss the action* on the ground that he had not been served with summons. This motion was heard on affidavits, and oral testimony—the plaintiff appearing generally, and the defendant specially. From the evidence introduced it would seem that the defendant had been served with summons, but that the service was irregular. The officer showed the defendant a copy of the summons, and the defendant said it "was all right," and probably took hold of it, but the constable inadvertently put it back in his pocket, and kept it. If a motion had been made *to set aside the service*, before the defendant made any other appearance in the case, probably such a motion should have been sustained. The justice overruled said motion *to dismiss the action*. The defendant then moved the court for an adjournment of the trial of the case, for thirty days, on the ground of the absence of material testimony which he had been unable to procure; and he supported his motion by affidavit. The court sustained the motion, and granted the adjournment. The defendant

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then filed his bill of particulars. This bill of particulars did not set forth merely a defense to the plaintiffs' cause of action, but it went beyond defenses, and even beyond counterclaims, and set up a cause of action, wholly independent of the plaintiffs' cause of action, and in favor of the defendant and against the plaintiffs. This cause of action of the defendant was in the nature of an action for "malicious prosecution" against the plaintiffs, for "falsely, wantonly, maliciously and without probable cause" suing out in this same action an attachment, and having the same levied on the defendant's goods "for the purpose of mere oppression," etc. The plaintiffs' claim was for \$224.20, for goods sold and delivered. The defendant's claim was for \$1,000 damages for wrongfully suing out said attachment. The defendant made no defense to the plaintiffs' claim, but admitted that the same was correct, and then asked that one claim be set off against the other to the extent of the plaintiffs' claim, and then that he, the defendant, have judgment for \$300, a part of the overplus, and the full amount to which a justice's jurisdiction extends. The plaintiffs demurred to the defendant's bill of particulars. *Both parties appeared* and argued the demurrer. The court sustained the demurrer. Now after all this transpired, can it be said that the justice did not have sufficient jurisdiction of the defendant to render judgment against him? Any voluntary appearance of a party to an action which recognizes the general jurisdiction of the court, or which is not made for the special purpose of contesting the jurisdiction of the court, or for any other special purpose, will be construed to be a general appearance in the case, and will be held to give the court general jurisdiction in the case of such party. *Cohen v. Trowbridge*, 6 Kas. 385, 393; *McBride v. Hartwell*, 2 Kas. 411, 415; 1 U. S. Dig., first series, 101, 103, paragraph 580, *et seq.*

II. We think the justice rightfully held that the defendant's set-off could not be set up in this action. 1st: It had no existence at the time this action commenced. A *defense* to an action may be set up and used, although it may not have accrued until after the action was commenced. But this is

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not a defense. 2d: The defendant does not claim that his supposed set-off is a counterclaim, and it is not. It has no connection with the "foundation" or "subject" of the plaintiffs' action. (Civil Code, § 95.) 3d: Neither is his supposed set-off, a set-off. A set-off "must be a cause of action arising upon contract, or ascertained by the decision of a court." (Civil Code, § 98.) There is no pretense in this case that the defendant's set-off is founded upon any contract, or upon the decision of any court. It is founded purely and entirely upon a tort. The plaintiffs of course gave bond when they obtained said attachment. The bond in this case was for the sum of \$500. But the defendant did not found his set-off upon said bond. He entirely ignored the bond. He did not even mention the bond in his bill of particulars. It would seem from the amount he claimed that he thought the bond was too small to cover his damages.

The judgment of the court below must be affirmed.

BREWER, J., concurring.

HORTON, C. J., not sitting in the case.

GEO. W. CULP V. ATCHISON & NEBRASKA RAILROAD CO.

NEGLIGENCE; *Heedless and Careless Acts of Railroad Employés.* The blowing of a steam whistle, and the letting off of steam, are not *per se* acts of negligence, or evidence of wrongful conduct on the part of those in charge of a railroad train. But when those acts are done carelessly, heedlessly, and without any necessity therefor, they may become acts of negligence, and the railroad company be responsible for injuries caused thereby. [*R. R. v. Garfield*, 10-552; *R. R. v. Lyon*, 24-748.]

Error from Doniphan District Court.

CULP's team became frightened, while near the railroad track and depot of defendants, in the city of Doniphan, in March 1874, causing plaintiff to be thrown from his wagon, and breaking his leg, and so injuring him that amputation of

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the leg was necessary. He alleged negligence on the part of the *Railroad Company*. A demurrer to his petition was sustained at the September Term 1874, and *Culp* brings the record here for review.

W. D. Webb, and *B. O'Driscoll*, for plaintiff.

W. W. Guthrie, for defendant.

The opinion of the court was delivered by

BREWER, J.: This was an action for damages for physical injuries. The petition alleged, that plaintiff was driving his team on a traveled road which led by the railroad track and depot of defendant, that his team was frightened by the whistle and escape of steam from a locomotive at the depot, upset his wagon, and thereby caused him great physical injury. His petition showed that there was no negligence or want of care on his part. The allegations showing negligence on the part of the defendant are as follows:

"That there was then, and for thirty minutes theretofore had been, standing on the track of defendant's said railroad a train of defendant's cars, with a locomotive-engine attached to the north end thereof for the purpose of propelling the same, which said engine was then in charge and under the control of defendant's engineers, firemen, and servants, and was then standing still, but under full steam generated by fire; that when the plaintiff with his horses hitched to his wagon, and while he was so driving and riding in his wagon on said public road, had come opposite to said engine, and within one hundred feet thereof, the firemen, engineers, and servants of the defendant in charge of said engine, needlessly, carelessly, and with gross negligence, and heedlessly, caused the steam whistle of said engine to be suddenly and violently blown with useless, unusual, startling and terrifying noise and screeches, and at the same time heedlessly, carelessly and unnecessarily caused to be suddenly opened for the escape of steam the safety-valve on said engine, thereby the emission of steam therefrom making a sudden, violent and startling noise, and at the same time heedlessly, carelessly and unnecessarily, and with gross negligence, caused the steam to be let into the cylinder while the cylinder cocks were open, thereby causing

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sudden, violent, useless, startling, and hissing noises to be made by the escape of steam from said cylinder, and that the said defendants by their said misconduct, and by their said gross carelessness, greatly frightened the said horses of this plaintiff so that they became unmanageable," etc.

A demurrer to this petition was sustained, and this ruling is the error alleged. It cannot be questioned that defendant's train was rightfully on its track, and that the blowing of a whistle, and the letting off of steam with its attendant noise, are not *per se* acts of negligence, or evidence of wrongful conduct. It is also equally clear, that plaintiff was rightfully on the public road, and that in driving his team along the ordinarily traveled way he was guilty of no negligence and no wrong. Both parties were therefore rightfully where they were, the one with its train, and the other with his team. Each had a right to the enjoyment and use of its property in the ordinary and reasonable manner in which such property is used and enjoyed. Courts must take knowledge of the fact, that the blowing of a whistle is one of the ordinary signals used in the running of a train, and that in the management of locomotive-engines it is at times necessary to open the valves and permit the escape of steam. But still these acts, which at times are legal and necessary, may be done without any necessity therefor, out of mere heedlessness and negligence, or with a wanton and criminal intent to do wrong. That a party has a right to do a given act at certain times and under certain circumstances, does not prove that the same act is right under all circumstances, and at all times. A man may be guilty of no negligence, and do no wrong in firing a revolver, or he may thereby be guilty of the grossest negligence and cause the most grievous wrong. So in this case, while the defendant might under some circumstances, lawfully, and without subjecting itself to responsibility for injuries resulting therefrom, cause the whistle to be blown, or the valves to be opened and steam permitted to escape, yet the same acts done without any necessity therefor, done negligently and heedlessly, might render the defendant responsible for all injuries caused thereby. *T. W. & W. Rld. Co. vs. Harmon*, 47 Ill. 298. *Sic utere tuo ut*

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alienum non lœdas, regulates the conduct, and determines the liability of corporations, as of individuals. Now the petition before us alleges that these acts of the defendant were unnecessarily, carelessly, heedlessly and negligently done. And upon demurrer these allegations must be taken as true. If they are not sufficiently specific and definite, motion, and not demurrer, is the remedy.

We think that the court erred in sustaining the demurrer, and that its ruling must be reversed, and the case remanded with instructions to overrule the demurrer.

VALENTINE, J., concurring.

HORTON, C. J., not sitting in the case.

ALFRED PALMER *et al.* v. MARIA E. MEINERS.

1. JURY TRIALS; *Jury to Weigh and Consider all the Testimony.* It is the province of the jury to weigh the contradictory and conflicting evidence, and also to consider all of the testimony introduced in determining the issues presented; and it is not error for the court to refuse to instruct the jury to the effect, "that if the evidence of the plaintiff impressed their minds as being so unreasonable as to remove a fair presumption of the truth of the statements made by the plaintiff, they should find for the defendants."
2. ESTOPPEL; *Rule Stated.* Where M. told T., an agent of creditors of Z., that certain personal property belonged to Z., her son-in-law, after the claim of said creditors had accrued against Z., and such creditors were not influenced or induced to part with their goods or any property, or to give Z. any extension of credit, *held*, that when said personal property was attached at the suit of such creditors subsequent to the statement of M. to their agent, M. was not estopped thereby from asserting ownership of the property attached, although she had not derived title to the property after the time of said statement. *Carithers v. Weaver*, 7-110.
3. IMMATERIAL ERROR; *Disregarded; Examination of Witness.* Where a preliminary question is asked, and objections thereto improperly sustained, *held*, that the judgment will not be reversed therefor unless it be affirmatively shown that the error affects the substantial rights of the party complaining. [*R. R. v. Pointer*, 9-626; *Budd v. Kramer*, 14-101; *Shepard v. Allen*, 16-182; *Comm'r's v. Roberts*, 22-763.]
4. TESTIMONY, *When Issue is Immaterial, should be Excluded.* Where an attempt is made to introduce evidence to establish the fact that the plaintiff

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did not testify on a former trial of the case, such evidence is rightfully rejected by the court, as tending to introduce an immaterial issue on the trial.

5. DAMAGES, IN REPLEVIN; *When Interest on Value of Property is Proper.* In an action of replevin, in the absence of fraud, malice, negligence, oppression, proof of the value of the use of the property, or of special damages, the measure of the plaintiff's damage for the detention of the property by the defendant, is the interest on the value of the property for the time it was wrongfully detained. [See *ante*, 197, 209, 213.]

6. JUDGMENT, *Against Persons not Parties, error.* In an action of replevin against a sheriff and under-sheriff for property seized by them on attachment, where the plaintiffs in the attachment proceedings are not made parties defendant, a judgment rendered jointly against said officers and the attaching-creditors is erroneous as to the persons not parties to the suit. [*Hall v. Jenness*, 6-365; *Furrow v. Chapin*, 13-112.]

Error from Cherokee District Court.

CLAFLIN & THAYER brought suit against one Fred. Zipp, and sued out a warrant of attachment therein. Said attachment was executed by A. S. Dennison, under-sheriff, by levying the same on a span of mares, a double-wagon, a set of harness, one pony, one cow, five steers, and five heifers. Immediately thereafter, *Meiners*, as plaintiff, brought replevin for said property, claiming to be the owner thereof, making *Palmer*, the sheriff, and his under-sheriff *Dennison*, defendants. Trial at the January Term 1875. All material facts and proceedings are stated in the opinion. Verdict for plaintiff, assessing the value of the property at \$386, and plaintiff's damages, for the wrongful taking and detention thereof, at \$21.19. Judgment on the verdict against *Palmer*, *Dennison*, and *Claflin & Thayer*, all of whom now unite as plaintiffs in error, and bring the record here for review.

Rucker Bros., and *W. H. Whiteman*, for plaintiffs in error.

H. G. Webb, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: Action in replevin, by Maria E. Meiners against Alfred Palmer, sheriff, and A. S. Dennison, under-

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sheriff of Cherokee county. The property described in the petition was replevied. The defendants gave bond, retained it, and afterward sold it. The defense was substantially, that the property in controversy belonged to one Fred. Zipp, against whom the firm of Claflin & Thayer had sued out an attachment, under which process the defendants had attached and taken possession of the property. Mrs. Meiners was the mother-in-law of Zipp, and at the time of the levy she and the family of Zipp lived together on a farm owned by the wife of Zipp, but which Mrs. Meiners claimed to manage and control. The property was attached on this place. Palmer and Dennison disputed this claim, and offered evidence tending to show Zipp exercised ownership over the property, and used it as his own; that the claim of Mrs. Meiners thereto was fraudulent, and only asserted to defraud the creditors of Zipp. The jury returned a verdict for Mrs. Meiners, valued the property at \$386, and assessed her damages at \$21.19. The jury also returned special findings, to the effect that the property levied upon was not the property of Zipp, that Zipp purchased the same as the agent of Mrs. Meiners, and that the property replevied actually belonged to Mrs. Meiners when the attachment was served. Judgment was rendered that Palmer, Dennison, and Claflin & Thayer return the property, and in case return could not be had, that plaintiff in the court below recover \$386 as the value of the property, \$21.19 damages, and the costs of suit.

The first error complained of, is the action of the court below as to the instructions contained in the general charge. As to this objection, it is sufficient to say the only exception to the charge was thus taken: "Excepted to by the defendant." The charge as a whole, in its general scope, is not erroneous, and the exception is unavailing. *Wheeler v. Joy*, 15 Kas. 389; *Sumner v. Blair*, 9 Kas. 521.

Instructions Nos. 4 and 5 given by the court were excepted to because, it is alleged, there was no evidence introduced to sustain the same. Instruction No. 4 reads: "If Zipp was furnished money by the plaintiff with which to buy property for

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her, and he did buy property which he afterward turned over to her and which she accepted in lieu of a part of said money, such property became and was hers, whether Zipp paid in money or goods therefor, or whether he bought it on credit, if it was so accepted before its seizure by these defendants." And instruction No. 5 is as follows: "A man in failing circumstances has a right to pay his debts, and may prefer one creditor over another, and may pay such one to the exclusion of the others." The testimony is very indefinite as to any property being turned over to Mrs. Meiners in payment of debts due her from Zipp; but there is evidence in the record that Mrs. Meiners advanced or loaned money to Zipp, and as she claimed to be in the actual custody of the property at the time of its seizure, we cannot say that facts sufficient to base said instructions thereon were absolutely wanting. Admitting however that the evidence did not sustain such instructions, the special findings of the jury plainly show they could not have prejudiced the defendants in the court below, and hence the giving of the same is no cause for reversal of the judgment. *Luke v. Johnnycake*, 9 Kas. 511.

The court properly rejected instructions Nos. 3 and 14 asked for on the part of the defendants. No. 3 is to the effect that, if "the story as related by plaintiff as to her acquirement of the amount of money she claimed to have had when she left the old country, her mode of taking care of it, the discrepancy, if any, as to the amount she had then, the way she made it, the length of time she had it, the length of time she had been a widow, and all of these circumstances related by her, strikes your mind as being an unreasonable story to the extent of removing a fair presumption of its truth from your minds, you must find for the defendants." And No. 14 states, "the court instructs the jury there is no evidence in this case that the plaintiff purchased any of the stock in dispute." That neither of these instructions should have been given, is evident. No. 3 is not the law. No argument is necessary to sustain this position. As there was some evidence before the court, although indefinite, as to the purchase of the stock in

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prejudice.

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testimony.

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controversy, the matter was properly submitted to the jury, and instruction No. 14 rightly refused. Mrs. Meiners testified, that "the stock was hers, and that she gave her son-in-law money before he went to Colorado, to buy stock with." She also testified, "that she gave him \$650 to keep and use for her, and that Zipp brought back from Colorado the wagon, harness, and pony" named in the petition. The evidence in the case, it is true, is very conflicting and contradictory; but the fact that the jury returned in their special findings, "that Zipp purchased the property as the agent of Mrs. Meiners," is conclusive. They believed the witnesses for the plaintiff in the court below. The court had nothing to do with weighing the evidence introduced, and properly refused to invade the province of the jury by giving said 14th instruction.

Objection is also taken to the action of the court in refusing to give an instruction to the effect, "that if plaintiff let Zipp have money to take to Colorado, and he brought back with him a part of the property levied upon, and such property was purchased with the money procured from plaintiff, the presumption of the law is that it was his own property, unless there had been a *bona fide* purchase thereof by plaintiff before it was attached." There was no error in this refusal, as the court in the general charge had fully covered the subject-matter intended to be presented to the jury in this instruction, and had stated therein more clearly the law upon this identical point. The court is not bound to repeat instructions to the jury, and should present the same in as simple and concise form as possible.

Objections are also made to the refusal of the court to give instructions Nos. 9 and 10. The ninth instruction so asked reads:

"If you believe from the testimony that Zipp, in the presence and hearing of the plaintiff told the witness G. W. Todd that he was trading for the farm where this property was taken from, and had purchased certain personal property to be used thereon, and was going to put the plaintiff then in charge thereof—asking said Todd what the house of Claffin & Thayer

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would say or think of his trading his old stock of boots and shoes into said farm and stock, and in going to Colorado—and the plaintiff did not dissent from or consent to said statement, you must find for the defendants, provided you find said personal property was taken to the farm and the same or its increase, or property it was exchanged for, is a part of the property in dispute.”

The instruction is erroneous, and was never the law. The court might have stated to the jury, that if they found such facts to have existed, they could take them into consideration in determining the ownership of the property; but the court had no right to say “they must find for the defendants.” The 10th instruction asked was—

“If you believe from the testimony that the plaintiff told G. W. Todd that Zipp owned the property then on the farm, and she did not after that time, in good faith, purchase the same, you should find for the defendants, provided, you find that said property, its increase, or property with it traded for, is the same or a part of the property in dispute.”

Todd was the agent of Claflin & Thayer; and counsel presenting this case claim Mrs. Meiners was estopped, if the statements were made as set forth in the instruction, from claiming the property sued for. It is not alleged in the record that the statements were made to Todd previous to the accruing of the account against Zipp in favor of Claflin & Thayer; nor does the instruction state when the conversation occurred. “Estoppels *in pais* are upheld to prevent gross injustice in cases where one party, having rights in property, by representations or conduct in reference thereto, fraudulently induces another to part with value for that property, and thereafter insists on those rights to deprive the latter of both value and property.” *Carithers v. Weaver*, 7 Kas. 110, 125. As Claflin & Thayer were never influenced or induced to part with their goods on such alleged statement, and never gave any credit or extension of payment thereon, the reason for holding Mrs. Meiners estopped thereby fails. The instruction was properly refused.

¹ Estoppels *in pais*. Rule stated.

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A. S. Dennison was introduced by the plaintiff as a witness in the court below, and after testifying in chief as to serving the attachment, the property taken, the value thereof, and that Mrs. Meiners and Mr. Zipp were present at the time, on cross-examination was asked: "Was Zipp using or exercising any control over any property there on that day?" and was also asked, "if Zipp was present on the day of the sale of the property?" The court, upon objections being made, refused to permit the witness to answer. We find no error herein. The first question was too general in its character, and did not refer to the property in dispute. The last question was incompetent, and wholly irrelevant to the issues presented. For like reasons the court committed no error in refusing the witness Rucker to answer the same interrogatories.

When Mrs. Meiners was upon the witness-stand, she was asked, on cross-examination, "How long was Zipp gone to Colorado?" Also, "How long was he to be gone to Colorado, if you know?" And, whether "Gehart Deeters and you came over in the same passage." The witness was not permitted to answer. Owing to the claim of the witness to the property, the character of her alleged possession thereof, her relationship with the debtor, and the circumstances testified to by her on cross-examination as to giving her son-in-law money before he went to Colorado to buy stock with; that he did go to Colorado; that she brought with her from Germany over \$1,200; that she knew Deeters; saw him on the vessel in which she came to New York, the court might have permitted the questions to have been answered. Indeed, we think it would have been better for the court to have overruled the objections thereto, and also many of the other objections to the questions propounded. The utmost latitude should have been given upon the cross-examination of this witness. But a trial court must have some discretion as to the admission and rejection of testimony, otherwise there would be no limit to an examination; and we cannot say in this case that such discretion was abused, or that any injustice was done to the plaintiffs in error.

s. Cross-examination; latitude; immaterial error.

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Error is also alleged in the action of the court in permitting the following question and answer, while one Delia Fitzsimmons was being interrogated: "Who was the owner of the property you have just described?" Answer—"Mrs. Meiners was controlling and directing the use of it," etc. In the manner the question was answered we do not see that any conclusion of law was stated, nor that the witness understood that her opinion was desired other than as to the facts of the case. The reply was both intelligent and proper. The objection was properly overruled.

While A. W. McGill was being used as a witness for the defendants in the court below, he was asked, "Did she (plaintiff) testify in this case at the last term of court?" Objected to as irrelevant, and ruled out by the court. We ^{4. Immaterial issue—evidence not admitted.} think as a preliminary question this interrogatory was proper and pertinent; and if plaintiffs in error had affirmatively shown by the record that the purpose of the question was to show statements made by Mrs. Meiners at the previous term of the court, we should hold the court committed error in refusing such question to be answered. But taking the whole record together, we come to the conclusion that such question was asked to bring out before the jury the fact that Mrs. Meiners did not testify "in the case at the last term of the court;" and as the purpose of the inquiry was to introduce an immaterial issue in the case, we think no error was committed in sustaining the objection.

Error is also claimed because the property was valued by the jury at \$386, and the damages assessed at \$21.19. The petition states the property to be worth \$431. Several witnesses testified to the value of each article sued for, and taking the different values sworn to, the jury found the same worth the amount returned in their verdict. It was their province to weigh the testimony, and as sufficient evidence was presented to sustain the verdict it will not be set aside because the jury affixed the highest value to each article.

The court instructed the jury, "if their verdict was for the

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plaintiff, they should find the value of the property in controversy, and assess to plaintiff as damages seven per cent interest per annum thereon from the commencement of the action to the present time." The jury, under the instruction, ascertained the interest on the actual value of the property at \$21.19. The attachment was served on March 4th 1874, and this suit was commenced on the 7th of the same month. Interest should have commenced from the time the property was wrongfully taken. Still, in the form in which it was given, the plaintiffs in error suffered no injury. In an action of replevin, in the absence of fraud, malice, negligence, oppression, or in the absence of proof of the value of the use of the property, or of special damages, the measure of the plaintiff's damages for the detention of the property by the defendant is the interest on the value of the property for the time it is wrongfully detained. *Bell v. Campbell*, ante, page 213; *Yandle v. Kingsbury*, ante, p. 197; *Ladd v. Brewer*, ante, p. 209; *Blackie v. Cooney*, 8 Nevada, 41; *Berthold v. Fox*, 13 Minn. 501; *Mayberry v. Cliffe*, 7 Caldwell, (Tenn.) 117; *Wood v. Braynard*, 9 Pick. 322; *Allen v. Fox*, 51 N. Y. 565.

The court below rendered judgment, "that the said plaintiff Maria E. Meiners have and recover of and from the said defendants Alfred Palmer, sheriff, A. S. Dennison, under-sheriff, and Claflin & Thayer, return of the property replevied in the action, and in case the defendants fail to return to said plaintiff the said property, then and in that case the plaintiff have and recover of and from said defendants," etc. Claflin & Thayer were not parties to the action. They could have been made defendants in lieu of Palmer and Dennison, upon proper proceedings being had in accordance with §§ 43 and 44 of the code, or they could have been substituted for the officers under § 45 of the code. But as no action was taken to make them defendants, the court erred in ordering them to return the property in controversy, and in rendering judgment against them. *Hall v. Jenness*, 6 Kas. 865; *Furrow v. Chapin*, 13 Kas. 112.

s. Damages in replevin. When interest is proper.

e. Judgment against persons not parties error.

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This case is remanded with instructions to the court below to reverse the judgment as to Claflin & Thayer, and to affirm the same as to Palmer and Dennison.

The costs in this court must be divided between Palmer and Dennison, plaintiffs in error, and Maria E. Meiners defendant in error.

All the Justices concurring.

THE STATE OF KANSAS V. ROBERT WHITE.

1. *CONFESSION OF ACCUSED; When Voluntary, Admissible in Evidence.* A criminal offense was committed in the city of Lawrence. On the next day the defendant was arrested therefor by the city marshal, but was immediately discharged. In eight or nine days thereafter the defendant was again arrested by the marshal, who at this time said to the defendant that "it would be better for him [the defendant] to make a clean breast of it, and tell me [the marshal] all about it." The marshal testified on the trial of this case that he may have said more than this by way of inducement to the defendant to confess; but another witness who was present and heard all of the conversation between the marshal and the defendant, testified that this was all that was said by the marshal for that purpose. What the defendant said is not shown, but the defendant himself testified that he made no confession at that time, or at any other time. Afterward, but on the same day, the defendant was put into the custody of a constable to be taken to the county jail. While on their way to the jail, by the way of the defendant's mother's house, the defendant made a confession of his guilt to the constable. The constable was not present at the interview between the defendant and the marshal, and no one was present at the time the defendant made his confession to the constable, except the defendant himself. No inducement was at any time held out to the defendant to confess, except the foregoing language of the marshal. *Held*, That said confession must be considered as having been voluntarily made, and that the trial court did not err in permitting said constable to testify on the trial concerning it. [*State v. Reddick*, 7-148; *State v. Ingram*, 18-14; *State v. Mortimer*, 20-93; *State v. Folwell*, 14-105.]

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2. **AFFIDAVIT OF PARTY, Read as Deposition; Instructions.** An affidavit purporting to state what the evidence of four absent witnesses would be, if present, was read on the trial by the defendant in a criminal prosecution, upon an agreement of the county attorney that such affidavit might be read to the jury as the deposition of such witnesses. Afterward the court refused (though requested to do so by the defendant,) to instruct the jury to treat such alleged evidence as though said witnesses had been personally present at the trial, and had testified to such evidence on the witness stand. *Held*, Not error. [*Thompson v. State*, 5-159; *State v. Dickson*, 6-209; *State v. Adams*, 20-319; *State v. Roark*, 23-152; *State v. Rhea*, 25-579.]

Appeal from Douglas District Court.

WHITE was charged by information with the crime of rape, on one M. D., a girl fourteen or fifteen years of age. The crime was alleged to have been committed on 28th May 1875. Plea, not guilty. Trial at the October Term 1875. Verdict, guilty: New trial refused, and defendant sentenced to imprisonment in the penitentiary for the term of twelve years. From this judgment and sentence defendant appeals to this court. But two questions are raised, upon which the facts are stated in the opinion.

N. Hoysradt, for appellant.

Nevison & Alford, for The State.

The opinion of the court was delivered by

VALENTINE, J.: This was a criminal prosecution for rape. The defendant was convicted, and sentenced, and he now appeals to this court. On the trial it was shown that the defendant made a confession. Whether this confession was voluntary, or not, is the first question presented to this court. The confession was made to one A. J. Phillips, who was at the time a constable, and had the defendant in charge. There is no claim that said confession was made because of anything said or done by Phillips, or in Phillips' presence. But it is claimed that the said confession was made because of threats, promises, or inducements previously held out to him by one Samuel Walker. The evidence upon this subject is as follows. Said

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Samuel Walker, who was a witness for the state, testified, among other things:

"I was marshal of the city of Lawrence in May 1875. I remember the rape at Mr. Gunn's, in that month, and examined the premises the next day, and then three or four hours after the examination I saw the defendant. I sent policeman Brockelsby to bring him to me. Nobody said to him anything about this rape that day in my presence. * * * I had him arrested again in eight or nine days, and brought to me at the calaboose of the city by one of the policemen, either Brockelsby, or Schott, I forget which. He was brought into the calaboose where I was sitting, and sat down beside me, and put his hand on my shoulder, and asked me if I had had him arrested for that affair over at Mr. Gunn's. I then told him it would be better for him to make a clean breast of it, and tell me all about it. It is my best impression that I told him, if he would make a clean breast of it, and tell me all about it, I would do all I could to get him out of it. I am not certain that I promised him I would do all I could to get him out of it, but that is my recollection, and I know I did make some such statement as that to prisoners when I was trying to get them to make confession. I know and am certain that I told him that it would be better for him to make a clean breast of it, and tell me all about it. He was then in my custody, in the calaboose of the city of Lawrence, I having charge of him as marshal of the city."

John Schott, who was the officer who arrested the defendant the second time, and who took him before said Walker, testified on the part of the state among other things as follows:

"Colonel Walker, the marshal of the city, had me arrest the defendant on this charge, and take him to the calaboose. I then went and got Walker. We went into the calaboose, and Walker had a conversation with the defendant. I was present at the conversation all the time. Walker told him he was arrested for the affair at Mr. Gunn's, and told him he had better make a clean breast of it, and tell the whole truth about it. I did not hear Walker tell him that if he would make a clean breast of it he would do all he could to get him out of it. I don't think he told him so. I was present all the time, and I did not hear him say so. If he had said so, I should have heard it."

No evidence was introduced concerning any confession

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made by the defendant to Walker, or in Walker's presence, and the defendant himself testified in his own behalf that he never made any such confession. Said conversation between Walker and the defendant was at the city calaboose. The defendant was afterward taken to the police court-room, where he was afterward transferred from the custody of marshal Walker to the custody of constable Phillips. Phillips afterward, but on the same day, took the defendant to the county jail. Phillips testified among other things as follows:

"I remember when the defendant was arrested. I had some conversation with him after the arrest. I was then on Vermont street, in the city of Lawrence. Nobody was with me but the defendant. I was constable of the city of Lawrence, and had him in custody under a mittimus, and was taking him to jail. I had been in the country, and came in from the country, and took him from marshal Walker's custody at the police court-room, to take him to jail. This was on the first day he was arrested. I understood he had been brought from the city calaboose to the police court-room, where he was turned over to my custody, to take him to jail. After I took him in custody to take him to jail, he asked me to take him to his mother's, and I was on the way to his mother's house before going to the jail, when he made a statement to me. The defendant said he hoped he would get justice. I asked him what he had been doing. He said," etc., [here follows his confession.]

The defendant seems to have been a man of mature years. He testified for himself; and, although a colored man, he seems to have had sufficient intelligence as not to have been easily overcome by inducements. Taking the whole of the evidence together, it would seem to us that said confession was undoubtedly voluntary. It was eight or nine days after the offense was committed, and after the defendant was first arrested therefor, before said confession was made. And then the only thing shown to have been held out to induce him to make a confession of any kind, was the language of marshal Walker at the calaboose, that "it would be better for him to make a clean breast of it and tell me [Walker] all about it."

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Schott testifies that this was all that was said by Walker. Walker does not say positively that anything further was said: and no one else testifies concerning the matter, except that the defendant himself testifies that he was not actually induced by any means to make any confession. It was some time after these words were spoken before the defendant made said confession; and when he made the confession he was not in the custody or presence of either Walker or Schott, and was in the presence of no one except the officer to whom he made the confession.

The court below refused to give the following instruction to the jury, to-wit: "The jury must treat the testimony of the four witnesses mentioned in the defendant's affidavit for continuance in the same manner, and to the same extent, as if such witnesses had been present at this trial, and, as sworn witnesses, had given such testimony from the witness stand." There was no error in this refusal. The statute merely requires that the facts alleged in such an affidavit should be read and treated as the deposition of the absent witnesses; (Gen. Stat. 689, § 317; id. 854, § 210.) And the affidavit in this particular case was read in evidence merely upon the agreement of the county attorney that it might be read to the jury merely as the deposition of the said four witnesses.

The judgment of the court below must be affirmed.

All the Justices concurring.

**COBB, STRIBLING & Co. v. THE INSURANCE COMPANY OF
NORTH AMERICA.**

1. **INSURANCE AGAINST FIRE; Terms of Policy; General and Special Clauses.**
Where an insurance policy provides *in writing* for insuring a "stock of boots and shoes, dry goods, drugs, liquors, and such other goods as are usually kept for sale in a country store," and provides *in printing* that "gunpowder, saltpetre, phosphorus, petroleum, naphtha, benzine, benzole or benzine varnish, are positively prohibited from being deposited, stored, or kept in any building insured, or containing any property insured by this policy, unless by special consent *in writing* indorsed on this policy, *naming each article specially*, otherwise the insurance shall be void," and accompanying the policy, and a part of it, is the application of the assured, in the body of which he obtains *in writing* special permission to keep one of the prohibited articles, in the following words, to-wit, "Permission given to keep coal oil, not to exceed three barrels at any one time," *held*, that the assured could not keep gunpowder in any shape or quantity in his store along with his other goods, without the consent of the insurance company in writing, *naming such article specially*, without violating the terms of his policy.
2. **CONSTRUCTION OF CONTRACTS OF INSURANCE; Written and Printed Clauses, Not Repugnant.** The court should not construe the written and printed clauses in a policy of insurance so as to make them conflict with each other, if such a construction can be avoided; but on the contrary, should construe them so as to make them harmonize, if such a construction is possible; and should construe them so as to give to each and all their terms full force and operation. And in construing them the court should also take into consideration the rest of the instrument, the acts of the parties, and all the surrounding circumstances, for the purpose of arriving at the real intention of the parties; for the real intention of the parties is the great end and object in the construction of all instruments. [*Ins. Co. v. Twining*, 12-481; *Simpson v. Kimberlin*, 12-579; *Carr v. Cullin*, 13-394.]
3. ——— [The natural and proper construction of a policy of insurance containing both written and printed clauses, which clauses, if separately construed, would be in apparent contradiction, explained and illustrated in the opinion.]

Error from Shawnee District Court.

IN May 1867, defendant in error, *The President and Directors of the Insurance Company of North America*, issued its policy of insurance to one G. F. Bernstein, to insure him on his stock

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of goods in Council Grove. In March 1868 the goods of Bernstein covered by the policy were entirely destroyed by fire. In June 1868, Bernstein assigned the policy, and his claim thereon, to *Cobb, Stribling & Co.*, who commenced this action in March 1869. The case was first tried in 1870, upon an issue of law, and was appealed to this court, and heard and decided in January 1873. (*Cobb v. Ins. Co. of N. A.*, 11 Kas. 93.) Upon being remanded to the district court, a trial upon the issues of fact was had at the December Term 1873. The case hinged upon the question, whether the keeping of *gunpowder*, by Bernstein, was within, or without, the terms of the policy, and if without, then whether the fact that such article was kept by Bernstein in his store rendered the policy void. The terms and clauses of the policy, so far as they relate to the controverted questions, are quoted in the opinion, *infra*. On the trial in the district court, it was shown by plaintiffs' witnesses that Bernstein, the insured, "kept gunpowder in the store in cans containing from one to two pounds each, and in quantities from one to three dozen cans." And the plaintiffs then offered to prove by a competent and experienced keeper of a country store, that gunpowder in the quantities and shape mentioned, was usually kept in country stores. The *Insurance Company* objected to this testimony, and the court ruled that the testimony was inadmissible. Verdict and judgment in favor of defendant, and plaintiffs bring the case here on error.

W. P. Douthitt, and *C. M. Foster*, for plaintiffs, contended, that the main question in this case is, whether it is competent to prove by parol what goods were covered by the policy under the head of "such other goods as are usually kept for sale in a country store." We maintain that when it is shown that gunpowder, in the form and amount kept by Bernstein, is an article usually kept for sale in a country store, that in legal effect gunpowder is as much insured as if written in the body of the policy, and that the insurance company cannot complain if the assured keeps the property insured. That such evidence is

admissible, we insist the authorities are uniform and decisive: 16 Gray, 359; 58 N. Y. 292; 17 N. Y. 194; 5 Minn. 492; 12 Mich. 124; 26 Iowa, 66, 67; 8 Conn. 467; 53 Penn. St. 485; 10 Rich. (S. C.) 202; 43 Mo. 434; 5 Ohio St. 450; 31 Md. 219; 36 Md. 122; 2 Pars. Cont. 424; Pars. Merc. Law, 499; Phillips on Ins., § 883; Flanders on Ins. 309; May on Ins. 251.

2. When there is a conflict between the written part of an insurance policy, and the printed portion, greater effect is given to the written part, as the written words are the immediate language of the parties, and the printed words the general formula adapted equally to their case and to that of all other contracting parties upon similar occasions and subjects: 4 East, 130; 2 Hall, 665; 47 N. Y. 603; 2 Pars. Cont. 516; Phillips on Ins., § 125; Bliss on Life Ins. 620; Angell on Ins. 11; 1 Arnould on Ins. 80; Flanders on Ins. 70, 79; 7 Chi. Leg. News, 31.

3. In order to defeat the policy, the defendant must prove that there was gunpowder in the store at the time of the fire. A breach of the condition only suspends the risk. It is not a warranty on the part of the assured: 41 Ill. 298; 50 Ill. 129.

A. L. Williams, for defendant, submitted, that the only issue in this case is, was the assured authorized to keep gunpowder at all? The defendant affirms that he was not. If the policy absolutely prohibited the keeping of gunpowder in any quantity, it is surely immaterial whether it was kept in such quantities as are usually kept in a country store or not. If the policy did authorize it, the defendant is the sufferer; for, by excluding all testimony, defendant takes from itself the right to make an issue on the question as to whether the quantity was unusual or not. The question is a very important one, and of great interest to all the insurers and insured in the state. A good deal of stress is laid upon the modern rule of construction that, when the written and printed parts of a contract are repugnant to each other, the written governs. It

Brief of Defendant.

seems to have been forgotten by counsel, however, that what is here called "a rule," is merely an aid to a very ancient rule, namely, that where two parts of a contract (and whether written or printed is of no consequence) are repugnant to each other, the one which shall give effect to the intention of the parties is to be chosen, and the other rejected. The fact must not be overlooked, that this new rule destroys no old one, interferes with no old one. The same rules of construction which governed when it was introduced are of full force to-day. It is still true that where effect can be given to all parts of a contract, it must be done. The conflict must be the same in a contract partly printed and partly written, as in one entirely in writing, to authorize a court to annul one clause as repugnant to some other. The conflict spoken of means conflict, and must be so plain that the clauses in question cannot be reconciled. It means, that a clause in its entirety conflicts with some other clause in its entirety—not merely that one clause modifies or explains another. The two clauses as a whole must be repugnant to each other so that to give effect to one requires the annulling of the other. The true rule on this subject may be found in §§ 660, 661, of Story on Contracts, and in note 1 to page 20, 2 Parsons on Contracts. If the policy in this case, after insuring "such a stock of goods as is usually kept in country stores," had contained a clause (either written or printed) that nothing in the policy should be held as permitting the insurance of "such a stock of goods as is usually kept in a country store," a repugnancy would have existed. If, as the fact is here, the insurance was upon "such a stock as is usually kept in a country store," with a *proviso*, that certain dangerous goods, although usually kept in country stores, were excepted from the general provision, no repugnancy would exist. The condition merely limits and explains the general clause. 5 Minn. 492. [Counsel reviews all the cases mentioned in the opinion of the court, *infra*, and concludes that "this case presents questions never before brought before an American court."]

2. The plaintiffs are estopped from denying the construction, that there is no repugnancy between the written and printed clauses in the policy. Accompanying the policy, and a part of it, is an application of the assured for insurance. By the terms, both of the policy and the application, they are considered as one contract. This application, which is signed by the assured, contains a statement of the property to be insured, answers to various questions about the property, which statements and answers are his warranty, and an application for the insurance. On his application he obtains *written permission* to keep one of the prohibited articles in these words: "Permission given to keep coal oil, not to exceed three barrels at any one time." Does not this show conclusively that he knew that the clause was operative on his contract? *Expressio unius est alterius exclusio*. By his act in obtaining consent in writing to keep one article usually kept in country stores, but which was prohibited in the printed clause, the assured recognized the validity and full force of that clause, and the defendant, in carefully specifying in writing the kind of oil and the quantity to be kept, showed that it had no intention of waiving it. If there were any force in the construction of the policy contended for by plaintiffs, this act of the assured would deprive them of its benefit.

3. Plaintiffs contend that "to defeat the policy it must be shown that gunpowder was kept at the time of the fire; that a breach of the condition only suspends the risk." The proposition has no force either in fact or in law. The plaintiffs' testimony shows the description of goods lost, enumerates among the articles kept by the assured this very gunpowder. And in the next place no authority exists, none can be found, which says or intimates that under such a policy as this the keeping of any of the prohibited articles only suspends the risk during the time the article is so kept. The true rule, on this question, is stated in May on Insurance, p. 265.

The opinion of the court was delivered by

VALENTINE, J.: This action was brought by Cobb, Stribling

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& Co., as assignees of G. F. Bernstein, against the Insurance Company of North America, for the loss of a certain stock of goods insured by said company, and destroyed by fire." We have once before had this case under consideration, and we then decided such questions as were then presented to us. (*Cobb v. Ins. Co. of N. A.*, 11 Kas. 93.) A new question is now presented, and that question is, whether Bernstein had a right under his insurance policy, and without any further or other permission from the insurance company, to keep gunpowder for sale in his store, along with his other goods, in such quantities and in such shape as it is usually kept for sale in country stores. The insurance policy, so far as it has any application to this question, provides for insuring Bernstein's "stock of boots and shoes, dry goods, drugs, liquors, and such other goods as are usually kept for sale in a country store;" and that "gunpowder, saltpetre, phosphorus, petroleum, naphtha, benzine, benzole or benzine varnish, are positively prohibited from being deposited, stored, or kept in any building insured, or containing any property insured by this policy, unless by special consent in writing indorsed on this policy, naming each article specially, otherwise the insurance shall be void." Accompanying the policy, and a part of it, is the application of the assured, in the body of which he obtains, *in writing*, special permission to keep one of the prohibited articles, in words following: "*Permission given to keep coal oil, not to exceed three barrels at any one time.*"

The first paragraph or clause above quoted from the policy is *in writing*, and the second is *printed*. Therefore, if there were any real and irreconcilable conflict between the two paragraphs, the first would, according to well-known rules of construction, be of controlling force in determining what the real intentions of the parties were. But we should not construe said paragraphs or clauses so as to make them conflict with each other, if such a construction can be avoided. On the contrary we should construe them so as to make them harmonize, if such a construction is possible; and should construe them so as to give to each and all their terms full force and

operation. And in construing them we should also take into consideration the rest of the instrument, the acts of the parties, and all the surrounding circumstances. By this means we can probably arrive at the real intention of the parties and the real intention of the parties is the great end and object in the construction of all instruments. The two most natural constructions that can be given to said paragraphs (provided it be attempted to make them harmonize,) would seem to be about as follows: *First*—The insurance company insures Bernstein's "stock of boots and shoes, dry goods, drugs, liquors, and such other goods, [including "gunpowder, saltpetre, phosphorus, petroleum, naptha, benzine, benzole or benzine varnish,"] as [the same] are usually kept for sale in a country store," provided, that "gunpowder, saltpetre, phosphorus, petroleum, naptha, benzine, benzole or benzine varnish [except "as" they "are usually kept for sale in a country store"] are positively prohibited from being deposited, stored or kept in any building insured or containing any property insured by this policy unless by special consent [of the company] in writing indorsed on this policy, naming each article specially." *Second*—The insurance company insures Bernstein's "stock of boots and shoes, dry goods, drugs, liquors, and such other goods [including "gunpowder, saltpetre, phosphorus, petroleum, naptha, benzine, benzole or benzine varnish] as [the same] are usually kept for sale in a country store," provided however, that as to "gunpowder, saltpetre, phosphorus, petroleum, naptha, benzine, benzole or benzine varnish [said insurance does not extend except by the "special consent" of the company "in writing indorsed on this policy, naming each article specially," and said articles] are positively prohibited from being deposited, stored or kept in any building insured or containing any property insured by this policy, unless by special consent [of the company] in writing indorsed on this policy, naming each article specially." Other constructions might also be given to said paragraphs; but we think the second one which we have given is the most natural, and it undoubtedly has this great advantage over all others—it is the

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one which the assured himself gave to said paragraphs when he made his application for the insurance policy in which they are contained. If he had supposed that he could keep "coal oil" for sale without special permission from the insurance company, he would not have taken any trouble to obtain such permission. The reason for using the words or terms that the parties did use in said policy, instead of using some other words or terms, we think is obvious. It was evidently the intention of the parties, as we think, that every article of goods such as are usually kept for sale in country stores should be insured, either conditionally, or absolutely. But these articles are so various in kinds, and so unlimited in numbers, as to be practically infinite; and to name each article separately would be practically impossible. Then how are they to be named or designated? Some of them, as we have before stated, are insured absolutely, while others are insured only conditionally or contingently. Then how are these two classes to be designated? Probably the only easy way of doing it would be to do it in the very manner that it was done in this particular case. First, use general language embracing all articles in both classes, and then by way of exception, limitation, or modification use special terms, naming each particular article belonging to the smaller class. This can easily be done in this particular case, for in this case only a few articles, to-wit, "gunpowder, saltpetre, phosphorus, petroleum, naptha, benzine, benzole or benzine varnish," belong to the smaller class. This use of language is common both in contracts, and in statutes. General language is first used embracing a large class of things, and is used with reference to such things absolutely; and unconditionally. And then special words or terms, embodying an exception, a modification, a limitation, a proviso, or some condition, is used with the intention of qualifying or explaining the previous general language. Bonds and mortgages in contracts, and provisos and saving-clauses in statutes, are good illustrations of this use of language. It is also easy to be understood why the first paragraph above quoted from the policy

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of insurance is in *writing*, and why the second is *printed*. Insurance companies always use printed policies, with certain blank spaces left in them to be filled up when issued according to the circumstances of each particular case. And insurance companies, like the defendant in error, generally insure all kinds of personal property which they may be asked to insure, whether the same is kept in stores or somewhere else, whether the same is kept for sale or for use, or for some other purpose, and whether the same belong to a merchant, a mechanic, a professional man, a farmer, or to some other person. Hence a blank space is always left in the printed policy for the description of the property insured, which blank space must be necessarily filled up in writing when the policy is issued. But this is not so with reference to "gunpowder, saltpetre," etc. They are always dangerous articles, and are therefore, and should always be sufficiently provided for in the printed policies. Or at least, they should be and are always sufficiently provided for so far as the insurance company is concerned. Such an insurance policy as we are now considering has never before received judicial construction. What force and effect should be given to the words, "naming each article specially" contained in this policy, have never before been judicially determined. Hence we are left to grope our way in the dark so far as any exact judicial precedents are concerned. In certain cases, where the said words, "naming each article specially," have been omitted from the policy, courts have said that the insurance by the company by a clause in writing of "all such goods as are usually kept for sale in a country store," is a "consent by the company in writing indorsed on the policy" to keep the prohibited articles in quantities and in the shape in which they are usually kept for sale in country stores. But no court has ever decided that such an insurance was a consent to keep such prohibited articles "*naming each article specially*." In some of said cases it has also been said by the court, in delivering the opinion, that there was a repugnancy between the written and the printed clauses; but such of course

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has never been said in a case like the one at bar. In said cases the consent to keep the prohibited articles could be given and was given *in general language*; but in this case the consent must be given by "naming each article specially." If the written clause in this case had so read as to insure Bernstein's "stock of boots and shoes, dry goods, drugs, liquors," "gunpowder, saltpetre, phosphorus, petroleum, naphtha, benzine, benzole or benzine varnish," "and such other goods as are usually kept for sale in a country store," then this case would be analogous to those cases, for the written clause in this case would then mention the prohibited articles in the very language required by the printed clause, just as the written clause did in the cases to which we have referred. We do not think that there is any repugnancy in this case which the law will recognize between the written and printed clauses. Many analogous illustrations might be given, and we shall give two or three. Suppose that the granting part of a mortgage were written, and conveyed (as that part of the mortgage usually does) an absolute title, and that the defeasance clause were printed: then, if the mortgagee should bring an action on the mortgage, would it be held that there was a conflict between the written and the printed parts of the mortgage, and that the printed part was void? Would it be held that as the written part of the instrument was an absolute grant of the premises, and the printed part empowered the mortgagor, on the payment of a sum fixed, to have the instrument canceled, there was a conflict, and therefore the printed part should be disregarded, and the written treated as an absolute conveyance? And take the case of an ordinary penal bond, or a recognizance; and suppose that the obligation is written, and the conditions printed: the obligor, by his bond, admits that he owes, and binds himself in writing to pay the obligee a sum certain. By the condition, which is printed, he seeks to explain that he does not owe any money, and will not owe any, unless he fails to do a particular thing at some future time. Now there is as much conflict between the written and the printed parts of this bond, as there is in the contract at bar;

but would any court if called on to pass upon this bond, say that the printed part, being inconsistent with the written, must be ignored, and the obligor held to the payment of the money as upon an absolute promise to pay? And again: Suppose that a farmer should make an agreement to sell "all the corn then on his farm, being about five thousand bushels," "provided, however, that he might if he chose retain two hundred bushels thereof for his own use." Would any person suppose that there was an irreconcilable conflict between the two clauses, and that if the first were in writing, and the second printed, that the second must be held to be void?

After a careful consideration of the case, we have come to the conclusion that the printed clause in the policy in this case is not in conflict with any written clause therein. Or at most, there is no such conflict between any of the clauses of said policy as will render said printed clause void. The conflict, if any, is only to the extent that one clause modifies the other. Therefore, as *gunpowder* was not insured, except upon a condition precedent, which has never been fulfilled, and as it was absolutely prohibited from being kept upon the premises except upon a condition subsequent which has never been fulfilled, and as the assured did keep gunpowder on the premises in violation of the express terms of his insurance policy, we think the policy was rendered void in accordance with its own express terms. We have examined many authorities supposed to apply more or less nearly or remotely to this case, among which are the following, cited by the plaintiffs in error: *Phoenix Ins. Co. v. Taylor*, 5 Minn. 493; *Whitmark v. Conway Fire Ins. Co.*, 16 Gray, 359; *Niagara Fire Ins. Co. v. DeGraff*, 12 Mich. 124; *Harper v. Albany Mut. Ins. Co.*, 17 N. Y. 194; *Brabant v. Poughkeepsie Mut. Ins. Co.*, 17 N. Y. 200; *Harper v. N. Y. City Ins. Co.*, 23 N. Y. 441; *Pindar v. Kings Co. Ins. Co.*, 36 N. Y. 648; *Steinbach v. Lafayette Fire Ins. Co.*, 54 N. Y. 90; *Halk v. Ins. Co. of N. A.*, 58 N. Y. 292; *Archer v. Ins. Co.*, 43 Mo. 434; *Wash. Ins. Co. v. Mer. & Man. Ins. Co.*, 5 Ohio St. 450; *Franklin Fire Ins. Co. v. Updegraff*, 43 Penn. St. 350; *Citizens Fire. Ins. Co. v. McLaughlin*, 53 Penn. St. 485. And the follow-

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ing cited by defendant in error: *Steinbach v. Ins. Co.*, 13 Wallace, 183; *People's Ins. Co. v. Kuhn*, 1 Cent. Law. Jour. 214; [This case will probably also be reported in 9 Heiskell's Tennessee Reports]; *McComber v. Howard Fire Ins. Co.*, 7 Gray, 257; *Whitmarsh v. Charter Oak Ins. Co.*, 2 Allen, 581; *Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass. 186. Now we think that the printed clause in the present insurance policy may be held to be *valid* without conflicting with any of the foregoing decisions; but it could not be held to be *invalid* without conflicting with the last five of said decisions.

The judgment of the court below will be affirmed.

BREWER, J., concurring.

HORTON, C. J., not sitting in the case.

I. N. SULLIVAN V. LEAVENWORTH, LAWRENCE & GALVESTON RAILROAD CO.

1. PRACTICE IN SUPREME COURT; *Case-Made, to be Considered, Must be Properly Authenticated.* Where the only paper attached to a petition in error is what is called a "case-made," and the only authentication of such case-made is the certificate of the clerk of the district court, which fails to show that the document is a copy of a case-made filed in his office, or that it is the original case-made signed by the judge, and where an examination of the paper shows that it is not, *in toto*, either a copy, or an original document, such paper cannot be considered as a properly-authenticated document for the consideration of this court. [*Cohen v. Towbridge*, 6-388; *Hodgden v. Comm'rs*, 10-838; *Karr v. Hudson*, 19-474; *Transport. Co. v. Palmer*, 19-471; *Thompson v. Williams*, 30-114.]
2. AGREEMENT TO CONVEY; EQUITY; *Title-Bond; Condition; Performance.* A person who executes a title-bond, whereby he agrees to convey to another party the title to certain lands, on the receipt of a specified sum of money and the fulfillment of certain stipulated conditions, is bound by his contract; and when the obligee, within the time designated in the bond, pays to the obligor the stipulated purchase-price for the land, and complies with all the other conditions of the bond, the obligor cannot

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avoid performance on his part; and it is no excuse or justification for non-performance on his part, that third parties have not performed their agreement to him, and especially so when such non-performance by said third parties is the result of his own laches. He cannot keep both the land, and the money paid him for it; and a decree vesting title to the land in the obligee, is right, and will not be disturbed. [*Curtis v. Buckley*, 14-449.]

Error from Montgomery District Court.

ACTION by the *Railroad Company*, plaintiff, against *Sullivan* and wife, to compel the specific performance of a contract. *Sullivan* executed a title-bond, wherein he contracted on certain terms to convey by a good and sufficient deed forty acres of land in Montgomery county to J. M. W., in trust for the *Railroad Company*. The facts, and the alleged breach, are fully stated in the opinion, *infra*. The action in the district court was referred to B. M. A., who reported that the plaintiff was entitled to a specific performance of the contract of conveyance; and the district court, at the December Term 1873, confirmed the referee's report, and rendered a decree that *Sullivan* and wife execute, acknowledge and deliver to the *Railroad Company* a good and sufficient deed, conveying to said company the title in fee to the land described in the title-bond, within fifteen days, or that the decree stand and operate, in law and equity, as such conveyance. The *Sullivans* appeal, and bring the case here on error.

Turner & Ralstin, for plaintiffs in error.

Solon O. Thacher, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: We are met at the outset of our inquiry in this case, by a motion to dismiss, on the ground that no copy of a case-made, and no properly authenticated transcript of the proceedings in the district court, is attached to the petition in error. We are inclined to the opinion that technically and strictly there is little in the record before us to command our attention. The latest expression of the legislative purpose in

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the matter of a "case-made" is found on page 274 of the laws of 1871. That provides, that the "case-made" shall be filed with the papers, and a certified copy attached to the petition in error. There is no pretense that anything of this kind was done. Evidently, there was an attempt to prepare a case-made; but as evidently no such case was filed in the district court, and no certified copy prepared for this court. The document that comes up here contains original papers, depositions with their notices, envelopes, etc. Nor does it appear that the paper attached to the petition in error is the original case-made, complete and perfect. The certificate of the clerk does not state that "the foregoing is the case-made, settled and signed by the judge," but reads, "that the above and foregoing case-made contains a full and correct transcript of the files and proceedings," etc. But it is not the function of a clerk to certify what a case-made contains. It is for him to certify that it is the case-made; and then the document will show for itself what it contains. Now he nowhere certifies that the "foregoing" is the case-made. Because the case-made contained certain matters, *non constat* that it did not contain certain others. The certificate of the clerk might be strictly true, and yet half of the matters which were in the document signed by the judge be omitted from this so-called case-made. A waiver of all errors, signed by the plaintiffs in error, might have been in the document signed by the judge; and the certificate of the clerk to the document before us be strictly true, although no such waiver appears in it. In this very case-made appears what purports to be a stipulation signed by counsel, agreeing to the case-made, and the approval and allowance thereof by the judge. But on the face it is apparent that this stipulation and allowance are mere copies, and not originals. They are all, including three signatures, in the same handwriting; and it is also established by the affidavits of plaintiffs in error, on the motion to dismiss, that they are mere copies. Again, the certificate of the clerk states that the said case "contains all the evidence introduced on the trial before the said referee by the said plaintiff and defendants, and which was reduced to

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writing and made part of the report of the said referee, *excepting* only the impeaching testimony as to the witness N. B. Blanton," etc. Now we search in vain the report of the referee, or the case-made, for anything to sustain this exception in the certificate. We think therefore that we cannot consider the paper attached to the petition in error as in strict sense a legally-authenticated case-made, within the purview of the statute.

We have nevertheless examined the record, to see if any substantial wrong appears therein. We have not stopped to examine any mere technical questions, nor do we affirm that there were no errors which, if the record was fully and properly before us, would not be sufficient to compel a reversal. We think these may be stated to be the facts in the case: On May 3d 1871, L. N. Sullivan, then in possession and occupancy of a quarter-section, which he was intending to enter and purchase, executed a bond, whereby he agreed to convey to one James M. Walker, the president of the L. L. & G. Railroad Co., as trustee for said road, forty acres of said quarter-section, provided said company furnished the entrance-money for said forty acres, and also located their road within a half-mile of Coffeyville, and completed it within a certain time; that when the time to enter said land came round, Sullivan, without seeking any assistance from the company, entered and paid for the entire quarter-section; that within a few days thereafter, Sullivan, on application, refused to deed the forty acres in accordance with his agreement; that within three weeks however of his entering the land, he agreed, in consideration of fifty dollars, the entrance-money, and five dollars interest thereon, and a bond from two individuals not connected with the road, but interested in the town-site of Coffeyville, and in having the road located and constructed through said town, to convey to him a lot to be by him selected in such town-site, to convey said forty acres to said company; that in pursuance of said agreement he and his wife executed a deed to said company of said forty acres, and deposited the same with a neighbor to be delivered to the company on the completion of the road within a certain time

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to Coffeyville, and the payment of the fifty-five dollars; that the company completed the road within the time specified, and within three days after said agreement gave the fifty-five dollars to the holder of the deed, who within three days thereafter gave the same to Sullivan; that Sullivan never selected the lot in Coffeyville; that the holder of the deed, without the consent of the company, returned the same to Sullivan, who still retains both the deed and the money. Now we fail to see how any substantial wrong is done to Sullivan by a decree vesting title to the forty acres in the company. The company has done what it agreed to do. It completed the road to Coffeyville within the stipulated time, and it paid to Sullivan the fifty-five dollars, which Sullivan both received and retains. The obligation of the individuals to convey him a lot may never have been performed; but until he makes a selection, he has no ground to complain because of their non-fulfillment of their agreement. It would be monstrous if he could make his own laches an excuse for withholding the deed for which he has received all that the company agreed to give him. Can a man keep both the land, and the money paid him for it?

We have examined none of the mere technical questions in the record presented by Sullivan, for technically we think he has no standing in this court; and equitably we think he ought to have no standing anywhere.

The judgment will be affirmed.

VALENTINE, J., concurring.

HORTON, C. J., not sitting in the case.

J. N. HARRISON v. WM. A. SIMPSON *et al.*

PAROL CONTRACT; Verbal Promise to one Party, for Benefit of Another. C. bought of H. a lot of cattle, made a partial payment, and agreed to pay the balance on taking the cattle, and to take the cattle between two given dates. When the time came for taking the cattle, C. went to the bank of S. & Co., informed them of all the facts, gave them a draft upon certain parties to whom he intended shipping the cattle, and received a parol promise to collect the draft, and out of the proceeds pay the check which he should draw on the bank and give to H. as final payment. C. then went to H., told him of the promise of the bank, gave his check thereon, and on the faith thereof H. delivered to him the cattle. The bank collected the draft, but refused to pay the check. C. is insolvent. *Held*, That H. was entitled to avail himself of the parol promise made to C., and could recover of the bank the amount of the check. [*Anthony v. Herman*, 14-494; *Center v. McQueen*, 18-480; *R. R. v. Hopkins*, 18-494; *Floyd v. Ort*, 20-164.]

Error from Franklin District Court.

ACTION brought by Harrison against Wm. A. Simpson and J. J. Crippen, partners as "Simpson Bank," and Wm. J. Cummings, to recover \$2,450, and interest. Trial, at March Term 1875. General verdict in favor of plaintiff, and against Simpson and Crippen, for \$2,577.60. The jury also returned answers upon particular questions of fact, which questions and answers are quoted in the opinion, *infra*. On motion of defendants, the court gave judgment in favor of defendants, and against the plaintiff, *non obstante*, dismissing the plaintiff's petition, with costs. From this ruling and judgment Harrison appeals, and brings the record here on error for review.

J. W. Deford, and A. Franklin, for plaintiff.

Nevison & Alford, and Benson & Parkinson, for defendants.

The opinion of the court was delivered by

BREWER, J.: On the trial in the court below the jury returned a general verdict for plaintiff, but at the same time returned answers to special questions. Both parties moved

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for judgment, and the court sustained the motion of defendants. No motions were made by either side to set aside the verdict, or for a new trial; so that though a bill of exceptions preserves the testimony, our inquiry is limited to the pleadings, the verdict, and the answers. The petition alleges that in March 1874 the defendant W. J. Cummings purchased of plaintiff thirty-eight head of cattle for \$2,850, payable \$400 cash in hand, as earnest-money, and the balance when the cattle should be taken, which was to be between June 25th and August 25th; that Cummings drew his draft for said \$400 upon the other defendants, doing business as bankers under the firm name of Simpson Bank, and to induce plaintiff to take the same stated that while insolvent himself he had made arrangements with Simpson Bank whereby said draft would be promptly paid, as well as any checks he might thereafter draw; that relying thereon plaintiff received said draft, and that said draft was duly paid by Simpson Bank with full knowledge of all these statements and matters. The petition then proceeds as follows:

"Afterward, on the 25th of June 1874, the said William J. Cummings, desiring to take possession of the said thirty-eight head of cattle and to ship them, (together with about sixty-four other head of cattle, before that time sold to said Cummings by one McLane,) to the firm of Rhea, Moody & Co., as consignees, at St. Louis, Missouri, called at the banking-house of said firm, Simpson Bank, in Lawrence, and notified said bank of his desire to obtain possession of said cattle, and to ship them to Rhea, Moody & Co. as aforesaid, and then and there drew and delivered his draft for \$7,280, in favor of said Simpson Bank, on Rhea, Moody & Co., against said proposed consignment of sixty-four head and thirty-eight head of cattle, so as aforesaid bought of plaintiff and of said McLane; and said Cummings then and there, and before delivering said draft for \$7,280 to Simpson Bank, further notified said bank that he was by contract bound, and intended, on obtaining possession of said cattle, to give to said McLane a check on said Simpson Bank for about \$4,525, and to this plaintiff a check on them also for about \$2,450, the balances of the purchase-money due and owing to the said McLane and this plaintiff, respectively, for said cattle; and said Simpson

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Bank then and there expressly promised and agreed to and with said Cummings, to collect said draft for \$7,280, and out of the proceeds thereof, to pay said checks, and each of them promptly on presentment therefor, and thereupon, on that condition, for that consideration and purpose, and with that understanding and none other, the said Cummings then and there delivered said draft for \$7,280 to Simpson Bank, and it was by them presented to Rhea, Moody & Co., the drawee therein named, for payment, and was by them duly paid to Simpson Bank, on or about the 1st of July 1874, as said bank then well knew. Afterward, on the 26th of June 1874, said Cummings called upon this plaintiff, at said Franklin county, and then and there stated to him all and singular the facts above set forth, and particularly repeated to him the promise so as aforesaid made by said Simpson Bank to pay the check for about \$2,450, to be given by said Cummings to the plaintiff, on taking possession of said thirty-eight head of cattle, in consideration of the delivery to them of said draft for \$7,280, as hereinbefore alleged; and said Simpson Bank, then and there itself likewise expressly promised this plaintiff, if he would deliver said thirty-eight head of cattle to said Cummings, to pay said check so to be given as aforesaid for the balance of the purchase-money thereof, to-wit, about \$2,450, and this plaintiff, relying upon and induced by the said statements and promise of said Cummings and said Simpson Bank, then and there delivered to said Cummings the thirty-eight head of cattle, receiving from him in exchange therefor a check for \$2,450 on Simpson Bank."

The petition then gives a copy of the check, dated June 29th, alleges that it was duly presented on July 3d, and payment refused; that it is still unpaid; that Simpson Bank had received the amount of draft on Rhea, Moody & Co. in full before check was presented, and had the same when they so refused payment, and that Cummings was and is wholly insolvent. The bank filed a general denial, and upon these pleadings the trial was had.

The first question presented was this, "Had said defendant the Simpson Bank, previous to the delivery of the check for \$2,450 in plaintiff's petition described, promised to pay the checks of Cummings generally?" The answer was, "Not generally, but did agree to pay Harrison's check." The next sever

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questions and answers cut no figure in the case, and need not be quoted. The remaining questions and answers are as follows:

9th.—Did Simpson Bank promise to pay the check for \$2,450, in plaintiff's petition described, at the time defendant Cummings drew his draft for \$7,280 on Rhea, Moody & Co. of St. Louis? *Ans.*—Yes.

10th.—If there was such a promise, what officer of the bank made it? *Ans.*—The president.

11th.—If there was such a promise, to whom was the promise made? *Ans.*—To Cummings, and by Cummings communicated to Harrison.

12th.—If there was such a promise, where was it made? *Ans.*—In Simpson Bank.

13th.—If there was any promise, was there any consideration therefor? *Ans.*—There was.

14th.—If there was such a promise and a consideration therefor, what was the consideration? *Ans.*—Draft on St. Louis for \$7,280.

15th.—If there was such a promise and a consideration therefor, who paid the consideration? *Ans.*—Cummings.

16th.—If there was any consideration paid, when was it paid? *Ans.*—At the time draft on St. Louis was delivered to Simpson Bank.

17th.—If there was any such promise made, was such promise in writing? *Ans.*—No.

18th.—If there was such promise in writing, what was the writing? *Ans.*—Answered by No. 17.

19th.—Did the defendant Simpson Bank, after Cummings gave the check in plaintiff's petition described, promise to pay the said check? *Ans.*—Yes.

20th.—If such promise was made, was it in writing? *Ans.*—No.

21st.—And if in writing, what was the writing? *Ans.*—Answered by No. 20.

22d.—If there was such a promise, was there a consideration therefor? *Ans.*—Yes.

23d.—If there was such promise, what officer of the bank made the promise? *Ans.*—President.

24th.—If there was such promise, when was it made and to

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whom? *Ans.*—To Harrison, on the 4th of July, and to Cummings and Harrison on 6th July, and also on 25th of June to Cummings.

25th.—At the time the check for \$2,450 was presented to Simpson Bank for payment, had Cummings, the maker of the check, funds enough in Simpson Bank to pay that check? *Ans.*—Don't know.

26th.—Had Simpson Bank funds enough of defendant Cummings to pay said check at any time after the same was presented for payment? *Ans.*—Don't know.

27th.—Did Simpson Bank at any time accept the check in plaintiff's petition described in writing? *Ans.*—No.

28th.—If the Bank did so accept said check, when was it accepted? *Ans.*—Answered in No. 27.

The question, as it seems to us, presented by the record is, Can the payee of a check recover of the bank upon which it is drawn, upon a parol promise made by the bank to the drawer before it is drawn that it will pay such check, which check is to be and is given to the payee for a debt due from the drawer to him at the time of the promise, of which fact the bank had full knowledge, and which promise is communicated to the payee at the time the check is received by him, and upon the faith of which promise and check the payee at the time parts with value? As it appears from the 25th and 26th questions, that the plaintiff failed to show that the drawer had funds in the bank to meet it, his check cannot be considered, as it is in some cases, as an equitable assignment of funds, and an action maintained upon such a theory. Neither was there any acceptance of the check when presented, nor any promise in writing to pay or accept it. Indeed, it is plain that no action can be maintained upon the check upon any recognized theory concerning mercantile paper. But while no action can be maintained upon the check, we think, upon the facts as found, Harrison was entitled to recover. The only promise made by the bank was a promise to Cummings, but it was a promise upon a valuable consideration to pay Cummings' debt to Harrison. And as already decided by this court in *Anthony v. Herman*, 14 Kas. 494, "An action can be

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maintained upon a promise made by a defendant, upon valid consideration, to a third party for the benefit of the plaintiff, although the plaintiff was not privy to the consideration." Harrison, it is true, was not privy to the consideration given by Cummings to the bank; but Cummings was indebted to Harrison, and he gave to the bank valuable consideration, for which it promised to pay his debt. Harrison is entitled to avail himself of this promise. It will be borne in mind that Cummings, at the time of this promise of the bank, was already indebted to Harrison, the purchase of the cattle having been made some months before, and that the bank was fully aware of the circumstances of the purchase and the existence of the debt, so that the promise of the bank is fairly to be deemed as a promise to pay that debt, the check being only the means of evidencing and accomplishing the payment. There is a difference, it is true, between the case of *Anthony v. Herman*, and this, but the difference is in favor of this. There, Anthony parted with nothing, and he was held entitled to avail himself of a transaction entirely between third parties. Here, Harrison parted with value, which will be entirely lost to him if the bank is permitted to break its promise. Again, the petition alleges that the bank itself promised Harrison to pay the check if he would deliver the cattle, and that upon the faith thereof he delivered the cattle. The general verdict would be equivalent to a finding that this was so. The answers to the special questions do not absolutely negative this finding. But we are not inclined to place any stress on this, for the testimony, though not properly before us for consideration, discloses the fact that no such direct promise was made.

For the reasons first given the judgment of the district court will be reversed, and the case remanded with instructions to enter judgment in favor of the plaintiff on the general verdict.

VALENTINE, J., concurring.

HORTON, C. J., not sitting in the case.

33-17 Ka.

LEWIS W. HOVER v. WM. W. COCKINS.

1. **PLEADING; Bill of Particulars; Petition; Action to Recover Usurious Interest.**
Where a bill of particulars, filed by a plaintiff in a justice's court, states, in substance, that the plaintiff previously gave a promissory note to the defendant for money loaned to the plaintiff—the note also including a certain amount of usurious interest, and that the plaintiff afterward gave another note to the defendant in lieu of said first-mentioned note for the full amount of said first-mentioned note and the interest that had accrued thereon, and that afterward the plaintiff paid said second note on execution; and said bill of particulars does not state that said second note was negotiable, or that it was transferred before due, or was transferred to an innocent purchaser, or that it was transferred at all, and does not state what amount the plaintiff paid on execution, or whether he paid any usurious interest or not, and does not state for what amount the judgment was rendered on which said execution was issued, or whether said judgment was rendered for any usurious interest, and does not state what or whether any defenses were set up in the action in which said judgment was rendered, but simply asks upon the foregoing alleged facts that a judgment shall be rendered in favor of the plaintiff and against the defendant for the entire amount of interest, legal as well as usurious, which the plaintiff paid or agreed to pay on the money which plaintiff borrowed from the defendant; *held*, that the court below did not err in holding that said bill of particulars did not set forth facts sufficient to constitute a cause of action against the defendant. [*Major v. Major*, 2-337; *Ayres v. Crum*, 13-269; *Nesbit v. Hines*, ante, 316; *Hover v. Cockins*, post, 518; *R. R. v. Taylor*, post, 566; *Rice v. Harvey*, 19-148; *Typer v. Sooy*, 19-599; *Hadley v. R. R.*, 22-362; *R. R. v. Byron*, 24-351; *R. R. v. Reynolds*, 24-368; *Horn v. Bank*, 32-523; *Osborne v. Young*, 28-769.]
2. **DEFENSE OF USURY, To be Available Must be Made at First Opportunity.**
Presuming (for the purpose of sustaining the decision of the court below, and all presumptions must be construed in favor of such decision,) that the said action on said second note (which was executed in 1870) was not brought by an innocent and *bona fide* purchaser before due of a negotiable note, then the plaintiff in this action had in that action a perfect defense to said note to the extent of all the interest paid or agreed to be paid by the plaintiff; and the judgment in that action is a bar to this action, whether the plaintiff in this action set up the defense of usury in that action, or not.

Error from Douglas District Court.

ACTION by *Hover*, to recover \$171.30, which sum he claimed *Cockins* had forfeited to plaintiff by reason of having taken and received unlawful interest on a promissory note. All the

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facts are stated in the opinion. The district court, at the August Term 1873, gave judgment for defendant, and plaintiff appeals, and brings the case here on error.

L. W. Hover, plaintiff, for himself.

Hampton & Borgholthaus, for defendant, cited 9 Johns. 238, 244; 17 Mass. 394; 1 Pick. 435; 8 Conn. 456; 1 N. H. 38; 2 N. H. 61.

The opinion of the court was delivered by

VALENTINE, J.: The plaintiff commenced this action in a justice's court by filing the following bill of particulars:

(*Title, and Court.*) "The plaintiff complains of the defendant, that the said defendant did upon the 10th of March 1870, at the city of Lawrence, Kansas, lend to the said plaintiff the sum of twelve hundred and thirty-three and 70-100 dollars, for which the said defendant drew and caused to be signed by the said plaintiff a note of thirteen hundred dollars, payable to him the said defendant eight months after date, with interest at twelve per cent. per annum thereon, which said note of \$1,300 and interest, amounting to the sum of fourteen hundred and four dollars was paid by said plaintiff to the said defendant on the 7th of November 1870, in another note since paid on execution. That the difference between the face of said note of thirteen hundred dollars, and the money actually received at that time, to-wit, sixty-seven dollars and thirty cents, was unlawful and usurious interest, by the taking of which he the said defendant forfeited to the said plaintiff all the interest on the above-mentioned sum lent, amounting to one hundred and seventy-one and 30-100 dollars, for which said sum of \$171.30, and interest thereon from the 7th of November 1870, the plaintiff asks judgment against the defendant.

L. W. HOVER, Plaintiff."

Afterward the case was taken on appeal to the district court, where it was again tried on said bill of particulars. The case was tried by the district court without a jury. No evidence was introduced on the trial by either party, but both parties agreed that the facts set forth in the foregoing bill of particulars were true. Upon the agreement the court below rendered judgment in favor of the defendant and against the

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plaintiff, and the plaintiff now brings the case to this court for review.

It will be seen that the only question in this case is with regard to the sufficiency of the facts set forth in said bill of particulars. And preliminary to a decision of that question, we would say, that the bill of particulars in this case is not aided by any evidence, or by any finding, or verdict, nor by the judgment of the court below. On the contrary, the finding and judgment of the court below are against the sufficiency of said bill of particulars. And all presumptions are in favor of the correctness of the decision of the court below. There has nothing transpired in this case to cure any of the defective allegations of said bill of particulars, and hence we must give to said allegations no more force or weight or value than they are justly entitled to. And this indeed is also true with respect to the bill of particulars taken as a whole.

Let us now examine said bill of particulars, and the facts set forth therein, for the purpose of determining their sufficiency. It seems that on March 10th 1870, the plaintiff, in consideration of \$1,233.70 in money, and \$66.30 usurious interest, gave to the defendant his (the plaintiff's) promissory note for \$1,300 due in eight months, and drawing interest at the rate of twelve per cent per annum. This note seems to have been payable to the defendant alone, and was therefore not negotiable. On November 7th 1870, (a few days before said note became due,) the plaintiff gave another note to defendant in lieu of the first-mentioned note. This second note was for \$1,404, the exact amount of the first note with the interest thereon. Whether this second note was to draw interest or not, or whether it was negotiable or not, is not shown. Afterward this note was paid on execution, but to whom it was paid, and how much was paid, are not shown. As it was paid on execution, there must have been a judgment previously rendered against the plaintiff on such note. But in favor of whom such judgment was rendered, and for what amount it was rendered, and what defenses were set up against the note in that action, we are not informed. If said note

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was not negotiable, or if it was transferred with notice, or was transferred after due, or was not transferred at all, then the plaintiff in this action had a perfect defense to the note in that action to the extent of all the interest paid or agreed to be paid by him, and he should have set up such defense in that action if he desired to ever claim the benefit of the same. Perhaps however he did set up such defense in that action; and if he did, then whether he was successful or not, we have not been informed. If he had set up the defense in that action, then the judgment rendered against him on said note should have been for just \$1,233,70, the amount which he received from the defendant in this action. Whether the judgment was rendered for that amount, or for more, or less than that amount, we cannot tell. And whether the plaintiff in this action ever paid more than that amount, or whether he ever paid a cent of usurious interest, we cannot tell. The presumptions however are all against the plaintiff, and in favor of the decision of the court below. Under the statutes applicable to this note, "all payments of money or property made by way of usurious interest, or of inducement to contract for more than twelve per cent. per annum, whether made in advance or not, shall be deemed and taken to be payments made on account of the principal; and the courts shall render judgment for no greater sum than the balance found due after deducting the payments of money or property made as aforesaid, without interest." And "any person contracting, by promissory note, bill of exchange, bond, or otherwise, to receive a greater rate of interest than that allowed by this act, [to wit, twelve per cent. per annum,] shall forfeit all interest, and shall recover no more than the principal of such note, bill, bond or other contract." (Gen. Stat. 525, 526, §§ 3 and 4; *Jenness v. Cutler*, 12 Kas. 500; *Ayers v. Probasco*, 14 Kas. 175.) Now if the plaintiff in this action did not set up the defense of usury in the action brought against him on said note, then why did he not do so? He has wholly failed to inform us. But whether he did set it up or not, the judgment in that case is a bar to any further proceeding. If he did set it up, then he

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has already had an adjudication upon the subject-matter of this action, and he cannot have another adjudication thereon. But if he did not set it up, then he has lost by his own laches his last opportunity of making the subject-matter of his defense available. It is a general rule of law, that where a defendant has a defense to an action, and fails to set it up in that action, he forever loses the same, not only as a defense but also as a cause of action. (See authorities cited in defendant's brief, and also *McLaughlin v. The State*, ante, 286.) And this rule of law is applicable to cases of this kind. (*Schrappel v. Corning*, 10 Barb. 576, 581; *Day v. Cummings*, 19 Vt. 496; *Perkins v. Conant*, 29 Ill. 184; *Jones v. Kirksey*, 10 Ala. 579; *Mallory v. Mallock*, 10 Ala. 596.) If we were to make a guess with reference to the facts not shown, and which should have been shown in this case, we would guess—that said note was negotiable—that it was not transferred however, that the note was sued on by the defendant in this action—that the plaintiff in this action did not set up the defense of usury in that action—that the judgment was rendered for the full amount of the note, and that the plaintiff in this action paid that amount; but of course these are only guesses.

The judgment of the court below must be affirmed.

BREWER, J., concurring.

HORTON, C. J., not sitting in the case.

LEWIS W. HOVER V. COCKINS AND MCCARROLL.

1. MOTION FOR NEW TRIAL, *To be Considered Must Appear in Record*. Where the record fails to contain the motion for a new trial, this court cannot say whether there was error in overruling it, nor pass upon questions in the admission of testimony, or the sufficiency of the evidence to support the findings, or verdict. [See cases cited, ante, 514; also, *Ferguson v. Graves*, 12-39; *Decker v. House*, 30-61, and cases cited.]
2. VALUE OF DEBT NOT DUE; *Rule for Ascertaining*. The present worth of a debt payable at a future time is ascertained by dividing the face of the debt by the amount of \$1.00 for the given rate and time, and the quotient is the present worth.

Statement of the Case.

Error from Douglas District Court.

THIS action, like the one next preceding, was commenced by *Hover* to recover money alleged to have been paid and forfeited upon usurious contracts. The petition was as follows:

(*Court, and Title.*) "The plaintiff complains of the said defendants, W. W. Cockins and James H. McCarroll, and says, that on the 7th of November 1870, at Lawrence, Douglas county, state of Kansas, they drew and caused to be signed by the said plaintiff a certain promissory note payable to defendant McCarroll or order for the sum of \$1,530.64 with interest at the rate of twelve per cent. per annum four months after date; that the plaintiff received on the above note in fact only \$1,439.24, the remainder, being usurious and illegal interest, to-wit, interest at the rate of eighteen per cent. per annum for four months over and above the twelve per cent. per annum allowed by law, amounting to \$91.40, being added to the said amount \$1,439.24 to make the amount called for in the note, to-wit, \$1,530.64; that the note before mentioned was secured by a mortgage upon the lands of the plaintiff, to-wit, the home farm of the plaintiff situated in said Douglas county; that judgment was rendered on said note for \$1,530.64 in the district court of said Douglas county against the plaintiff on suit by R. S. George, assignee of defendant McCarroll, and plaintiff's said land sold under said judgment, which sale was confirmed to W. W. Cockins June 8th 1872, to which time the plaintiff continued to pay interest at the rate of twelve per cent. per annum on the above note of \$1,530.64; that the interest thus paid was \$290.80 in addition to the \$91.40 advance interest, in all amounting to \$382.20. The plaintiff further complains of said defendants, that after the sale of his farm as aforesaid they refused to release the judgment against him, and on the 5th of September 1872 they compelled him to assign to them notes, secured to him by chattel mortgages arising from the enforced sale of his personal property, amounting to \$450, and other notes, to obtain such release; that subsequently, and on the 9th of November 1872, he paid a note of \$250, interest at twelve per cent. for seven months and twelve days, said interest amounting to \$18.50; that on or about the 25th of December 1872 he paid the note of \$200, with \$16 interest; all this at the town, county and state aforesaid.

"The plaintiff therefore prays a judgment against the de-

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fendants for the sum of \$382.20, with interest from June 5th 1872; for the further sum of \$18.50, with interest from November 9th 1872; and for the further sum of \$16, with interest from December 25th 1872; that the judgment of R. S. George against him be discharged of record, and for such other relief as equity and good conscience demands."

Answer, general denial. Trial at the April Term 1874, at which time judgment was rendered for plaintiff, which judgment was afterward, at the October Term 1874, modified, and judgment entered for the defendants for their costs. *Hover* brings the case here on error.

L. W. Hover, plaintiff, for himself.

Thacher & Stephens, for defendants.

The opinion of the court was delivered by

BREWER, J.: This was an action brought by plaintiff in error, plaintiff below, to recover usurious interest. The record contains these matters—first, the pleadings; then a bill of exceptions, showing the testimony given on the trial, and stating that the court gave its finding and judgment for plaintiff for \$192.80; that the plaintiff excepted thereto, and filed his motion for a new trial, which motion was continued to the next term of the court; that the court then overruled said motion, and modified its judgment, finding now for the defendants, on the ground that the previous computation was erroneous, and giving judgment against the plaintiff for costs. After the bill of exceptions appear certain findings of fact and conclusions of law, and the judgment of the court, and then a journal entry showing that the motion of both parties for a new trial came on for a hearing, and that the court sustained the same to the extent of modifying the judgment, by changing it to a judgment for defendants. No motion for a new trial on the part of either party is copied into the record, and nothing to indicate what grounds were presented in any such motion, other than may be inferred from the statement in the bill of exceptions as to the error in computation. All that we

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are informed is, that the court took certain action on motions filed. Of course then, we cannot say that there was any error in overruling or sustaining the motions. *Ferguson v. Graves*, 12 Kas. 89; *Nesbit v. Hines*, ante, p. 817.

Nor can we consider any question in the admission or rejection of testimony, nor whether the findings are supported by the evidence. The only inquiries open to us are, whether the petition states a cause of action, and whether under the pleadings and findings of fact a judgment in favor of the defendants appears to be so erroneous as to compel a reversal. And upon those inquiries it is clear that the judgment must stand. The error made by the court in the first computation is patent. As a part of the computation it became necessary to find the present worth, at the time of sale, of several notes due respectively in one, two, three, or four years thereafter. To ascertain this, the court computed the interest on the face of the notes for such years, and subtracted that amount from the principal and called the result the present worth, while the correct rule is, to divide the face of the debt by the amount of \$1.00 for the given rate and time, and the quotient will be the present worth. The difference in favor of the defendants between the two methods of computation more than exceeded the amount found due the plaintiff, and therefore the court properly changed the judgment.

It is unnecessary to consider any other questions in the case, though we may remark that it seems very doubtful whether the petition states facts sufficient to constitute a cause of action.

The judgment will be affirmed.

All the Justices concurring.

SCHOOL DISTRICT NO. 2. V. JOHN D. M. CONRAD.

MECHANIC'S LIENS; Public School-House; Sub-Contractor. A sub-contractor under the provisions of the act relating to liens of mechanics and others (laws of 1872, pp. 294, 297,) may secure a lien upon a public school-house erected by a school district. *Wilson v. Sch. Dist.*, ante, 104; also, *Ed. v. Scoville*, 13-27.]

Error from Saline District Court.

ACTION by Conrad against H. C. Stanley, *School District No. 2, Saline County*, and others, to recover from Stanley, as principal contractor, \$195 alleged to be due to plaintiff as sub-contractor, and to establish and enforce said sum as a lien upon the school-house of said district. The district court at the May Term 1875, gave judgment for plaintiff, and said *School District No. 2* alleges error, and brings the record here for review.

C. A. Hiller, for plaintiff in error.

T. F. Garver, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: The only question presented in this case is whether a sub-contractor, under the provisions of the act relating to liens of mechanics and others, (laws of 1872, pp. 294, 297,) can secure a lien upon a public school house erected by a school district. We answer in the affirmative, and refer to the recent case of *Wilson v. School District*, (ante, p. 104,) containing our reasons for the conclusion herein, and for full discussion of the subject.

The judgment will be affirmed.

All the Justices concurring.

WILLIAMS & FINNIGAN V. GEO. W. ELLIOTT.

1. **MUTUAL ACCOUNTS; Case Triable before Referee.** Where E. has an account of \$3,650.90 against W. & F., merchants, for merchandise returned of \$1.35, note taken up of \$484.55, and the balance for drafts deposited with them at different dates, between July 9th 1871 and February 9th 1872, in sums ranging from fifteen dollars to five hundred dollars, and which drafts were not paid or received by W. & F. in payment of their accounts, and said W. & F. have a running account against E. from July 18th 1871 to August 4th 1872, for goods sold and moneys paid, exceeding \$3,500, and consisting of over one hundred and fifty items, *held*, that "mutual accounts" exist between E. and the firm of W. & F.; and also, *held*, that upon a petition for a settlement of mutual accounts between E. and W. & F., the court, upon the application of E., and the showing of the above facts, committed no error in directing a reference of the case, and in requiring an examination of the mutual accounts between the plaintiffs and defendants, against the objections of the defendants. [*Noble v. Dowell*, 22-498; *Galbraith v. McCormick*, 23-706.]
2. **ERRONEOUS FINDINGS; Error Without Prejudice.** Where a referee is appointed to make an examination of mutual accounts, and to report the facts found, and the conclusions of law, and thereafter the report is made and confirmed, a conclusion of law therein, which the findings of fact plainly show could not have prejudiced the defendant, is not cause for reversal, even though it be erroneous.

Error from Marshall District Court.

Action by *Elliott* to recover an alleged balance of \$111.65 due him on account from *Williams & Finnigan*. The principal facts and proceedings are stated in the opinion, *infra*. The district court, at the August Term 1875, C. A. S., judge *pro tem.*, presiding, confirmed the report of S. C., referee, and gave judgment in favor of *Elliott* for \$116.89, and costs. The defendants bring the case here on error.

A. J. Banta, for plaintiffs in error.

The opinion of the court was delivered by

HORTON, C. J.: *Elliott* filed his petition, in the usual form, for settlement of mutual accounts with the firm of *Williams & Finnigan*. An answer, containing only a general denial,

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was filed. Upon the hearing of the case, as to whether an account should be had, evidence was introduced, and the court ordered a reference in pursuance of § 292 of civil code (Gen. Stat., 685,) against the objections of Williams & Finnigan. The legality of this order, under the circumstances, the chief question in the case which is presented to this court. Williams & Finnigan were merchants, and their account against

1. *Mutual accounts, entitling a party to a reference.* Elliott was made up of over one hundred and fifty items for goods sold and moneys paid on his account. W. & F. received from Elliott in drafts, a note and an item of goods returned, \$3,650.90. Their alleged claim was \$3,689.35. The counsel for the plaintiffs in error claim that, as W. & F. received from Elliott the said sum of \$3,650.90 principally in drafts, ranging in sums from \$15 to \$500, there were no mutual accounts existing between the parties for examination. We think differently. Neither the drafts, nor the proceeds thereof, were ever treated or intended as payment of the accounts of W. & F. They were deposited with W. & F. at various dates, without regard to the accounts of the said firm. They were entered upon the books of W. & F., and drawn against by Elliott when he wished. Some of the drafts were deposited before any account accrued against Elliott. If W. & F. had brought their action for the entire amount of their account against Elliott, the latter might, under a proper answer, have set-off those several drafts, not as a payment, in the technical sense of the word, but as a claim and demand arising upon contract. The dealings exhibited between the parties run from July 10th 1871, to August 15th 1872. Under our view, there were "mutual accounts" existing between the plaintiff and defendants. The demands were reciprocal, and there seems to have been an understanding between the parties that the mutual debts should be set-off or satisfied *pro tanto*.

Counsel for plaintiffs in error further object to the reference, because it appeared in evidence that plaintiff and defendants did settle all their transactions except the amount of difference between \$1,494.85 contained in one settlement of

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W. & F.'s account, and \$1,590.90 set forth in another statement rendered, and that there was never any disagreement about the amount of money or drafts received by W. & F. from Elliott. The plaintiffs in error are in no condition to take advantage of this objection. At the common law, there were two distinct courses of proceeding in actions of account on the part of a defendant. In the first place, the party might interpose any matter in abatement, or bar, of the proceeding, and if he failed in it, then there was an interlocutory judgment that he should account (*quod computis*) before auditors. When the account was finished, the judgment was, "that the defendant do pay the plaintiff so much as he is found in arrear." 3 Blackst. Com. 164. Courts of equity, in those states where there is a court of chancery, have for a long time exercised a general jurisdiction in all cases of mutual accounts, because the object is much more readily obtained by a bill in equity. The defendant, under equity practice, may plead that he has fully accounted; or he may plead a release, arbitrament, bond given in satisfaction, or that the money was delivered to him for a specific purpose, which has been accomplished, etc. But other matters, which admit that the defendant was once liable, cannot in general be pleaded in bar to the action. In such an action there is no general issue. In this case, only a general denial was filed to the petition, which set forth in indefinite terms, mutual dealings between the parties; and under the pleadings each item of account was a proper subject of proof. No plea of a stated or settled account was made by answer. The defendants in the court below did not take advantage of the various defenses the facts warranted. There is nothing in the pleadings to show that either party relied upon any former settlement; and when the evidence before the court established the mutual accounts between the parties, upon the pleadings existing in this case the court rightfully referred the cause for an accounting to be had. The evidence conclusively shows that W. & F. were once liable, and might be made account-

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able; and no defense thereto was pleaded sufficient to prevent a reference.

Further complaint is made, that the referee, having found as a conclusion of fact, "That there had been a mutual settlement between the parties of all transactions except the excess of money paid by Williams & Finnigan to one Kepler, under the orders of Elliott, which excess so paid amounted to \$96.65," thereon reported as a conclusion of law,

2. Duty and
report of
referee. Erroneous findings.

"that it is not within the province of this court to examine into the accounts and dealings of the parties plaintiff and defendants herein, prior to any mutual settlement, which may have been made by them." This conclusion of law is erroneous in a case where the cause has been referred to a referee for an accounting, and no settlement or previous accounting is pleaded. The very object of appointing a referee is to procure an account, showing a balance in favor of one of the parties. He is, therefore, required to make out an account, showing the state of indebtedness on either side. In the case at bar, the referee rightfully received evidence as to any former settlement of the parties, in order to ascertain the correctness of the items charged, just as he could have received the admissions of either party as to the account of the other to establish items disputed. While the conclusion of law is erroneous, and the referee gives an incorrect reason for his finding of the moneys due to Elliott on the taking of the account, the plaintiffs in error are not prejudiced thereby, as in fact the referee did properly make out an account showing the indebtedness on both sides; and the record shows that W. & F. admitted the items charged against them by Elliott to be correct, and Elliott admitted the charges of W. & F. correct, except as to certain items furnished to Kepler. For the excess, Elliott obtained judgment. The account was fully taken and reported to the court. No evidence was rejected, and no item charged by W. & F. was disallowed except the goods and money obtained by Kepler on Elliott's account, in excess of the sum authorized by Elliott to be charged to him.

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We find no error in the order of reference, and none prejudicial to the plaintiffs in error in the referee's report.

The judgment of the court below is affirmed.

All the Justices concurring.

OLIVER B. COLBY V. SARAH A. CROCKER *et al.*

EQUITY; MARSHALING ASSETS OF DECEASED DEBTOR; Homestead Exemptions; Specific Liens, not Generally Security. A husband and wife gave a mortgage to G. on their homestead and other real estate belonging to the husband. Afterward L. obtained a judgment-lien upon all the property belonging to said husband except said homestead. Afterward the husband and wife sold and conveyed to W. a portion of the real estate not occupied as a homestead, but covered by said mortgage, and said judgment-lien. Afterward the husband died. His wife and family still occupy said homestead. The plaintiff in this action has a claim of \$800 against the decedent's estate for money loaned to the decedent during his lifetime, which claim has been allowed by the probate court, but such claim is not secured in any manner, by lien or otherwise. The estate is insolvent, and unable to pay all of its creditors in full. The plaintiff now seeks by this action to have the assets of the estate marshaled—to have G. compelled to exhaust that portion of said real estate occupied as a homestead in payment of said mortgage before resorting to any other property belonging to the estate; to have L. compelled to exhaust said real estate belonging to W. in payment of his (L.'s) judgment-lien, before resorting to any other property belonging to the estate, and to have the administrator in the meantime restrained from paying said mortgage or said judgment-lien from the proceeds of any property except said homestead and said property sold to W. *Held*, That the plaintiff has no such superior equities over the family of the deceased as occupiers of said homestead, or over W. as the purchaser of said land, as can be enforced either in law or equity, and therefore that this action cannot be maintained. [*Monroe v. May*, 9-496; *Gilworth v. Cody*, 21-702; *Sproul v. Bank*, 22-342; *Chapman v. Lester*, 12-595; *La Rue v. Gilbert*, 18-222.]

Error from Coffey District Court.

THE facts will fully appear from the syllabus, and the opinion. The district court, at the May Term 1875, sustained a demurrer to Colby's petition, and gave judgment in

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favor of demurring defendants for costs. *Colby*, plaintiff, appeals, and brings the record here on error for review.

Wm. L. McConnell, for plaintiff.

R. S. McConnell, *A. Gillett*, and *S. Fearl*, for defendants.

The opinion of the court was delivered by

VALENTINE, J.: This action was brought for the purpose of marshaling the assets of the estate of Allen Crocker, deceased, and of applying such assets to the payment of the debts of the estate in such manner as to be most advantageous to the interests of those creditors of the estate (of whom the plaintiff is one) who have no specific liens or other security for the payment of their claims. The plaintiff's petition sets forth in effect the following facts: 1st, The plaintiff, Colby, has a claim against said estate for \$800 for money loaned to the deceased in his lifetime, which claim has been allowed by the probate court, but such claim is not secured in any manner, by lien or otherwise. 2d, The defendant Gay has two claims against said estate, one for \$2,500, and the other for \$1,000, each secured by a mortgage on real property. Said mortgages are liens upon the following property, to-wit—first, the homestead which was occupied by the decedent and his family during the decedent's lifetime, and by his family since his death; second, a piece of land sold and conveyed by the decedent and his wife after the execution of said mortgages, and before the decedent's death; third, other real property belonging to the estate, and upon which there are no other liens or incumbrances. There is still other property real and personal belonging to said estate not covered by said mortgages, or by any other liens or incumbrances. The said Gay is about to commence proceedings to enforce his said mortgage liens. 3d, The defendants Crockers, who are the widow and children of said decedent, occupy a portion of said mortgaged property as their homestead, and their homestead right, in this particular case, is inferior and subject to said mortgage liens, but is not subject to any other express lien, incumbrance, or adverse

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the case.

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right. 4th, The defendant LaRue has a judgment against said estate for \$1,400, which judgment is a lien upon upon all the real property belonging to said estate except that portion of said real property which is occupied by the family of the deceased as a homestead, and is also a lien upon that piece of land which was sold and conveyed to defendant Geo. W. Welch; but said judgment-lien is inferior to said mortgage-liens. 5th, Defendant Geo. W. Welch did, as before stated, during the lifetime of the deceased, purchase from the decedent and his wife and procured a conveyance from them for a portion of the decedent's real property, which portion of real property was then and is now subject to both said mortgage and said judgment-liens; but it is not subject to any other express lien or incumbrance. 6th, All the heirs, and the administrator of said estate, are made parties defendant in this action. 7th, The estate is insolvent, and unable to pay all its creditors in full; or, at least, this is so, unless said homestead, and said property sold and conveyed to Welch, is used in paying the debts of the estate. The plaintiff then prays that the defendant Gay be compelled to exhaust, first, that portion of said real property occupied as a homestead in payment of his said mortgage-liens before resorting to any other property belonging to the estate; that the defendant LaRue be compelled to exhaust, first, said real property sold and conveyed to said Welch in payment of his judgment-lien, before resorting to any other property belonging to the estate, and that the administrator in the meantime be restrained from paying said mortgage-liens or judgment-lien from the proceeds of any property except said homestead, and said property sold to Welch.

Defendants Mrs. Crocker, Mary Welch, and Geo. W. Welch, demurred to said petition, on nearly all the grounds authorized by the code; and the court below sustained the demurrer on the ground that said petition did not state facts sufficient to constitute a cause of action. This is the only ruling of the court below complained of in this court. We think that the ruling of the court below was correct. It is true, as a

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general principle or rule of law, as administered in courts of equity, that where a person has a lien upon two or more funds to secure the payment of a debt, on one of which funds another person has a similar lien, equity will require such first-mentioned person to satisfy his lien, so far as he can, from those funds on which the other person has no claim, even though one or more of the funds charged may be realty and the others personalty. But this rule has its exceptions and limitations. Judge Story says, that "it is never applied except where it can be done without injustice to the creditor, or other party in interest having title to the double fund, and also without injustice to the common debtor. Nor is it applied in favor of persons who are not common creditors of the same common debtor, except upon some special equity." (1 Story's Eq. Jur., § 560.) And Chancellor Green says, that "it will never be applied where it is *injurious to a third party* over whom the party claiming the benefit of the principle has no superior equity." *M. B. & L. Association v. Conover*, 14 N. J. Ch. (1 McCart.) 220, 225. And Mr. Adams says, that "the equity is a personal one against the debtor, and does not bind the paramount creditor, *nor the debtor's alienee for value*. The equity is not binding on the paramount creditor, for no equity can be created against him by the fact that some one else has taken an imperfect security. But it is an equity against the debtor himself, that the accidental resort of the paramount creditor to the doubly-charged estate, and the consequent exhaustion of that security, shall not enable him to get back the second estate, discharged of both debts. If, therefore, the paramount creditor resorts to the doubly-charged estate, the *puisne* creditor will be substituted to his rights, and will be satisfied out of the other fund to the extent to which his own may be exhausted. And it seems that he may, on proposing just terms, require the paramount creditor to proceed against the estate on which he has himself no claim. His right however to do this is not an independent equity against the creditor, but a mere incident of his equity against the common debtor." (Adams Equity, 272.)

Equity: lien of
creditor upon
two or more
funds.

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Now for the purposes of this case, we will suppose that the plaintiff would have a right to maintain this action as against all the defendants except Crockers, as the occupiers of said homestead, and except Welch, the owner of a portion of the land sought to be marshaled among the assets of the estate. It would not seem that the estate, the common debtor, would have any right to object to such an action. Nor would it seem that LaRue, as administrator, or the Crockers and Mary Welch, as heirs, would have any such right; nor Gay, nor LaRue, as common creditors of the estate, for as to them all their rights and interests could be amply protected. But as to the Crockers, as occupiers of the homestead, and as to George W. Welch, the owner of said land, the question is different. The plaintiff's equity could not be enforced as against any of the defendants without turning the Crockers out of house and home, and depriving Welch of his land. Now what superior equity has the plaintiff over the Crockers, or over Welch? By our constitution and statutes the most sedulous care has been manifested to secure the homestead of the debtor and to his wife and family, as against all debts not expressly charged upon it. As was said in the case of *Monroe v. May*, (9 Kas. 476,) "the homestead is something toward which the eye of the creditor need never be turned. It is an element which may never enter into his calculations in his efforts to collect his debt. He may as well ignore that, as he does now (except in cases of fraud) the body of the debtor." It would certainly be against the spirit if not against the very letter of our homestead laws to hold, that when a husband and wife give a specific lien upon their homestead to secure the payment of some specific debt, they thereby make such specific lien a general security for the payment of all their debts, present and future, so long as such specific debt remains unpaid. The homestead-exemption laws provide in effect that the homestead shall be exempt from all debts except for purchase-money, taxes, improvements, and liens given by the consent of both husband and wife. Now the plaintiff's claim does not fall

Homestead
exemption.
Marshaling
assets. Specific
lien.

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within any of these exceptions. It is not for purchase-money, nor taxes, nor improvements; and the decedent and his wife never contemplated giving the plaintiff a lien on their homestead. They never supposed they were making their homestead security for the plaintiff's claim. And the plaintiff has no right, either in law or equity, to make it a security either directly or indirectly for the payment of his claim. The plaintiff does not seem to claim in this court that he can maintain this action as against Welch. He does not seem to claim that he has any equity concerning Welch's land superior to Welch's rights. And therefore he cannot expect to recover as against Welch. We think that the rights of the Crockers to their homestead, and of Welch to his land, are superior to the plaintiff's equity, and therefore that the plaintiff cannot recover in this action.

The judgment of the court below must therefore be affirmed.

BREWER, J., concurring.

HORTON, C. J., not sitting in the case.

STATE SAVINGS ASSOCIATION OF ST. LOUIS v. A. J. HUNT & Co.

1. **INDORSEMENT OF BILL OF EXCHANGE, BEFORE MATURITY; *Payment to Indorser, No Discharge of the Bill.*** When a bill of exchange of a third party, payable to order, is indorsed before maturity as collateral security for a debt contracted at the time of said indorsement, the indorsee is a *bona fide* holder for value in the usual course of business, and payment by the acceptor to the indorser, without authority from the indorsee, will not discharge the bill.
2. **INSTRUCTIONS, *Not Warranted by the Evidence, Erroneous.*** Where Y. B. & Co., payees of a bill of exchange, indorse the bill before maturity to a bank as collateral security for an advance thereon at the time of the transfer, and the bank, upon the payment of the bill, is to pay the proceeds thereon in payment of such consideration, and after protest of the bill for non-payment, the acceptors remit to Y. B. & Co. the amount of

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the bill, without authority from the bank, and Y. B. & Co. fail to turn over the remittance from the acceptors to the bank. *held*, in an action on the bill by the bank against the acceptors, that the court erred in instructing the jury to the effect, if they found the truth to be that Y. B. & Co., the original payees, simply indorsed the draft to the bank for collection, with authority or directions to apply the proceeds when collected to the account which the bank had with the said Y. B. & Co., the bank holding and accepting the paper, under such circumstances, became the agent or trustee of Y. B. & Co., as such instruction was not warranted by the evidence, and was liable to mislead the jury to the prejudice of the bank. [*Atchison v. King*, 9-551; *Raper v. Blair*, 24-374; *Johnston v. Clements*, 25-376; *Baughman v. Penn*, 33-505; *Feineman v. Sachs*, 33-621.]

Error from Cherokee District Court.

ACTION by the *State Savings Association of St. Louis, Mo.*, against *A. J. Hunt* and *Jonathan Hunt*, as partners, on their acceptance of a draft drawn on them by *W. W. Young, Bro. & Co.*, of St. Louis. The facts, and instructions complained of, fully appear in the opinion, *infra*. The district court, at the April Term 1875, gave judgment in favor of defendants and against the plaintiff for costs. The plaintiff brings the case here on error.

John N. Ritter, for plaintiff.

Hutchinson & Cowley, for defendants.

The opinion of the court was delivered by

HORTON, C. J.: This was an action on a bill of exchange drawn by Young, Bro. & Co. of St. Louis, Mo., upon A. J. Hunt & Co. of Columbus, Kansas, dated at St. Louis, December 2d 1872, payable in sixty days, to the order of the drawers, and accepted by A. J. Hunt & Co. December 3d, 1872. Before maturity the draft was transferred by indorsement thereon to the State Savings Association of St. Louis by Young, Bro. & Co. A few days after the draft became due it was sent by the plaintiff to the First National Bank at Baxter Springs for collection, and notice of this fact was received by the defendants from the bank at Baxter. Defendants delayed to attend to the notice of the bank at Baxter, and when one of the defend-

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ants finally called at the bank to pay the same, he was informed the draft had been returned the day before. A. J. Hunt then obtained exchange on St. Louis at the bank at Baxter, of sufficient amount to pay the draft, and sent it by express to Young, Bro. & Co., at St. Louis, Mo. The latter firm duly received this money, and gave the defendants credit for the remittance. Young, Bro. & Co. suspended business in July 1873. The draft was protested for non-payment, March 3d 1873. In the court below, a verdict was rendered for the defendants, judgment given accordingly, and the case is here upon exceptions to the instructions of the court. The second instruction reads as follows:

"If however you find the truth to be, that W. W. Young, Bro. & Co., the original payees, simply indorsed the draft to the plaintiff for collection, with authority or directions to apply the proceeds when collected to the account which the plaintiff had with the said Young, Bro. & Co., the plaintiff holding and accepting the paper under such circumstances became but the agent or trustee of the said Young, Bro. & Co.; and any defense which the defendants might suggest in answer to this action, were it prosecuted in the name of Young, Bro. & Co., is, under such circumstances, good in this action, although prosecuted in the name of the State Savings Association of St. Louis, the indorsee."

Upon an examination of the record, we do not think there was sufficient evidence relating to the transfer of the paper for the purpose stated in the instruction to have authorized the court to give the same to the jury. This necessarily leads us to examine the testimony upon this subject. W. P. Young, whose deposition was taken by defendants, states:

"We drew a draft for \$115 on the defendants for a bill of goods sold them. W. W. Young, Bro. & Co. deposited that draft in the State Savings Association, of which bank Charles Parsons is president, with other drafts, as collateral for W. W. Young, Bro. & Co.'s note discounted on or about that date by the bank, which note has since been paid. Young, Bro. & Co. were customers of the bank. We were in the habit of drawing drafts on our country customers, and taking them to the bank and getting advances on them to the amount of

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seventy per cent. Young, Bro. & Co. would give their notes, and it was customary to pay the notes as they fell due out of the first moneys realized on the drafts. This was done by the bank with our knowledge. The bank kept what was called a collateral account with Young, Bro. & Co. Drafts were deposited with the bank, went into this account, and as fast as collections were made of drafts thus deposited, the moneys were drawn from that account and applied in payment of Young, Bro. & Co.'s notes as they matured. The acceptance sued upon in this instance was placed in the State Savings Association under the above arrangement which I have described."

On cross-examination he stated: "At the time W. W. Young, Bro. & Co. suspended business in July 1873, they were indebted to the State Savings Association about \$3,100. At that time the bank held this draft for \$115 against the defendants. It has never been returned to Young, Bro. & Co. The bank at that time held some other collateral besides this acceptance, out of which they have realized some money. Our indebtedness to the bank now amounts to more than the amount of the defendants' acceptance, but I cannot give the exact amount."

"*Ques.*—Was it not customary in your firm dealings with the bank, that the collaterals of which this draft in suit is one, were all held as general collaterals, and applied at maturity to any of this species of notes maturing first, and that this was without reference to any particular draft or collateral for any special notes being specially held for such special notes? *Ans.*—Yes."

"*Ques.*—Did you not give a great many scores of these notes, secured by drafts as collateral in the way you have described? and did not these collateral drafts amount to many hundreds? *Ans.*—Yes."

"*Ques.*—Was not the amount received from time to time by the bank, on the collateral drafts, put to your collateral account, and drawn from that account and applied to the payment of your notes as they matured, without regard to any special notes? *Ans.*—Yes."

On the part of the plaintiffs the deposition of Charles Parsons, the president of the Association, was read. Parsons testified that—

"In regard to the acceptance of A. J. Hunt & Co., on bill of exchange drawn by W. W. Young, Bro. & Co. to the order

of themselves, and by them indorsed in blank, and which is the same acceptance sued on in this action, the truth is, that this paper, before its maturity, was indorsed as aforesaid to the State Savings Association of St. Louis, Missouri, for a valuable consideration advanced and paid by said Association to said Young, Bro. & Co. The transactions of the firm of Young, Bro. & Co. with the bank were numerous; but in all instances where paper of this description was received by the bank, there was an advance of money made therefor. There was no understanding or agreement ever existing, that the bank was to be satisfied short of redemption in money of each acceptance; and neither the bank, nor any one else by its authority, nor myself, nor any one by my authority, has ever been paid the acceptance sued on. The paper is unpaid. *The money advanced on it is still due.* If this collection cannot be made on this acceptance, the bank will lose just that much money. There was no agreement or understanding that any payment to Young, Bro. & Co. was payment to the bank, or that any arrangement could be made short of lifting the acceptance by cash. The acceptance never has been lifted, or paid, and is due; (and if not paid by the acceptor in this action, the security of negotiable paper bought for value before maturity, fails.) There is no other understanding about it."

The evidence establishes the fact, that there was a present consideration at the time of the transfer. The jury might evidently have been misled by the character of the instruction. If the plaintiff had received the draft simply *for collection*, with authority or directions to apply the proceeds when collected to the account which the plaintiff had with Young, Bro. & Co., a different case would be presented than the one we are now considering. The plaintiff received the draft under other circumstances. There was an advance of money made therefor at the time of the indorsement. Young, Bro. & Co. did not indorse the paper for collateral security, as a mere volunteer service. The plaintiff accepted it with its burdens and benefits. It is settled, that when a bill of exchange of a third party, payable to order, is indorsed as collateral security for a debt contracted at the time of such indorsement, the indorsee is a *bona fide* holder for value in the usual course of business. Upon the facts, the plaintiff was

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neither the agent nor trustee of Young, Bro. & Co. In the absence of proof to sustain the instruction, the rights of the plaintiff may have been prejudiced. We cannot say therefore that the error was immaterial. It may have induced the verdict for defendants. In this opinion we have purposely refrained from deciding whether, or no, the instruction commented upon, as an abstract proposition, is good law. For the purpose of this case, it is sufficient to say that it is not applicable to the facts proved, and may have been detrimental to the rights of the plaintiff.

The judgment must be reversed, and the case remanded for a new trial.

All the Justices concurring.

BOARD OF EDUCATION V. A. G. CAMPBELL.

APPEAL, AND TRIAL ON MERITS; Regularity of Appeal Presumed. Where a right of appeal is given, and it appears that this right was attempted to be exercised, that the appellate tribunal took jurisdiction of the matter, that the parties interested appeared, and were heard before such tribunal, that no objection was made to its jurisdiction of the appeal, and that it decided the matter on such appeal, the regularity of the steps taken to perfect such appeal will, in any collateral inquiry be presumed. [*R. R. v. Wilder*, ante, 239, and cases cited.]

Error from Morris District Court.

ACTION by Campbell against *The Board of Education of the City of Council Grove*, to recover \$130, balance alleged to be due him on a school order issued by the predecessor of said board of education. Trial at the April Term 1875, and judgment for plaintiff. The defendant brings the case here. The opinion contains a full statement of the facts.

Sharp & Johnston, for plaintiff in error.

Bradley & Nicholson, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This was an action originally commenced by A. G. Campbell, defendant in error, to recover for wages claimed to be due him as a school teacher. The facts as developed on the trial, and as set out in the "case-made," are substantially as follows: In the year 1871 the territory now embraced by the plaintiff in error was composed of two school districts, known respectively as School District No. 1, of Morris county, and School District No. 2, of Morris county. Campbell was employed to teach a school in District No. 1, for three months, beginning April 15th 1871, for the sum of \$65 per month. After he had taught the school two months, and on the 14th of July 1871, the superintendent of public instruction of Morris county formed a new school district out of said Districts No. 1 and 2, and other territory adjacent in the county, under the name of "Union School District No. 1, of Morris county." This new district immediately elected officers, took possession of all the property and franchises of old District No. 1, and hired new teachers, and exercised all the functions of a school board under the law. Afterward certain citizens of said School District No. 1, feeling aggrieved at the action of the county superintendent in forming said new school district, notified him that they would appeal from his decision creating said new school district to the board of county commissioners of Morris county; and they did so appeal, and the county board, on the 9th of September 1871, heard said appeal, and reversed the decision of the county superintendent, and placed said School Districts Nos. 1 and 2 in their former condition. The officers of said School District No. 1 still continued to act, and after the aforesaid proceedings were had before the board of county commissioners renewed their contract with Campbell, and by the terms of this contract, and by mutual consent, Campbell was hired to teach the school for three months, from September 9th 1871, at \$65 per month, and Campbell performed his part of the contract. This made five months in all that Campbell

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taught school for said District No. 1; and afterward said district, by its duly-authorized officers, executed and delivered to Campbell as evidence of its indebtedness to him for his said services two orders on its treasurer, one for the sum of \$180, being for the first two months' teaching, and the other for the sum of \$195, being for the last three months' teaching. But the so-called Union School District No. 1, upon its creation, (by the act of superintendent, as before stated,) had possessed itself of the property and franchises of School Districts Nos. 1 and 2, and after the aforesaid action of the county commissioners refused to surrender to School District No. 1 its property and franchises; and said so-called "Union School District" had collected the taxes of School District No. 1 for the year 1871, so that School District No. 1 was unable to pay Campbell the amount it was indebted to him. In the winter of 1871, School District No. 1 obtained a *mandamus* from the district court of Morris county, commanding the said "Union School District" to restore to School District No. 1 its property, effects and franchises; but before said *mandamus* could be enforced, the territory comprising said School District No. 1 and School District No. 2, being the territory that had been organized into said new school district as "Union School District No. 1," (all of said territory comprising the city of Council Grove, it being then a city of the third class,) was by act of the legislature (chapter 101, laws of 1872,) created into a city of the *second class*, and said School District No. 1, and Union School District No. 1, had no legal or corporate existence as such districts so-called after that time, but all the territory comprising said districts was thereby merged into a new school-district governed by the Board of Education of the city of Council Grove, and said board of education became possessed of all the property, effects, and franchises of said School District No. 1, and Union School District No. 1. Neither School District No. 1, nor Union School District No. 1, ever paid Campbell for his services, or any part thereof. He presented the aforesaid school orders to the board of education of the city of Council Grove, and said board of education

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paid him (June 4th 1872,) the sum of \$180 in full for said order issued for the two months he taught school in the spring of 1871, and \$65 on the order issued to him for the three months' teaching in the fall of 1871. Said money was not paid to him as a settlement in full, and he brought suit for \$180, the balance due on the last-mentioned order, and recovered a judgment for that balance.

The alleged errors complained of by plaintiff, are, 1st, that there was no legal appeal taken from the action of the county superintendent in forming Union School District No. 1; and 2d, that old District No. 1 was superseded, and never had power to make a valid contract after the action of July 14th, merging it into the Union District. The second proposition of counsel hinges on the first; for if the action of the commissioners was valid, then the action of the superintendent was vacated, and District No. 1 possessed all the powers to contract it ever had. Was there an appeal taken, such as the law contemplates? Section 51 of the Gen. Stat. 1868, page 926, provides that, "if in the formation or alteration of a school district, any person or persons shall feel aggrieved, such person or persons may appeal to the board of county commissioners, who shall confer with the county superintendent, and their action shall be final." This was the law in force at the time the contract sued on was made. There was no specified time fixed for the appeal, except that mentioned in this section. Counsel contends that, as no time for taking an appeal is fixed, it must be taken at or about the time of the superintendent's action, and that an appeal two months after such action is too late. We cannot assent to the conclusion he reaches. The record is silent as to how and when the appeal was taken. It recites that after the superintendent had taken his action, certain residents and citizens feeling aggrieved thereby notified him that they would appeal from such action to the county commissioners, and that afterward, and on the 9th of September, certain proceedings were had before the commissioners, they conferring with the county superintendent, and that such proceedings re-

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sulted in setting aside the superintendent's order. In such proceedings before the commissioners, both the advocates and opponents of the superintendent's action appeared, and were heard by counsel. At what time the notice was given to the superintendent, at what time the papers in the case were filed with the clerk of the county board, does not appear. Neither does the record show whether there was any session of the commissioners between the 14th of July and the 19th of September. The law required no meeting between those dates. Gen. Stat. 256, § 18. But beyond all this, the district court of Morris county, a court of general jurisdiction, in an inquiry between the old and the new districts (by proceedings in *manamus*,) sustained the corporate existence of the former, as well as its rights to the possession of the school buildings and other property. The court below, in the case at bar, made no special findings of fact, but only a general finding in favor of Campbell. Where the right of appeal is given, When regularity of appeal presumed. and the record shows that this right was attempted to be exercised, that the appellate tribunal took jurisdiction of the matter, that the parties interested appeared before such tribunal, that no objection was made to its jurisdiction of the appeal, and that the appellate tribunal decided the matter on such appeal, the regularity of the steps taken to perfect such appeal, will, in any collateral inquiry, be presumed.

The judgment will be affirmed.

All the Justices concurring.

In re Snyder, Petitioner, &c.

In the matter of the Petition of A. J. SNYDER, for a Writ of Habeas Corpus.

1. **HABEAS CORPUS; Practice; Power of Courts, or Judge.** Under section 672 of the code, Gen. Stat. 1868, p. 763, the judge or court issuing a writ of *habeas corpus* on a petition complaining that the person in whose behalf the writ is applied for is restrained of his liberty without probable cause, may, even in case there is no defect in the charge or process, summon the prosecuting witnesses, investigate the criminal charge, and discharge, let to bail, or recommit the prisoner, as may be just and legal. [*Ex parte Phillips*, 7-49; *Ex parte Nye*, 8-100; *In re Payson*, 23-757; *Gleason v. Comm'r's*, 30-54.]
2. **FALSE PRETENSES; Belief of Injured Party; Proof; Mental Emotions; Competency of Testimony.** On the hearing and determination of a cause arising upon a writ of *habeas corpus*, before a judge or court investigating the criminal charge against a person committed by an examining magistrate for the offense of having obtained money or property by false pretenses, the prosecutor, when examined as a witness, may testify that he believed the pretenses, and, confiding in their truth, was induced thereby to part with his money or property. [*State v. Cowdin*, 28-269, 273.]
3. ——— **What Constitutes Offense of Obtaining Goods by False Pretenses.** It is not necessary, to constitute the offense of obtaining goods by false pretenses, that the owner has been induced to part with his property solely and entirely by pretenses which are false; nor need the pretenses be the paramount cause of delivery to the prisoner. It is sufficient, if they are a part of the moving cause, and, without them, the defrauded party would not have parted with his property. [*State v. Cowdin*, 28-269, 273.]
4. ——— A pretense which is false when made, but true by the act of the person making the same when the prosecutor relies thereon and parts with his property, is not a false pretense within the statute.
5. ——— **False Pretense must be as to Past, or Present Existing Facts.** To hold a person for trial who is charged with obtaining money or property by false pretense, it must appear that the pretense relied upon relates to a past event, or to some present existing fact, and not to something to happen in the future. A mere promise is not sufficient.

Original Proceedings in Habeas Corpus.

PETITION filed in this court on the 2d of January 1877, on behalf of *A. J. Snyder*, for a writ of *habeas corpus*. The petition sets forth the following facts:

"That *A. J. Snyder*, was illegally restrained of his liberty

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in the county jail at Mound City, the county-seat of Linn county, by D. R. Lamoreau, as sheriff of said county; that said D. R. Lamoreau pretends to restrain said A. J. Snyder of his liberty by virtue of some pretended proof, the precise nature of which is unknown to your petitioner, the justice before whom he was examined not having reduced such testimony to writing. Your petitioner further represents unto your honorable court that such illegal restraint consists in the following: that on the 1st day of December 1876, said A. J. Snyder was arrested upon the charge of obtaining money under false pretenses, and taken before one A. D. Hyatt, a justice of the peace in and for Linn county, for preliminary examination; that upon such examination there was no evidence offered which showed or tended to show in any manner that an offense had been committed against or under the laws of the state of Kansas; nor was there any evidence offered which showed, or in any manner tended to show, that there was any probable cause for believing that said A. J. Snyder had been guilty of any offense whatever under the laws of the state of Kansas. Yet notwithstanding the premises, the said justice of the peace refused to discharge the said A. J. Snyder, or to admit him to bail, as under the laws of the state of Kansas he was required to do."

The petition further alleged that the order or warrant of commitment under which *Snyder* was held in custody was illegal, and insufficient in law. It also states that the reason the application was not made to the probate judge of Linn county, was, "that such probate judge was disqualified from hearing the same by reason of being an attorney-of-record in a civil suit involving the same transaction." And the petition further alleges, "that an application was made to the Hon. W. C. Stewart, judge of the 6th judicial district, in which Linn county is, for a writ of *habeas corpus*, and that said application was refused." The usual prayer for the issuance of the writ was also annexed thereto. Upon such petition the writ of *habeas corpus* was issued by the court, and was duly served upon the said Lamoreau, sheriff, to which a return was made by said sheriff, in effect that "he had the body of said Snyder before the court." And for the authority and cause of restraint of the said Snyder in his custody, he stated that—

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"On December 1st 1876, John Hood made in writing, and upon oath, a complaint before A. D. Hyatt, a justice of the peace of Linn county, against the said A. J. Snyder, charging him with having, on November 25th 1876, procured \$1,500 in money, and a check drawn by Snyder & Co. on Hood & Kincaids, in favor of Snyder & Co. for the sum of \$1,500, upon which check the said John Hood wrote across the face, 'The First National Bank of Kansas City, Missouri, will please pay. —HOOD & KINCAIDS,' from the firm of Hood & Kincaids, by false pretenses and with intent to defraud Hood & Kincaids; that on said December 1st said justice of the peace issued a warrant, reciting fully the alleged offense; that Snyder was arrested; that upon the preliminary examination numerous witnesses (giving their names,) testified; that the evidence taken at the examination was not reduced to writing; that upon the conclusion of the examination the justice decided an offense had been committed, and that there was probable cause to believe said Snyder guilty as charged in the complaint and warrant, and ordered that he give bail in the sum of \$5,000 for his appearance at the district court of said Linn county, at the next term thereof, to answer said charge, and in default of such bail to be committed to the jail of the county of Linn; that no bail whatever was offered; that said justice of the peace then made out a written order of commitment, and gave the same to the respondent to execute; that said respondent was and is the sheriff of said Linn county, and held said Snyder in his custody as such sheriff by virtue of said order of commitment."

Copies of the complaint, warrant, and decision of the justice, are attached to the return. The original order of commitment was also produced by the sheriff on the hearing. A reply was filed to the return of the officer, stating that the testimony mentioned in the return, and the evidence given by the witnesses named, were not sufficient to authorize the magistrate to find *Snyder* probably guilty of the offense charged. Afterward, under the requirements of the court, an amended reply was filed, setting forth in detail the evidence of the prosecution before the justice.

The case was set for hearing, and was heard on the 30th of January 1877. On the hearing, the questions as to bail, and the illegality and insufficiency of the warrant of commitment,

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were waived, and the only allegation relied on by *Snyder* was the one contained in the petition concerning the "alleged want of probable cause." The counsel for the respondent admitted that the testimony contained in the reply set forth all the evidence admitted before the justice, excepting that purporting to have been given by John Hood, one of the witnesses for the prosecution, and a member of the firm of Hood & Kincaids. The court summoned John Hood, as a witness, and received his evidence orally.

Upon an investigation of the criminal charge preferred against *Snyder* before the justice, the facts of the case were found to be substantially as follows: During the fall of 1876, A. J. *Snyder* was engaged in buying and shipping stock under the name of *Snyder & Co.*, and had made several shipments of stock from points along the Missouri River, Fort Scott & Gulf railroad, to D. A. Painter & Son, who were live-stock brokers and commission merchants at Kansas City, Missouri. One J. M. Shores was connected with *Snyder* in business. Hood & Kincaids were bankers, having a banking-house at Pleasanton, Linn county, Kansas, of which Mr. Hood was cashier and general manager. The firm of D. A. Painter & Son was composed of D. A. Painter and Charles Painter. On the 22d of November 1876, *Snyder* went to Charles Painter, the book-keeper of Painter & Son, for a letter of credit. Charles Painter thereupon wrote out a letter of credit, took it to the Mastin Bank, had it endorsed by the teller, returned to his office, and delivered the letter of credit to *Snyder*. *Snyder* looked it over and remarked that he thought there would be bother about it on account of the words, "bill of lading attached." At his request, Charles Painter wrote out another letter of credit, of which the following is a copy:

KANSAS CITY, MO., Nov. 22, 1876.

Messrs. Hood & Kincaids, Pleasanton, Kansas:

DEAR SIR: We will honor Messrs. A. J. *Snyder & Co.*'s draft on us to the amount of four thousand dollars (\$4,000,) to pay on live stock consigned to us.

Very truly yours, D. A. PAINTER & SON.

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Snyder took this letter also, remarking that if he couldn't use the one, he would the other. Snyder then went to Pleasanton, and on the 23d he called at the banking-house of Hood & Kincaids, and presented the above letter of credit, and said he wanted to get money to buy stock with. Hood asked him what amount of currency he wanted; he answered about \$2,000. Hood told him they were short of currency, but would send up to Kansas City and have some shipped down, but that they could not see to the shipping of stock. In this conversation Snyder told Hood the cattle would be shipped to Painter & Son. Snyder then telegraphed to Painter & Son, that—

“Your letter of credit says, *on stock consigned to us*. Hood & Kincaids can't go and see how consigned. Telegraph to H. & K. to erase that part. We will want some money to-morrow.
“SNYDER & Co.”

On the same day Painter & Son, in answer to the said dispatch, telegraphed to Hood & Kincaids—“We will honor Snyder & Co.'s drafts, *to pay on stock*, to the amount of four thousand dollars.” On the 23d, or the 24th, (the witness Hood fixes the 24th as the date,) Snyder again called at the bank, and asked Hood what was the matter with the telegram—and then stated he had been to Fort Scott to get money on his draft on Painter & Son, and that the bank there had telegraphed to H. & K., and H. & K. had answered they would honor the draft on certain conditions; that he had bought the pick of a large lot of cattle, and wanted money to pay for them. Hood thinks he said about one hundred head. Snyder then stated he would send to Painter & Son and have the letter of credit modified. After this conversation, Snyder took the cars and went to Fort Scott. On the 24th, late in the afternoon, he drove out to D. G. Glasscock's, in Vernon county, Mo., nine miles northeast from Fort Scott, and about sixteen miles from Prescott. (Prescott is on the railroad, six miles south of Pleasanton.) On the morning of the 25th, Snyder and Glasscock went out and looked at the cattle Glasscock was fattening, and Snyder made a bargain for the cattle, by the terms of which he was to take eighty head of steers at $8\frac{1}{4}$ cents per pound, 87

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or 38 of them to be delivered on the next Monday, the 27th, and the balance about the middle of February. Snyder paid Glasscock \$25 on the cattle, and took his receipt therefor. Glasscock also sold him his hogs, twelve or fifteen in number, and agreed to try to get up a car-load. Snyder then returned to Pleasanton, and on the same day telegraphed to Painter & Son—

“The words, *to pay on stock*, in the way. Say to Hood you will, or will not, pay. Answer quick. SNYDER & Co.”

Painter & Son telegraphed back to Hood & Kincaids, “We will honor Snyder & Co.’s drafts to the amount of four thousand dollars.” This telegram was received by Hood before Snyder called at the bank on the 25th. About noon, on the 25th, Snyder went to the bank, and asked Hood how it was “in regard to that money to-day.” Hood told him that he thought everything was right now, and asked him how much money he would need. He said he thought that \$3,000 would do. Snyder made a draft for the amount on D. A. Painter & Son, and Hood paid him \$1,500 in currency, and a certified check on the First National Bank at Kansas City for \$1,500. Hood said to him at the time, that he supposed the cattle would be shipped on Monday night. Snyder said, no; that it would take a couple of days to get them to the station; that they were about nine miles northeast of Fort Scott, and sixteen miles from Prescott. Hood remarked to him, that he ought to get them to Fort Scott in less time than that. Snyder said the cattle were to be delivered and paid for at Young’s scales; that Young’s scales were nearer on the road to Prescott, and that the cattle were fat and would have to be driven slow. This conversation between Hood and Snyder occurred while Hood was certifying to the check. Snyder first drew a draft for \$3,000, but its terms being unsatisfactory to Hood, in not being payable at sight, Hood made one out inserting therein “Pay to the order at sight of Hood & Kincaids,” etc., and Snyder signed the firm-name of “Snyder & Co.” thereto. Hood testified he believed all the

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representations made to him by Snyder to be true, and that he was induced to deliver to Snyder the \$1,500 in currency, and the certified check of \$1,500, on November 25th, upon Snyder's statement that he had enough cattle bought, and that he would ship them to Painter & Son, and believing that Painter & Son would pay his draft when the cattle were disposed of, if not before, and further, that he would pay H. & K. twenty-five cents on the \$100 for exchange. Hood also testified, that at the time he delivered the money and certified check to Snyder, he did not know the financial condition of D. A. Painter & Son, and that he did not have at the time such confidence in Painter & Son as to have advanced the money obtained, on their credit alone; that he had confidence in their integrity, not in their financial ability, and his confidence in their integrity was based upon representations that had been made to him by different parties that they were respectable dealers. Snyder returned to Fort Scott. On Sunday, Snyder and Shores together went again to Glasscock's house, and called him out to the fence. Shores said: "Mr. Glasscock, we've come to see if we couldn't get you to hold these cattle another day. Our financial matters is so we can't pay for 'em to-morrow, and if it would suit you as well, we'd like for you to hold 'em another day." Glasscock rather objected to this. Then Shores said, in the presence of Snyder: "If you would rather do it, we'll have to get you to ship the cattle in your own name." Glasscock then consented to keep the cattle another day. Snyder then went to Fort Scott and engaged four cars of Ming, the agent of the Mo. R., Ft. Scott & Gulf Railroad, to be used Tuesday night for Glasscock's cattle, and others. On Monday he went to J. V. Morrison, a cattle shipper who shipped cattle over the M. K. & T. Railway, told him he had bought Glasscock's cattle, and made arrangements with him to have him ship the cattle in his own name to St. Louis; told him to order the cars and attend to the shipping of them, and also made arrangements with him to go out to Glasscock's with him the next day. On Monday night

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Snyder and Shores went to Glasscock's house, stayed over night, and Tuesday, the 28th, in the morning, they went to "cut the cattle out." Snyder selected 38 to take, and then turned the rest back. Glasscock examined the cattle turned back, and found Snyder had turned back many of the cattle he had agreed to take then, and in their place had selected cattle which were more profitable to feed. Glasscock then insisted that if he took the cattle he had selected, he should secure him that he would take the balance. This Snyder would not do, saying he was not prepared to leave the means. Glasscock still insisted on security, and finally Snyder said: "If you can't do better than what you proposed, I'll have to let the trade fall back;" and Snyder and Shores then drove off. The cattle selected would weigh about 1100 pounds, and the 38 head selected, at $3\frac{1}{2}$ cents, would amount to \$1,358.50. At the feed-gate they met Morrison, and told him that the trade was "busted up;" wanted him "to go and buy the cattle, if he could—they would have nothing more to do with them." At Fort Scott Snyder saw Ming, "told him he could not ship, and withdrew his order for cars." They then got on the freight train of which Chas. Sykes was conductor, and left Fort Scott about 1:30 p. m. Snyder paid his fare, first to Prescott, and then from Prescott to Pleasanton. The train stopped at Pleasanton about fifteen minutes. Snyder and Shores got out of the caboose. Snyder went to Hood & Kincaid's bank, and told Hood that he wanted some more money to finish paying for the stock he had bought; that he was in very much of a hurry; that there was a freight train at the depot ready to pull out, and that he wanted to get back to Prescott on it. Hood asked him how much more money he wanted. He said \$850, and gave a draft on D. A. Painter & Son for the \$850, in form similar to the \$3,000 draft, and Hood gave Snyder a certified check for the amount. Snyder then tried to get on the pay car going north; (Prescott is south of Pleasanton;) could not get on it, and then got on to Sykes' caboose again; showed Sykes a large amount of

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money; rode with him to Kansas City. At nine o'clock, on the 29th, he got the \$850 check cashed at Wyandotte, at the banking house of Northrup & Son. The \$3,000 draft in favor of Hood & Kincaids was sent to Kansas City, and Painter & Son being unable to pay the same, it was protested. On the 29th, D. A. Painter went to Wyandotte to see Snyder and Shores, and asked them what luck they had buying cattle. They stated that they had bargained for Glasscock's cattle; that Glasscock had disagreed with them about the selection of the cattle, and would not let them have the cattle. Painter said a \$3,000 draft had come on, and they had been forced to let it go to protest. Painter, Snyder and Shores then went to a saloon, where they had further talk about the \$3,000 draft. Painter insisted that if they hadn't bought any stock, they must have the money; that the money ought to go to pay the draft. Snyder replied that they were not going to commit themselves; that they were awaiting developments. Painter suggested that if they were keeping the money for what his firm were owing them, that he would pay them on Friday; they replied that they were not going to commit themselves. After Snyder was arrested on this charge, he said to one James Reynolds, "that they had put about \$3,000 in Painter's hands last spring, and he didn't like the way things were going lately; he said he hadn't lost anything, only \$700 or \$800." Reynolds also testified, "I can't say whether Snyder said that he had got even with him, and was going to keep even with him, or whether he said he had taken this plan to get even with him." While on his way back to Pleasanton, after his arrest, Snyder said to McGlothlin, the deputy sheriff who had him in charge, that Painter & Son owed him \$3,900; that he did this to get his money, or that it was the only way he had to get his money out of Painter & Son. While in the jail at Mound City, he made a similar statement to Robert Fleming. He also said he didn't care who H. & K. looked to for their money; that he was studying his own case. Painter & Son owed Snyder & Shores at this time from \$500 to \$700,

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and were able to pay that, but were not able to pay the \$3,850 without the cattle. They were persons of limited means. Neither Snyder, nor A. J. Snyder & Co., had any money on deposit with Hood & Kincaids at the time of these transactions, and Hood & Kincaids have never been paid any part of the \$3,850.

The foregoing statement of facts was prepared by the Chief Justice. Counsel appearing for *Snyder* in this court, were *J. D. Snoddy*, *A. F. Ely*, and *W. J. Buchan*. Counsel for respondent *Lamoureux*, were *Stephen H. Allen* and *W. R. Biddle*. The case was argued orally by Messrs. *Snoddy* and *Ely*, for petitioner, and Messrs. *Allen* and *Biddle* for respondent. An order for the release of the petitioner was made and issued on the 9th of February.

The opinion of the court was delivered by

HORTON, C. J.: The questions presented in the case for our consideration will be disposed of by us in the order in which they were raised. After the return of the sheriff had been made, and the reply thereto filed, the counsel for the respondent objected to the summoning of the prosecuting witness, and asked that the petitioner be remanded to the custody of the officer, as it appeared from the record that, upon complaint made that a criminal offense had been committed, a warrant describing the offense had been issued, the prisoner arrested, a preliminary examination duly had before the proper officer, and a finding made that the petitioner was guilty as charged in the complaint and warrant; that thereon bail had been fixed at \$5,000; that the petitioner had not offered any bail, and had been legally committed for trial, and no question was made on account of any defect in the charge, or process. Under §671 of the code, (ch. 80, Gen. Stat. 763,) it is expressly provided, that no court or judge shall inquire into the illegality of any judgment or process whereby the party is in custody, or discharge him, when the term of commitment has not expired, when the party is in custody upon any process

1. Power of court, or judge: practice.

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issued on any final judgment of a court of competent jurisdiction, or upon a warrant or commitment issued from the district court, or any other court of competent jurisdiction, upon an indictment or information." An order of commitment to hold a prisoner for trial, issued by a magistrate before whom a person is brought for examination, upon a charge of having committed an offense, after such examination is concluded, and a finding made that it appears that the prisoner is guilty as charged in the complaint and warrant, is not "a process issued on any *final judgment* of a court of competent jurisdiction;" nor is such a commitment included in any process named in § 671 of the code. Hence, there is no prohibition in said section to prevent a court or judge from inquiring into the legality of the imprisonment of a person under a commitment of an examining magistrate.

Sec. 672 of the code, (Gen. Stat. 1868, 763,) provides: "No person shall be discharged from an order of commitment issued by any judicial or peace officer for want of bail, or in cases not bailable, on account of any defect in the charge or process, or for alleged want of probable cause; but in all such cases, the court or judge shall summon the prosecuting witnesses, investigate the criminal charge, and discharge, let to bail, or recommit the prisoner, as may be just and legal, and recognize witnesses when proper." Under this section we hold that when a writ of *habeas corpus* issues on a complaint of illegal imprisonment, for alleged want of probable cause, the judge or court issuing the writ may, even in cases where there is no defect in the charge or process, summon the prosecuting witness, investigate the criminal charge, and discharge, let to bail, or recommit the prisoner, as may be just and legal. This section gives a party committed for a crime by an examining magistrate an appeal from his commitment by virtue of the writ of *habeas corpus*. *The People v. Tompkins*, 1 Parker's (N.Y.) Crim. Rep. 224, 240. Upon this ground the court overruled the objection to the hearing of evidence in the case, and the motion to remand upon the record. But the court ordered, on

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its own motion, that the petitioner should amend his reply by setting out therein as fully and specifically as possible the testimony given by the various witnesses before the examining magistrate, and named in the return of the sheriff. The better practice is, where a petition is presented for a writ of *habeas corpus*, for alleged want of probable cause, to embody in the petition all the testimony taken before the examining magistrate. When this evidence has been reduced to writing by the magistrate, or under his direction, a copy thereof should be obtained, with the certificate of the magistrate thereto. When such testimony is not reduced to writing, there usually is but little difficulty in setting out the material and important matters testified to.

Upon the hearing of the case on the merits, the petitioner objected to the witness John Hood testifying that he was induced to part with the \$1,500, and the certified check, on the statements and representations of Snyder, on the ground that it was incompetent, and was calling for the secret, mental emotions of the witness. The objection was not well taken. This was a material fact to be established. It was proper for this court to know what influence the representations of Snyder had upon the witness. If they had none at all, the prosecution must have failed. "The fact was sought after, and not the opinion of the witness." *People v. Herrick*, 13 Wend. 87; *People v. Sully*, 5 Parker's (N. Y.) Cr. Rep. 142; *People v. Miller*, 2 Parker's (N. Y.) Cr. Rep. 197; *Thomas v. The People*, 34 N. Y. 351. Objections were also taken to Hood's testimony that he believed the representations made to him by Snyder on the 23d, 24th, 25th, and 28th of November. The objections were overruled, and for the reasons above stated, we think the evidence competent. It is indispensable to the consummation of the crime of obtaining money or property under false pretenses, that the person who has been induced to part with his money or property thereby must believe the pretense is true, and, confiding in its truth, must by reason of such confidence have been cheated and defrauded. We do not mean by this ruling that

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such evidence is the best, nor the most reliable; nor that it is necessary for the prosecutor to state he believed and relied upon the pretense. All of this may be inferred. We simply hold the evidence admissible.

The material question however in this case, is, whether on the evidence submitted to us an offense is made out against Snyder for false pretense, within the statute, in his obtaining from Hood & Kincaids, on November 25th, the \$1,500 in currency, and the certified check of \$1,500. The counsel for the petitioner contended that there was no evidence of the procuring of the money or check by any false pretense. *First:*

a. What constitutes false pretenses. Inasmuch as Hood, at the time he let Snyder have the money and check on the 25th of November had an absolute order in the form of a telegram from Painter & Son to honor Snyder & Co's drafts for four thousand dollars, and had previously refused to pay the money on a letter of credit, which he construed as requiring him to see to the shipping of the stock to Painter & Son, it is conclusively shown that such telegraphic order of Painter & Son was the sole inducement by which the money and check were parted with by Hood. *Second:* That the representation made by Snyder to Hood, that he had bought the pick of a large lot of cattle, about 100 head, was true on the said 25th, when the money and check were obtained; and that the statement that the cattle would be shipped to Painter & Son at Kansas City, was a representation or assurance in relation to a future transaction, and did not amount to a statutory false pretense. As to the first proposition of counsel of the petitioner for his discharge, we answer, that we are not satisfied that Hood parted with the money and check solely on the telegram of credit of the 25th. The testimony tends to show that he was induced to part with the property in controversy, partly on that telegram, partly on the representation of Snyder that he had bought about 100 head of cattle, and partly on the statement that he would ship the cattle to Painter & Son. In an examination of this character, we are not to pass absolutely on the guilt or innocence of the prisoner: if we shall find an offense has been com-

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mitted, and there is probable cause to believe the prisoner guilty thereof, the prisoner should be committed for trial. As different motives were assigned by the prosecutor as operative in producing the delivery of the money and check to Snyder, the examining magistrate, and this court, is only to ascertain that there is probable cause to believe that the pretenses proved to have been false and fraudulent, if within the statute, were a part of the moving causes which induced Hood to part with the property, and that Snyder would not have obtained the same if the false pretense had not been superadded to the telegraphic order of Painter & Son of November 25th, to authorize the holding of Snyder for trial. It is not necessary, to constitute the offense of obtaining goods by false pretenses, that the owner should have been induced to part with his property solely and entirely by pretenses which were false; nor need the pretenses be the paramount cause of delivery. It is sufficient, if they are a part of the moving cause, and without them the prosecutor would not have parted with the property. *People v. Haynes*, 14 Wend. 547.

This leads us to examine the second proposition upon which the counsel for the petitioner claims his release, and to consider the representations made by Snyder, "that he had bought the pick of a large lot of cattle, about 100 head," and that "he would ship them to Painter & Son."

The first representation was substantially true when the money and check were obtained on the 25th of November. At that time the cattle had been contracted for by Snyder with Glasscock, and a part of the consideration paid. This representation when made on the 23d, or 24th, of November, was false. On the 25th, it had become true. Is a pretense, which was false when made, within the statute, if true when the property is parted with? We think not. The pretense employed is only the means by which the offense is perpetrated. The substance of the offense consists in the obtaining of the property, and thereby with a fraudulent intent depriving the lawful owner of that which properly belongs to

4. What false
pretense is
not within
the statute.

him. If a party by his own acts makes the false representations good, before obtaining the property, there is no consummation of the crime; and there is no criminal attempt, for it follows, that, when there is a change of purpose on the part of a person seeking to obtain property by a false pretense, before any other wrongful act is committed than the making of the false pretense, the crime of the attempt is taken away. The fact that in this case, Snyder never abandoned the scheme to defraud some one, does not militate against the conclusion, that the pretense must be false in fact when the property is parted with. How can it be said that Hood relied upon a false representation as to the purchase of the cattle when he delivered the money and check, if at that time the representation had become true? No property was parted with by Hood on the 23d, or 24th. The representation then made by Snyder as to buying the cattle, was true, on the 25th, and before he obtained the money, or check; and if he is to be held for the commission of a crime by obtaining property under false pretenses, it must be upon some other representation than the representation on the 23d, or 24th, as to having "bought the pick of a large lot of cattle."

As to the representation of Snyder, "that he *would* ship the cattle to Painter & Son at Kansas City," we follow authority in holding such statement is not a statutory false pretense. The false pretense relied upon to constitute an offense under the statute, must relate to a past event, or to some present existing fact, and not to something to happen in the future. A mere promise is not sufficient.

Rex v. Young, 3 Term R. 98; *Rex v. Lee*, L. & C. 309; *Commonwealth v. Drew*, 19 Pick. 179; *State v. Evers*, 49 Mo. 542; *Dillingham v. State*, 5 Ohio St. 280; *Burrow v. State*, 12 Ark. 65; *State v. Magee*, 11 Ind. 154; *The State v. Green*, 7 Wis. 676. The representation that the cattle *would* be shipped to Painter & Son, related to an event which was thereafter to happen. It was a promise or assurance, of a future transaction. Upon the evidence, we are therefore compelled to say, that as the only

6. False pretense must be as to past, or present facts,

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offense charged in the complaint, and in the warrant against Snyder, was the obtaining of the \$1,500 in currency, and the certified check of \$1,500 on November 25th, as therein stated, and as the order of commitment was issued on the finding of the examining magistrate, that there was probable cause to believe Snyder "guilty as charged in the complaint and warrant," there is no legal authority for holding the petitioner in custody, and he must be discharged. It is perhaps unnecessary to add, that in point of moral turpitude Snyder is as guilty in obtaining the property of Hood & Kincaids on the 25th of November on a false promise, if such be the fact, as if such pretense was within the statute. The criminal law however cannot reach the perpetrator of every fraud. "The statute may not regard naked lies as false pretenses." It has been well said, "The operation of the wisest laws is imperfect and precarious; they seldom inspire virtue; they cannot always restrain vice; their power is insufficient to prohibit all that they condemn, nor can they always punish the actions which they prohibit." We have intentionally abstained from commenting upon the transactions of the 28th of November, when Snyder is alleged to have obtained the certified check of \$850, because there is nothing in the proceedings before the magistrate, or in this court, to prevent the petitioner from being arrested, if any complaint is made, therefor. Whether a crime has been committed in that regard, and whether there is probable cause to believe the petitioner guilty thereof, may be a matter of future examination and judicial determination. In this investigation, the testimony of facts, subsequent to the 25th, was received by us only to explain the transactions of the 25th of November, and to shed light upon the intent of Snyder.

That the force of this decision may not be misconstrued, we may properly say, that the evidence shows there was no collusion between the firm of Painter & Son, and Snyder, and that the purchase of the cattle by Snyder of Glasscock on the morning of the 25th was made in good faith. It is evident however, that Snyder never intended to ship any of the cattle

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to Painter & Son, and all his statements to that effect were in pursuance of his scheme to successfully carry out his fraudulent purpose.

Let the petitioner be discharged.

All the Justices concurring.

JOHN KELLY, as *Adm'r*, *fc.*, v. DETROIT BRIDGE WORKS.

NEGLIGENCE; CARE AND DILIGENCE; *Master and Servant*; *Demurrer to Evidence*. The plaintiff's evidence showed substantially the following facts: The plaintiff's intestate was a laborer in the employ of the defendant, assisting the defendant to build a bridge. Said intestate fell from said bridge, and was killed. The fall was caused by a heavy step of the intestate on a defective board or plank, causing the plank or board to break in the middle, and allowing the intestate to fall about twenty-five feet. This plank was a part of a scaffold. The intestate and his co-laborers had erected said scaffold on the very morning that said accident occurred. How this particular plank came to be placed in said scaffold, is not shown. There were plenty of good plank at the bridge from which to make a good scaffold. Whether any one knew, prior to the accident, or even suspected, that this plank was defective, is not shown. The evidence, so far as it went, tended to show that all the plank were tested before they were used. It was not shown that the defendant was negligent in any respect whatever. And no negligence was shown against any one, unless it may be inferred from the foregoing facts. The defendant demurred to the plaintiff's evidence, on the ground that it did not prove any cause of action against the defendant. The decision of the trial court, sustaining the demurrer, was correct, and is affirmed.

Error from Doniphan District Court.

JOHN CORBETT, an employé, engaged with others in constructing a bridge, was instantly killed by falling from a scaffold, in February 1873, while in the employ of the *Detroit Bridge and Iron Works*. John Kelly was appointed administrator of Corbett's estate, and thereafter brought his action as

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such administrator to recover damages sustained by reason of the alleged "gross carelessness, gross negligence, and gross misconduct of defendant and its superintendent, while building the bridge aforesaid." Trial at the March Term 1874. Judgment for defendant, and plaintiff brings the case here.

Price & Heatley, R. M. Vinyard, and W. D. Webb, for plaintiff.

W. W. Guthrie, for defendant.

The opinion of the court was delivered by

VALENTINE, J.: This was an action of tort, brought by a foreign administrator against a foreign corporation for injuries to the plaintiff's intestate, claimed to have resulted from the negligence of the defendant, and resulting in the death of the plaintiff's intestate. The judgment of the court below was in favor of the defendant; and the plaintiff now brings the case to this court, and asks to have the judgment of the court below reversed. There are several questions raised in this case, but with the view that we entertain of the case, it will be necessary to decide only one of such questions. That question is, whether the plaintiff upon the trial of the case showed that the defendant was guilty of any negligence or not. There was no evidence introduced on the trial except that of the plaintiff. When the plaintiff rested his case the defendant demurred to the plaintiff's evidence, and the court below sustained the demurrer. Whether this ruling was correct or not, we think it is the only question which we need to decide. We think the ruling was correct. There was not a particle of evidence, as we read the record, tending to show that the defendant was guilty of any negligence. The facts would seem to be substantially as follows: The defendant, a corporation of Detroit, Michigan, was building a bridge across the Missouri river at or near St. Joseph, Missouri. Corbett, the plaintiff's intestate, was a laborer, assisting the defendant to build said bridge. The Missouri river was at that time and place frozen over. Scaffolds were erected to assist the workmen in building the bridge, and Corbett fell from one of these scaffolds to the ice below, a

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distance of about twenty-five feet, and was killed. These scaffolds were made from pine boards, or plank, each board being about twelve feet long, twelve inches wide and two inches thick, and resting upon cross-ties, or other supports, about ten feet apart. It would seem that Corbett was standing on one of these boards, and that he stepped down from eighteen inches to three feet, and across horizontally from eighteen inches to three feet, to another board, and that this board broke about the middle and permitted him to pass on through and down to the ice. The board that broke was probably apparently sound and strong, but in fact it had two knots in it which rendered it to some extent weak, and caused it to break. There were plenty of good boards about the bridge with which to make good scaffolds, and which were intended for that purpose. The scaffold in which this board that broke was placed, was made that same morning by Corbett and his co-laborers. We shall now quote some of the evidence. Antoine Shoemaker testified among other things as follows:

"I was near by when Corbett fell off the bridge, and saw him fall. * * * I went down and assisted to pick him up. He was unconscious at that time. I never heard him speak after he fell. There were several hundred plank on the span he fell from. These planks were two inches thick, and from ten to twelve inches broad, and twelve feet long. They were pine planks. These plank were there for the use of the bridge, to walk on, and for any purpose they were needed for. The workmen shifted all these planks, the morning he fell, from one side to the other, where we wanted them. Before they were shifted they had been used for the sole purpose they were used after they were shifted. The plank broke near about the middle between the two ends. There was a knot in it where it broke. The knot was about three inches from the edge of the plank, and was from one-and-a-half to two-and-a-half inches broad. * * * Corbett and I were common laborers, doing the same kind of work. We did the same kind of work putting up the first span. At the time of the accident we had just about got the second span done. Our work was mostly heavy work. We belonged to the gang of men who moved the plank for the workmen. The staging had been shifted by us about two hours previous to the accident. We had been using the

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planks for the same purpose up to the time of the accident. This staging was three planks wide. It was the same staging we used all the time, moving it ahead as the work advanced. * * * When we got the first span done we moved the staging forward to the second span, and the loose material to whatever place we wanted it. This was dangerous work we were at. Each man had to look out for himself. Some parts of the work were more dangerous than others. No man was made to go anywhere about the bridge where it was considered dangerous, so far as I know. If a man was ordered to go, and he thought it was dangerous, and would not go, some one else was asked to go. Sometimes I was asked to go out to places which I considered dangerous, and I would object to going, and the boss would ask some one else. Mr. Corbett helped to shift and put the staging in place that very morning, from another place on the bridge. The staging rested on the floor beams under the track of the bridge. * * * All the time we were on the bridge the bosses were urging the men to be careful. The bosses took pains not to have any of the men hurt. All the time I worked on the bridge, Corbett was the only one who met with an accident at this kind of work. John Wells, my foreman, was a very careful man, and several times went where I refused to go on account of the danger. Mr. Patton, our superintendent on that work, was a very careful man." Washington Bennett testified among other things as follows:

I saw Corbett fall from the bridge. * * * I tested some of these planks before they were put on the bridge. It must have been about one week before this accident that I tested the planks which were tested by me. I tested them on the ice under the second span. I was at work near one whole day testing plank. * * * At the time of the accident I was thirty-two years old, and weighed 232 pounds. I was about as stout and heavy as any man at work on the bridge. These plank I tested were brought from the first span. I understood they had been tested before they were used on the first span. The object of testing them before putting them on the second span, was, to see if they had suffered any damage while being used on the first span, before they were again used. The instructions of the foreman were, not to use any planks except those that were proven sound by actual test. The officers of the company seemed to be anxious about these plank, that none except good and sound ones should be used. I heard Mr.

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Robinson and Mr. Patten at different times say to the men who were putting up plank, not to put up any except good ones. I do not know whether the plank that broke was one of the planks I tested or not."

There was no evidence conflicting with the foregoing in any substantial particular. There was no evidence tending to show that any one knew, or even suspected, before said plank broke, that it was in the slightest degree defective. And the foregoing evidence is all the evidence that tends to show how said defective plank came to be placed where it was placed. It was evidently placed there by Corbett himself, or by some one of his co-laborers. And there is not a particle of evidence that tends to show that the defendant was guilty of the slightest negligence in the employment or retention of any of its agents or servants. Indeed, no negligence of any kind has been shown in this case on the part of the defendant, and it is doubtful even, whether any negligence has been shown on the part of any one. But even if any such negligence has been shown, it was on the part of the said intestate himself, or of his co-laborers, and therefore the plaintiff cannot recover in this case.

The judgment of the court below will be affirmed.

BREWER, J., concurring.

HORTON, C. J., not sitting in the case.

DAVID H. MITCHELL v. A. E. SKINNER *et al.*

1. ATTACHMENT, OR EXECUTION; *Levied on Property of Stranger, Not Set Aside at Instance of Defendants.* It is not competent for a defendant to move the court to discharge an attachment, or set aside a levy under an execution, on the ground that the property attached or levied upon does not belong to him, and it is error for a court to sustain such motion.
2. TRUSTS AND POWERS; *When No Trust Results.* When a conveyance of land for a valuable consideration is made by A. to B., under the direction and with the consent of C., and the consideration therefor is paid by C., and no agreement is made that B. is to hold the land, or some interest therein, in trust for C., no use or trust results in favor of C., but the title vests in B.; and C. has no interest in the land which he can legally enforce. [*Hixon v. George*, 18-260; *Walker v. Newlin*, 22-109.]

Error from Leavenworth District Court.

ALL necessary facts are stated in the opinion, *infra*. The district court, at the February Term 1875, on motion of *Skinner and wife*, defendants, set aside the levy of an execution on certain lands belonging to a daughter of defendants. *Mitchell*, plaintiff, appeals from such order, and brings the record here for review.

H. T. Green, for plaintiff.

M. L. Ent, for defendants.

opinion of the court was delivered by

HORTON, C. J.: On the 12th of February 1873, the defendants in error purchased a farm in Leavenworth county, consisting of 160 acres; in payment therefor they gave certain property in Lawrence, in this state, and executed a mortgage on the farm for \$3,333. The defendants, being husband and wife, occupied the farm with their family as a homestead. On September 9th 1874, proceedings were commenced to foreclose the mortgage on the homestead. The defendants not having the money to pay off and satisfy the same, made an arrangement with one Augustus Gates to

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convey to him their homestead, in consideration that Gates should assume the payment of the mortgage thereon, and convey to Dacotah Skinner, the daughter of defendants', eighteen years of age, a house and lot in Leavenworth City, and a tract of land in Leavenworth county containing $37\frac{1}{4}$ acres. The arrangements between Gates and the defendants were perfected, and on October 17th 1874 Gates conveyed the house and lot in Leavenworth City, and the $37\frac{1}{4}$ acres in the county, to Dacotah Skinner, by warranty deed, at the instance of said defendants. Afterward the defendants partially effected a trade of the house and lot and the said $37\frac{1}{4}$ acres of land with one L. D. Nichols, for a farm of 160 acres of land in Jackson county, which the defendants claim they designed and intended to use as their homestead. Dacotah Skinner, on October 23d 1874, signed and acknowledged a deed for the house and lot, and the $37\frac{1}{4}$ acres of land, conveying them to Nichols. This deed was never delivered. On November 12th 1874, and before the trade was completed with Nichols, Mitchell, the plaintiff in error, commenced his action in the court below to recover from the defendants \$350, and interest. In this action he obtained an order of attachment against the defendants, and had the property conveyed to Dacotah Skinner, by Gates, levied upon. The levy was made November 18th 1874. The defendants never occupied either piece of land attached. The court, on the motion of the defendants, discharged the attached property, "upon the ground that the property was the proceeds of a homestead, and because the affidavit of the attachment was not true." Judgment was taken on default, execution issued, the premises in controversy levied upon; and the court, on motion of the defendants, vacated and set aside the said levy, and all proceedings had thereunder.

The plaintiff in error claims the action of the court below was erroneous, *first*, because the attachment was discharged, and, *second*, because the levy under the execution was vacated and set aside. We have examined the affidavits introduced on the hearing of the motion to discharge the attachment, and as they fully sustain the finding of the district court, "that

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the affidavit for the attachment was not true," the ruling of the court in this respect was correct, although, as will be hereafter seen, we do not sustain all the reasons given therefor.

The more important question to be considered is, the action of the court in vacating the levy made under the execution on the property conveyed to Dacotah Skinner. We do not

1. Attachment, or execution, levied on property of stranger, not to be disturbed by defendant.

think it is competent for a defendant to move the court to discharge an attachment, or set aside a levy under an execution, on the ground that the property attached, or levied upon, does not belong

to him. *Langdon v. Conklin & Martin*, 10 Ohio St. 439. To

avoid the effect of this conclusion, the defendants call attention to the decision of this court of *Franklin v. Colley*, 10 Kas.

260, and insist, that as the conveyance was made by Gates to

Dacotah Skinner as part of the consideration for the home-

stead of defendants, under their instructions, that the law

implies a trust in favor of the latter parties, and that the

daughter, so holding title to the premises levied upon, will

be declared a trustee. Unfortunately for the position assumed

by the defendants, the record is silent as to any agreement on

the part of Dacotah to hold the land in trust for the defend-

ants. She never agreed by parol, or otherwise, to reconvey

the tracts in suits to the defendants, or to the person or persons

with whom the defendants should trade the same for a home-

stead. It is true, she signed and acknowledged a deed by

which she might have conveyed the land to Nichols; but the

deed was never delivered, and hence it was the same as no

deed. Section 6, of the act relating to trusts and powers,

(Gen. Stat. 1868, p. 1097,) provides: "When a conveyance for

a valuable consideration is made to one person, and the con-

2. Conveyance; no trust shall result in favor of the latter; but the title shall

vest in the former, subject to the provisions of the next two

sections." No facts are shown to bring the parties within the

exceptions of sections 7 and 8, referred to in section 6. The

conveyance to Dacotah Skinner was absolute—was not only

made with the full approval of defendants, but at their instance.

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No trust in favor of defendants is declared in the conveyance, nor is any agreement testified to by any witness on the part of Dacotah. The defendants, upon the facts in the record, under our statute as to implied and resulting trusts, have no interest in the land in the suit which could be legally enforced. The case of *Franklin v. Colley*, above cited, is not in point. It is undoubtedly true, that as the tracts of land were the proceeds of a homestead, Dacotah Skinner might successfully hold the same in opposition to the claims of the creditors of the defendants, but the law does not place her interests in the hands of volunteers, nor permit, in this case, the defendants to intervene in her behalf. The court below committed error in sustaining the motion of the defendants to set aside the levy made upon the property of Dacotah Skinner by virtue of the execution issued against defendants.

The order of the district court setting aside the levy under the execution, is reversed.

All the Justices concurring.

KANSAS PACIFIC RAILWAY CO. v. ROBERT H. TAYLOR.

1. **PLEADINGS IN JUSTICES COURTS; *Bill of Particulars*.** While the statute reads, that a bill of particulars in a justice's court "must state, in a plain and direct manner, the facts constituting the cause of action," yet no technical precision is demanded in such a pleading. On the contrary, the most liberal intendment will be given to it, and if every fact essential to the cause of action can be found in it, although stated in the most general way, or in the loosest and most indefinite manner, and no objection is raised to it at the trial, it will be held sufficient to sustain the judgment. [*Hadley v. R. R.*, 22-359; *R. R. v. Byron*, 24-351; *R. R. v. Ellis*, 25-108; *ante*, 514, 569; *R. R. v. McReynolds*, 24-368.]
2. ——— ***Essential Facts must be Stated, or Proven; Waiver.*** Where there is an absolute omission to state a fact essential to the cause of action, but it appears from the record that the case was tried without objection, as

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though this fact was alleged, and that the fact was duly proved and found, the omission will on proceedings in error be considered as waived. [*Nect v. Porter*, 19-134; *Kaub v. Mitchell*, 12-57; *Chapin v. Brown*, ante, 142.]

But where there is such an absolute omission, and nothing to indicate any proof, or finding, or admission of the fact, or waiver of the omission, this court must regard the omission as error, and reverse the judgment founded upon such a defective bill of particulars.

Stock-Law of 1874. In an action under the stock-killing law of 1874 the plaintiff's pleading must allege that the defendant's road was not fenced. [See cases cited, *R. R. v. Mower*, 16-573.]

Error from Leavenworth District Court.

THE opinion of the court contains a full statement of the facts and proceedings. The district court, at the March Term 1875, on petition in error, affirmed the judgment of a justice of the peace in favor of *Taylor*, and the *Railway Company* now brings the record here for review.

J. P. Usher, and *C. E. Bretherton*, for plaintiff in error, contended that the bill of particulars wholly failed to state a cause of action—and cited 13 Ind. 509; 21 Ind. 215; 30 Ind. 261; 49 Ind. 211; 47 Mo. 246; 48 Mo. 387; 19 Wis. 145; 36 Ill. 281; 51 Ind. 67.

R. A. Lovitt, for defendant in error, contended "that the bill of particulars in the present case, states a good cause of action," to sustain which he cited 2 Hil. on Torts, 500; Powell Appel. Prac. 158, §68. It is a rule of pleading, that exceptions to a general rule of liability need not be negated by the plaintiff, but are matters of defense to be alleged by the defendant. It is also a rule of pleading, that it is never necessary to anticipate a defense. *Van Santvoord's Pl.* 254; 2 *Waits' Pl. & Pr.* 389; 4 *Wis.* 20; 36 *N. Y.* 323; 6 *Greenl.* 278.

The opinion of the court was delivered by

BREWER, J.: This was an action brought by the defendant in error before a justice of the peace of Leavenworth county, upon the following bill of particulars:

(*Court, and Title.*) The plaintiff claims a judgment against the defendant for the sum of \$124.46, for seven head of cattle

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killed by the engine and cars of said company, on the 7th of September 1874, in said county and state, to-wit:

Two Cows valued at \$25.00 each,	\$50.00
One Cow " " " " " "	22.50
" Steer " " " " " "	22.50
" Cow " " " " " "	16.00
" Steer " " " " " "	15.00
" Heifer " " " " " "	12.00
	<u>\$138.00</u>
Also for skinning six head and taking to market,	3.00
Total,	<u>\$141.00</u>
Cr. by cash,	16.54
Balance due,	<u>\$124.46</u>

For which amount the plaintiff asks that judgment be rendered against the defendant, and for costs of suit, together with thirty dollars for attorney's fees.

ROBERT H. TAYLOR, *Plaintiff*.

The defendant did not appear, and judgment was entered for the plaintiff. The testimony was not preserved in any bill of exceptions. No findings appear, nothing to show what evidence was offered or what proceedings had, other than that upon such a bill of particulars at the time appointed for trial a judgment in favor of plaintiff was rendered for the amount claimed. A petition in error was filed in the district court to reverse this judgment, but that court affirmed it. And from that judgment of affirmance this proceeding in error is brought. And the single question presented is, whether that bill of particulars is sufficient to sustain the judgment. It is insisted by counsel for plaintiff in error that "it contains no averment either of negligence, or want of fence, and thus no case is stated either under the stock-killing law of 1874, (ch. 94, p. 143,) or on the ground of negligence." It will be unnecessary to enter into any general consideration of pleadings in justices courts, and the rules by which they are to be governed. A simple re-statement of what has already been decided by this court will be sufficient.

I. While the statute reads, that the bill of particulars "must state, in a plain and direct manner, the facts constituting the cause of action," (Gen. Stat. 791, § 72,) yet no

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technical precision is demanded in those pleadings. On the contrary, the most liberal intendment will be given to them; and if every fact essential to the cause of action can be found in one, although stated in the most general way, or in the loosest and most indefinite manner, and no objection is raised to it at the trial, it will be held sufficient to sustain the judgment. *Lobenstein v. McGraw*, 11 Kas. 645; *Kaub v. Mitchell*, 12 Kas. 57; *M. K. & T. Rly. Co. v. Brown*, 14 Kas. 557.

II. Where there is an absolute omission to state a fact essential to the cause of action, but it appears from the record that the case was tried without objection, as though this fact was stated, and that the fact was duly proved and found, the omission will not be regarded in proceedings in error, but considered as waived. Such a case will be held to resemble that in which an entire pleading, as a reply, ought to be filed, but is not, and nevertheless the case is tried without objection, as though one were filed. The omission is considered as waived, and this court, on proceedings in error, regards the case as though the pleadings were actually in the record. *Chapin v. Brown*, ante, p. 142; *K. P. Rly. Co. v. Yanz*, 16 Kas. 583; *Dresser v. Wood*, 15 Kas. 362, 363; *Bent v. Philbrick*, 16 Kas. 190; *Holden v. Clark*, 16 Kas. 346; *Russell v. Smith*, 14 Kas. 366; *Wilson v. Fuller*, 9 Kas. 177; *Walker v. Armstrong*, 2 Kas. 198.

III. But where there is an absolute omission to state a fact essential to the cause of action, and such fact is neither deducible nor inferable from those which are stated, and there is nothing to indicate any proof, or finding, or admission of the fact, or waiver of this omission, this court is bound to regard the omission as error, and reverse a judgment founded upon such a defective bill of particulars. *Hover v. Cockins*, ante, p. 514. In this case, there is no allegation, even in the most general or indefinite manner, that the defendant's road was not fenced, or that the injury resulted from negligence—nothing from which either of those facts could be inferred or deduced. Neither is there anything to show that any proof was offered upon these points, or any finding made thereon, or any waiver

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thereof by the defendant. The case stands before us just as though the matters alleged in the bill were all proved, and nothing more. It is in no better position than if the defendant had gone before the justice and admitted the allegations of the bill were true. And the question then comes, do these facts warrant a judgment against the defendant? (*Hover v. Cockins*, supra.) And this question, we are constrained to answer in the negative. It is of course a rule of pleading, that exceptions to a general rule of liability need not be negatived by the plaintiff, but are matters of defense to be alleged by the defendant. And it is therefore contended by defendant in error, that a bill of particulars, or other pleading, which shows that the action is brought against a railway company to recover the value of animals "killed by the engine and cars of said company," shows a good cause of action, and that if the road is fenced, that is a fact to be alleged, as an exception to the general rule, by way of defense. But this rule has no application to a cause of action of the nature of the one which we are now considering. Here, the ground of recovery is, that the act as a whole imposed a duty upon the railroad company, the penalty for a neglect of which was payment for all stock killed. And it was necessary to show a breach of that duty before the company's liability was disclosed. *K. P. Rly. Co. v. Mower*, 16 Kas. 573. This stock-law was taken substantially from that of Indiana, and this question has frequently been before the supreme court of that state; and its rulings have uniformly been in accord with these views. *I. & C. Rld. Co. v. Wharton*, 13 Ind. 509; *I. & C. Rld. Co. v. Means*, 14 Ind. 30; *I. & C. Rld. Co. v. Sparr*, 15 Ind. 440; *I. & C. Rld. Co. v. Stallman*, 16 Ind. 205; *T. & W. Rld. Co. v. Lurch*, 23 Ind. 10; *T. & W. Rld. Co. v. Reed*, 28 Ind. 101; *P. C. & St. L. Rld. Co. v. Keller*, 49 Ind. 211; *T. W. & W. Rld. Co. v. Eidson*, 51 Ind. 67.

The judgment will be reversed, and the case remanded to the district court with instructions to sustain the petition in error filed therein.

VALENTINE, J., concurring.

HORTON, C, J., not sitting in the case.

KANSAS PACIFIC RAILWAY CO. v. A. G. COUSE.

1. **DEMURRER TO EVIDENCE**—*When to be Overruled.* As sustaining a demurrer to evidence works a final disposition of the case, the court does not err in overruling such a demurrer whenever there is testimony which, although weak and inconclusive, yet fairly tends to prove every essential fact, and is sufficient to justify a court in overruling a motion to set aside a verdict based thereon. [*Simpson v. Kimberlin*, 12-579; *Jansen v. Atchison*, 16-358; *R. R. v. Doyle*, 18-62; *Schafer v. Weaver*, 20-296; *ante*, 278; *Watson v. Rogers*, 21-529; *Brown v. R. R.*, 31-1.]
2. **STATUTE OF FRAUDS; Possession Retained by Vendor.** Our statute of frauds does not imply that a party purchasing personal property without taking actual possession, is, if there be creditors of the vendor, presumptively engaged in a fraudulent transaction, and his conduct scrutinized accordingly, but simply, that one claiming under such a purchase takes nothing until he shows that he made such purchase in good faith, and for sufficient consideration. In other words, the mere production of a bill of sale, which would be sufficient as against the vendor, is not sufficient as against a creditor or subsequent purchaser, and he must supplement that bill of sale with proof of good faith, and payment of value. [*Phillips v. Reitz*, 16-396; *Locke v. Hedrick*, 24-765.]

Error from Saline District Court.

REPLEVIN brought by Couse against Thomas J. Going, sheriff of Saline county, to recover possession of ninety head of cattle. The cattle had been attached as the property of M. D. McCormick, at the suit of the *Kansas Pacific Railway Co.*, and said company was substituted in place of Going, as party defendant. Couse claimed the cattle as part of a larger lot purchased by him from McCormick. Trial at the March Term 1875. The proceedings and error complained of, are stated in the opinion. The *Railway Company* brings the case here for review.

J. P. Usher, for plaintiff in error.

Case & Putnam, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This was an action of replevin, for certain property seized on attachment by plaintiff in error in proceedings against one McCormick, and claimed by defendant in

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error under prior purchase from said McCormick. A demurrer to the plaintiff's evidence was overruled, and this is the error complained of. Under the pleadings, the only question to be tried was the validity of the sale to Couse. Its validity is challenged under the third section of our statute of frauds, (Gen. Stat. p. 504,) which reads:

"Every sale or conveyance of personal property, unaccompanied by an actual and continued change of possession, shall be deemed to be void, as against purchasers without notice, and existing and subsequent creditors, until it is shown that such sale was made in good faith, and upon sufficient consideration."

The provisions in New York, Wisconsin, Indiana, Michigan, and Minnesota, are similar. (See Bump, Appendix.) It is claimed that this sale was unaccompanied by any change of possession, and that there was no proof that it was made in good faith, and upon sufficient consideration. The purchase was made on the 30th of December, and the seizure on the 31st. The following bill of sale was introduced in evidence:

BROOKVILLE, DECEMBER 30th, 1874.

This is to certify that I have bargained, sold, and delivered to A. G. Couse, one hundred and thirty head of cattle, branded on the right shoulder (70,) also fifty tons of hay, for the consideration of \$1,460. I give said A. G. Couse the privilege of feeding said cattle on my place, until the 1st day of May 1875.

M. D. McCORMICK.

Witness, *W. H. Gentry*.

And the witness Gentry was called and testified to the execution of the instrument, and the circumstances attending the transaction. Before noticing his testimony it may be well to advert to the rule which must govern a court in deciding a demurrer to the evidence. The effect of sustaining a demurrer to the evidence, is a final disposition of the case. *St. Jos. & D. C. Rld. Co. v. Dryden*, ante, p. 278. It cannot therefore be used to deprive a party of his right to have questions of fact determined by a jury. It matters not therefore, whether the testimony which a party offers to prove a fact be absolutely conclusive, or only very weak and of uncertain import: he

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has a right to have that testimony considered, and its value and sufficiency determined by a jury. The court may sustain a demurrer to evidence only under the circumstances which will permit it, after all the evidence has been presented on both sides, to withdraw the consideration of the case from the jury, and decide it itself. *Jansen v. City of Atchison*, 16 Kas. 858. If the court would be bound to uphold a verdict in favor of a party upon the evidence, it cannot sustain a demurrer to such evidence. Turning now to the case, and we find the question purely one of fact, and resting in parol testimony. If therefore there was no testimony tending to prove the fact, then the demurrer should have been sustained. But if on the other hand, there was testimony fairly tending to prove the fact, and no contradictory testimony, then the court ought to have overruled the demurrer, and submitted the question to the jury. The witness testified that he accidentally met Couse, and was told by him that he had bought this property, and was asked to witness the bill of sale. Soon after the parties went to the house of witness, and a bill of sale was prepared and attested by him. They then went to McCormick's place, and the latter there turned the property over to Couse. It was not however actually removed from the place. In reference to the transaction the witness testified further, as follows:

"As soon as the cattle were paid for, we started out to go to McCormick's place. Don't recollect what money was paid. I did not count the money handed over, but saw Couse hand over a note and some money. They looked at it, and agreed to its being right. Couse was figuring while the bill of sale was being drawn up. I examined the note. Couse called my attention to the note. It was for thirteen hundred and some odd dollars. I don't know when the note was due. No suggestion was made as to the nature of the note. It was given up to McCormick. I think it was just after the bill of sale was drawn. I don't remember whether amount mentioned included accrued interest or not, nor who it was to. It was McCormick's note. Couse got two dollars from me to make out the money."

The witness proceeded further to testify as to the value of the cattle, etc., when it was admitted that the sum specified in

the bill of sale was a sufficient consideration. It also appeared from his testimony that there were two other parties present at McCormick's at the time the property was turned over to Couse, and that Couse and McCormick were intimate friends. Now here is testimony tending clearly to show good faith, and a sufficient consideration. It may not be conclusive. It may be open to suspicion. It might perhaps have been easily overthrown. Yet, standing alone, the inferences to be legitimately drawn from it are clear; and how can it be said that a jury must, as a matter of law, disregard it, or ignore the conclusions to which it plainly tends? McCormick sells his property for a specified sum, which is proved and admitted to be a sufficient consideration, and receives his own note and money in payment. That it was his own note, is proven, and that Couse held it, appears. True, there is no testimony stating when it was originally given, or that it was given for value. Neither is there any direct testimony that the money paid was genuine, and not counterfeit; nor that it had not been borrowed partly from McCormick, and the rest from the witness, as a mere sham; nor that the money and the note and interest actually amounted to the sum specified in the bill of sale. But this only shows that the testimony was not conclusive, nor that it was not sufficient in the absence of any contradictory evidence. When it appears that money was actually paid, the jury may rightfully assume that it was genuine, when there is no testimony tending to show that it was counterfeit—may rightfully assume that it was Couse's money, when there is no testimony tending to show that it belonged to some one else. In like manner, when a note is shown to be outstanding, and there is no testimony tending to impeach it, a jury may rightfully presume that it is valid, and given for value. Of course, the matter was subject to inquiry; but there being no inquiry, the jury ought not to presume it fraudulent and void. And so also, the testimony tends to show good faith. The actual payment of a sufficient consideration strongly indicates good faith. Applying to a party accidentally met to witness the trade and the bill of sale, borrowing the small sum of two

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dollars to make the cash payment complete, turning over the property in the presence of witnesses, all are circumstances affecting the question of good faith, and presenting testimony for the consideration of a jury. We do not understand the law to imply that one purchasing property without taking actual possession, is, if there be creditors of the vendor, presumptively engaged in a fraudulent transaction, and his conduct scrutinized accordingly, but simply that one claiming under such purchase takes nothing until he shows that he made such purchase in good faith, and for sufficient consideration. In other words, the mere production of a bill of sale, which would be sufficient as against the vendor, is not sufficient as against the creditor, and he must supplement that bill of sale with proof of good faith, and payment of value.

The judgment will be affirmed.

VALENTINE, J., concurring.

HORTON, C. J., not sitting in the case.

ROBERT E. CARR v. A. C. WILLIAMS *et al.*

STATUTE OF FRAUDS; Parol Agreement for Sale of an Interest in Lands. Where the owner of certain lands sells the same and executes to the purchaser a title-bond therefor, binding himself upon certain conditions to execute to the purchaser, his heirs and assigns, a general warranty deed therefor; and the purchaser under said title-bond is to have the possession of the land; and afterward the purchaser sells said land to another person, and delivers to such other person all his title-papers; and afterward the first purchaser makes an executory parol contract with the vendor to "surrender the title and title-papers to said land" back to the vendor within a certain time thereafter, and upon certain conditions, and afterward the second purchaser ratifies said executory parol contract, and then the two purchasers offer to perform such contract on their part, but the vendor refuses to perform on his part, *held*, that said executory parol contract, being a contract for the sale and transfer of an interest in land, is void under the statute of frauds. [*Wiswell v. Telft*, 5-286; *Moore v. Wade*, 8-380; *Franklin v. Colley*, 10-260; *Powers v. Cross*, ante, 218; *Wolf v. Dozer*, 22-436; *Bard v. Elston*, 31-278.]

Error from Leavenworth District Court.

THE opinion contains a full statement of the pleadings, and facts. The district court, at the February Term 1875, gave judgment in favor of *Williams* and *Stanton*, defendants, against *Carr*, plaintiff, and the plaintiff brings the case here on error.

J. P. Usher, and *C. E. Bretherton*, for plaintiff.

Stillings & Fenlon, for defendants.

The opinion of the court was delivered by

VALENTINE, J.: This was an action on three promissory notes, and to foreclose a vendor's lien on certain real estate, for the purchase of which real estate said promissory notes were given. The facts of the case, stated in brief, are substantially as follows: On May 12th 1871, the plaintiff Carr owned said real estate, and sold the same to the defendant Williams for \$1,280, receiving \$320 thereof in cash, and the balance in three promissory notes each for \$320, and due in one, two, and three years, respectively. Carr gave no deed for the land, but gave a title-bond therefor, containing among others the following conditions and stipulations, to-wit:

"Now the condition of this obligation is such, that if the said A. C. Williams shall pay the said notes, and interest thereon, as therein specified and set forth, together with all taxes, both general and special, assessed against the above described lands and premises, then the said Robert E. Carr will, without delay, execute to the said A. C. Williams, heirs and assigns, a deed of general warranty, conveying to the said A. C. Williams all his right, title and interest in and to the above described tract of land. And the further condition of this obligation is such, that if default shall be made in said payments, or any part thereof, as specified, then and in that case the said A. C. Williams will deliver up peaceable possession of said premises unto the said Robt. E. Carr, his heirs or assigns, and relinquish all right or claim in law or equity to all and singular the sum or sums of money that may have been paid by the said A. C. Williams, which sums he agrees to forfeit as liquidated damages for the use and occupation of said lands and premises.

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"And the further condition of this obligation is such, that if default be made in the payments above specified, and the said Robt. E. Carr shall elect to pursue his remedy in law or equity for the enforcement of said payments, then and in that case the said A. C. Williams hereby waives all benefit and advantage of the provisions of an act entitled 'an act to provide for the redemption of real estate sold under execution, order of sale, or other final process,' approved June 4th 1861.

"And the further condition of this obligation is such, that the said A. C. Williams shall not cut down or carry away, nor shall he allow to be cut down or carried away, any growing timber on said premises, other than what may be necessary for the improvements on said premises, and for the individual use of said party for fuel, nor shall he do or allow to be done any act of waste upon said premises; otherwise, this obligation shall be void and of no effect."

Afterward Williams sold said land to the defendant Stanton for the contract-price of \$1,680, receiving in cash \$720, and Stanton was to pay said three promissory notes to the plaintiff Carr. But neither Stanton nor Williams ever paid said promissory notes, nor said taxes. Therefore, after said promissory notes had all become due, and after three years' taxes had accrued against said land, and the land had been sold therefor, the plaintiff Carr commenced this action, and asked for a judgment against Williams for the amount of said notes and costs, and that said land be sold to satisfy said judgment and taxes, and that Williams' and Stanton's interests in said land be barred and foreclosed. The defendants answered setting forth—

"That the notes sued on in this action were given for purchase-money on the said land set out in said petition, and that in the month of January 1874, said Williams made an agreement with Abrams & Harris, a firm doing business as commission agents in the city of Lawrence, and who were then and there the duly-authorized agents of said plaintiff, by which it was agreed between said plaintiff and said Williams, that said Stanton and Williams should surrender the title and title-papers to said land, and that the notes and mortgage set out in said petition should be surrendered to said Williams, and these defendants allege that said surrender was to be made within three weeks thereafter; and these defend-

ants allege that they complied with said agreement, and offered and tendered the surrender of said title and title papers within said three weeks to said plaintiff, and that said plaintiff neglected and refused to surrender or deliver up said notes and mortgage; wherefore these defendants ask that said plaintiff be compelled to surrender up and cancel said notes and mortgage."

The plaintiff replied to this answer as follows:

"The plaintiff admits the making of the agreement in said answer alleged, with the explanation that the title to be so surrendered was expressly agreed to be a title free from any tax lien created by the non-payment of the taxes stipulated to be paid by said A. C. Williams. And plaintiff denies that the said defendants offered and tendered the surrender of such title and title-papers within three weeks, or at any other time after the making of the agreement in said answer alleged, but on the contrary, says, that defendants, or one of them, had incumbered the title to the premises by allowing the same to be sold, on or about the 10th of May 1872, for the taxes levied thereon for the year 1871, amounting to \$55.80, and on or about the 18th December 1872, for the taxes of the year 1872, levied thereon, amounting to \$38.69, and on or about the 10th day of November 1873, for the taxes levied thereon for the year 1873, amounting to \$37.14, and never discharged said liens and incumbrances so as to be able to give title to said premises at any time previous to the commencement of this suit."

On 24th February 1875, this case came on regularly for trial before the court and a jury. Counsel appeared for each party. It was then admitted that the statement of unpaid taxes in the replication, was correct. Defendant then opened, and called the following witnesses, who testified as follows:

"*A. C. Williams*: I am one of the defendants in this action. I have known Abrams & Harris for five or six years. I made my original contract for purchase of the land with Abrams. Some time afterward I sold Stanton, my co-defendant, the land, and informed Harris of the sale having been made. In January 1874, I met Abrams in Lawrence. He spoke to me about the non-payment of the first and second notes. I told him I did not think Stanton could pay the notes, and that I would like to get up and surrender the bond. He said if it was done within three weeks from that time he would sur-

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render the notes. I soon after met Stanton and paid him \$250 to get the bond. This was about a week after the conversation with Abrams."

On cross-examination, witness said: "Stanton paid me fifty cents on the acre more than I paid Mr. Carr for the land, that is, in all, \$400. The land has never been fenced or cultivated. In January 1874, I met Abrams in Lawrence. He said to me that Stanton was not meeting those notes. Two were then dishonored, one note not then due. I said, Stanton could not pay, as his circumstances had altered since he bought the land from me. He had lost his place. I then asked him if he would return the notes if I would give up the land and surrender the bond. He said he would, if I would return the bond within three weeks. I knew nothing about taxes at that time; I did not know whether they were paid or not. Abrams rode with me on the cars to Tonganoxie, and asked me if the taxes had been paid. At that time I did not know, and so told him. I told Stanton when I next saw him what had taken place; agreed to divide the loss of what he had paid me. The extra \$50 was for the use of the money; that is, the difference between \$250 which I paid him, and half of the \$400 which he originally paid me. I have no further personal knowledge of the matter. I never knew the negotiation had failed until after the suit had been commenced. I went to the Indian nation soon after my conversation with Abrams, and was absent for a considerable time."

"James Stanton: About January 24th 1874, I held the title-bond to the land in question. Williams then proposed we would surrender the bond and get the notes for the purchase-money. I soon after went to Abrams & Harris' office in Lawrence; I saw Harris, and told him my business. He said he had not the notes there, but would send for them, and I might leave the bond. I said I would keep the bond, and surrender it when I heard from him that the notes were come. The subject of taxes was first mentioned to me by Mr. Harris after service of the summons in this case."

On cross-examination, witness said: "This occurred somewhere from January 20th to January 24th. Williams saw me and asked me, could I pay for the land? I said 'I could not.' He then asked me, would I surrender the bond? I said, 'Yes, I would.' He then asked me how much I wanted to do so? No precise amount was then agreed upon. We agreed to divide the loss, which was about \$200 or \$300; the exact

amount I don't know. I went to Lawrence to see Abrams & Harris. I saw Mr. Harris, and told him my business. I said I had brought the title-bond to surrender in order to get Williams' notes. Harris said the notes were in St. Louis; said I could leave the bond with him and come and get the notes when they came. I thought I had better keep the bond. He said he would write me a note as soon as he got the notes. He asked me to hold on to the land, and he would extend the time for payment of the purchase-money. I told him I was unable to complete the purchase, any way. Nothing was said about taxes. I knew I had to pay the taxes according to the terms of the bond. I said nothing to Harris about any taxes being then due; the subject was not mentioned. This interview was in January. Service of summons in this case was made on me in the summer; I suppose it was in June. I heard nothing whatever of the matter during the intervening six months. I think he figured up what interest, taxes and back payments would be, if I kept the bond. I wanted to find what it would cost to do so. I don't know whether he had the amount of the notes or not; I am not positive whether he had the amount of the taxes or not."

On re-examination, he said: "A note of mine which was held by Williams was satisfied in part by the \$250 he agreed to give me back; I don't know whether I have destroyed that note or not."

The above was all the evidence adduced on behalf of the defendants, and they then rested their case. Plaintiff then demurred to the evidence adduced by the defendant, on the grounds that it did not show any facts constituting a defense to the action, and moved for judgment. The court overruled the demurrer and motion, and plaintiff excepted.

The plaintiff then introduced the testimony of the witnesses Harris and Abrams, which testimony shows that no written contract such as stated in the defendants' answer was ever made, and further shows that if any contract similar to that was ever made it was a parol contract, and such a contract as is set forth in the plaintiff's replication. This is all the evidence that was introduced on the trial. The court then instructed the jury that it was not necessary that the contract set up in the defendants' answer should be in writing, to which

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instruction the plaintiff excepted. The jury then found a verdict in favor of the defendants, and against the plaintiff.

We think it will be seen from the foregoing statement of the facts, that the only questions involved in this case are, whether a valid contract was made between the plaintiff and the defendants, and whether the defendants performed or offered to perform the contract on their part. Now we must assume that the contract admitted in the plaintiff's reply was a valid contract. That is, we must assume that the contract, "that said Stanton and Williams should *surrender the title* and title-papers to said land, [to Carr,] and that the notes and mortgage set out in said petition should be surrendered to said Williams," (see defendants' answer,) and "that the title to be so surrendered was expressly agreed to be a title free from any tax-lien created by the nonpayment of the taxes stipulated to be paid by said A. C. Williams," (see plaintiff's reply,) was a valid contract. But the defendants never performed or offered to perform this contract. They never offered to surrender the title freed from taxes, or tax-liens. They never even offered to surrender back as good a title as they received from Carr. They received their title from Carr, free and clear from all taxes and tax-liens. But if they ever offered to surrender any title back to Carr, which may be questioned, it was a title encumbered with taxes and tax-liens. It was admitted on the trial, and also proved, that they never paid any of the taxes on said land, and that the land was sold for such taxes, and there was no evidence introduced tending to show the contrary. The defendants therefore cannot defeat the plaintiff's action under the contract admitted by the plaintiff in his reply.

If the defendants can defeat the plaintiff's action at all, it must be under the contract set up in the defendants' answer. And even under that contract, if it may be construed to be the same as is admitted in the plaintiff's reply, they cannot defeat the plaintiff's action. But probably it may be construed differently, as follows: They allege in their answer that they were to "*surrender the title* and title-papers to said

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land." Now it may be that they did not intend to surrender such a title as they received from Carr—a full equitable title, unincumbered by taxes and tax-liens, as alleged by the plaintiff's replication—but just such a title as they then had. Assuming that this is what they meant, we shall now proceed to consider whether they made out a defense upon this assumption. At the time that this supposed contract was made the legal title to the property was in Carr, and the equitable title thereto was in Stanton. Stanton then had the title-papers given to Williams. The equitable title had passed from Carr to Williams, and from Williams to Stanton. By this contract the equitable title (or so much of it as was left, considering its subserviency to said taxes and tax-liens,) was in some manner to pass back to Carr, whether directly from Stanton to Carr, or indirectly, from Stanton to Williams and from Williams to Carr, the defendants have not informed us. But in whatever manner the title was to pass, the contract therefor was wholly executory. The contract was made by Carr though his agents, Abrams & Harris, on the one side, and by Williams on the other side, and was afterward ratified by Stanton; but no part of the contract was ever reduced to writing, and no part of the same was ever executed. No title, or title-paper, or possession, was ever surrendered by the defendants, nor did the plaintiff surrender his notes, or vendor's lien. All parties continued to retain just what each had, respectively, before the contract was made. We shall assume for the purposes of this case, that the defendants offered to perform on their part, though this under the evidence may be questioned. The only question then left is, whether said parol executory contract is valid or not. We must answer this question in the negative. The contract is void under the statute of frauds. (Gen. Stat. 505, §§ 5, 6.) To have made it valid, it should either have been reduced to writing, or should have been executed. In reply to a suggestion made by the defendants, we would say, that the title-bond does not provide that in case of a default the interest of Williams and his heirs and assigns shall cease. Nor does it give to Williams or to his heirs or as-

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signs any power to terminate said contract. And we hardly think it even gives to Carr any such power. But even if it does give to Carr any such power, he has never in fact exercised it. The defendants do not rely upon any actual termination of their original contract. But they rely merely upon a subsequent executory contract, providing by its terms that the parties should thereafter within three weeks, and upon certain conditions, terminate such original contract. Now where is the consideration for this executory contract? If Carr had the absolute right at his own option to terminate said original contract, then where was the new consideration going to Carr to sustain an executory contract compelling him to terminate said original contract? If however Carr had no such right to terminate said original contract at his own option, and if therefore the defendants' promise to surrender their equitable title, and the title papers to said land, is a sufficient consideration for the plaintiff's promise to surrender the notes, and to terminate said original contract, then this new contract is an executory parol contract for the sale and transfer of an interest in land, and is therefore void under the statute of frauds.

Before closing this opinion we might say that the title-bond itself gives to Carr the right to "elect to pursue his remedy *in law or equity* for the enforcement of said payment" of said promissory notes. And he is now pursuing just such a remedy.

The judgment of the court below will be reversed, and cause remanded to the court below for a new trial.

BREWER, J., concurring.

HORTON, C. J., not sitting in the case.

Clippenger v. Ingram.

PETER CLIPPINGER V. JOHN INGRAM & Co.

COSTS; JUDGMENT; *Presumption as to Taxing Costs.* Where the costs, in a case brought to the supreme court, have not yet been taxed, and the judgment with reference to the amount thereof is left blank, but the judgment will authorize a correct taxation of the costs, it will be presumed that the costs will be taxed correctly; and the judgment will not be reversed because of any supposed danger of the costs being taxed incorrectly. [*Swartzell v. Rogers*, 3-380; *Linton v. Housh*, 4-538; *Costello v. Wilhelm*, 13-232.]

Error from Nemaha District Court.

ACTION by *Ingram & Co.*, millers, on an account. Amount claimed, \$94.63. *Clippenger* filed a bill of particulars, claiming a set-off amounting to \$228.50. The proceedings are fully stated in the opinion. The plaintiffs had judgment at the April Term 1875, and defendant brings the case here.

Joseph Sharpe, for plaintiff in error.

C. W. Edgar, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This action was originally commenced in a justice's court. After trial and judgment before the justice, the case was appealed to the district court, where it was again tried, by the court and a jury, upon a petition, answer, and reply. The verdict of the jury was in favor of the plaintiffs below (defendants in error,) and against the plaintiff in error, *Clippenger*, who was defendant below. The jury assessed the damages at \$93.68. The district court rendered judgment, "that the plaintiffs have and recover of and from the said defendant Peter Clippenger the sum of \$93.68, as aforesaid found due, and the further sum of \$—— as costs in this behalf expended; and ordered that execution issue therefor." The defendant *Clippenger* then made a motion to set aside the verdict of the jury, and for a new trial, on the ground that "the said verdict is against the evidence in the case," which motion was

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overruled. The defendant then brought the case to this court, and makes the following assignments of error:

"1st, The district court erred in overruling the motion to set aside the verdict of the jury, and grant a new trial.

"2d, The district court erred in rendering judgment in favor of said plaintiffs, when the evidence in the cause produced by the plaintiffs shows that the judgment should have been for defendant.

"3d, The district court erred in rendering judgment for plaintiff against the weight of the evidence in the case.

"4th, The district court erred in rendering judgment against Peter Clippenger for costs as well in the district court as in the court of the justice of the peace before whom the trial was had; that the costs taxed by said justice of the peace were erroneous, illegal, and extortionate."

We think the verdict of the jury is sustained by sufficient evidence. But certainly we cannot say that it is not sustained by sufficient evidence, for the record does not show that all the evidence has been brought to this court.

It will be seen that the costs of this case have not yet been taxed, and the judgment with reference to the amount thereof is left blank. It would seem that the plaintiff in error has fears that the costs may be taxed erroneously. We presume however that they will be taxed correctly. The judgment will certainly authorize a correct taxation of the costs. If however the clerk should tax them erroneously the court would undoubtedly correct the taxation on motion. (*Linton v. Housh*, 4 Kas. 536, 541.)

We perceive no error in this case; and therefore the judgment of the court below must be affirmed.

BREWER, J., concurring.

HORTON, C. J., not sitting in the case.

PETER CLIPPENGER V. JOHN INGRAM.

OFFER THAT PLAINTIFF TAKE JUDGMENT, *In Action for Recovery of Money Only; Costs on Refusal.* A defendant in a civil action for assault and battery may, at any time before trial, although he may have already answered by filing a general denial, serve upon the plaintiff, in accordance with section 523 of the civil code, an offer in writing to allow judgment to be taken against him for a sum specified in such offer, and then, if the plaintiff fail to accept such offer, and afterward fails to recover judgment against the defendant for more than the amount so offered, the defendant may, in the same action, recover judgment against the plaintiff for costs accruing after such offer.

Error from Nemaha District Court.

ALL necessary facts are stated in the opinion. The judgment appealed from was given by the district court at the April Term 1875.

Joseph Sharpe, for plaintiff.

C. W. Edgar, for defendant.

The opinion of the court was delivered by

VALENTINE, J.: This was a civil action for assault and battery, brought by Peter Clippenger against John Ingram. The action was commenced January 25th 1875. The defendant answered by filing a general denial, February 16th. On April 6th, the defendant served a notice in writing upon the plaintiff that he (the defendant) would allow judgment to be taken against him in such action for the sum of ten dollars. This notice was drawn up and served in accordance with the provisions of section 523 of the civil code. (Gen. Stat. 782.) The plaintiff refused to accept the offer of the defendant, and so the action proceeded to trial and judgment. The trial was had before a jury, and the jury found a verdict in favor of the plaintiff and against the defendant, and assessed the damages at two dollars. The defendant then moved the court "that the plaintiff be taxed with all the costs in this case made in

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the case since the offer and tender of a judgment by the defendant to plaintiff," and the court upon the hearing of the motion sustained the same, and rendered judgment accordingly. The judgment was rendered in favor of the plaintiff and against the defendant for two dollars, and costs made up to April 6th 1875, and in favor of the defendant and against the plaintiff for costs made subsequent to said April 6th. The plaintiff complains of this judgment, and asks of this court to have said judgment reversed so far as it taxes the costs which accrued subsequently to the making of the offer on April 6th 1875. The plaintiff claims that said section 523 has no application to this case, nor to this class of cases. He claims that it applies only to such cases as are founded upon contract, and where the amount claimed is ascertainable by mere calculation, and is liquidated and certain. We know of no good reason **however** why the operation of said statute should be thus limited. Its operation is not thus limited by its own express terms. And we think there are many good reasons why its operation should not be thus limited. The statute, so far as it is necessary to quote it, reads as follows:

"The defendant in an action for the recovery of money only, may, at any time before the trial, serve upon the plaintiff or his attorney an offer in writing to allow judgment to be taken against him for the sum specified therein. * * * If the notice of acceptance [by the plaintiff] be not given [to the defendant] in the period limited, the offer shall be deemed withdrawn, and shall not be given in evidence, or mentioned on the trial. If the plaintiff fails to obtain judgment for more than was offered by the defendant, he shall pay the defendant's costs from the time of the offer."

Is not this "an action for the recovery of money only?" If it is not, then what else does the plaintiff ask to recover? It is certainly not an action for the recovery of any specific real or personal property, or to enforce a lien, or to compel specific performance, to set aside any instrument, or proceeding; nor for injunction, mandamus, or *quo warranto*; nor for divorce, nor for any other specific relief aside from the recovery of money. And the last sentence in the statute above quoted

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certainly contemplates an uncertainty in the amount of the judgment that may be recovered. And as that sentence provides that "if the plaintiff fails to obtain judgment for more than was offered by the defendant, he shall pay the defendant's costs from the time of the offer," we think a judgment may be rendered in the same action in favor of the defendant and against the plaintiff for such costs. There is no decision in any state, so far as we are informed, holding that said § 523, or any corresponding section, is not applicable to this class of cases, or that the judgment we have indicated is not a proper judgment in a case like the one at bar. In Ohio under § 498 of their code, (same as § 528 of ours,) which provides that in "an action for the recovery of money" the defendant may "*in court*" offer to confess judgment, etc., and then if the plaintiff refuse to accept the offer and "on the trial, do not recover more than was so offered to be confessed, such plaintiff shall pay all the costs of the defendant incurred after the offer," it was held, in an action "for a trespass upon the plaintiff's land, and injury to his cattle," that the defendant might make the offer, and if the plaintiff refused, and then recovered less than was offered, judgment might be rendered in favor of the defendant and against the plaintiff for the defendant's costs accruing after such offer. (*Cartwright v. Stagers*, 15 Ohio St. 511).

In the present case we think the plaintiff was entitled to recover costs only up to April 6th 1875, and the defendant was entitled to recover costs accruing thereafter. We think the court below committed no error in this case. Therefore the judgment of the court below will be affirmed.

BREWER, J., concurring.

HORTON, C. J., not sitting in the case.

BRIGGS & WATSON V. J. G. EGGAN.

SEPARATE FINDINGS OF FACT AND OF LAW; When Error Not to Make. Where an action is tried by the court without a jury, and one of the parties requests the court, in accordance with section 290 of the civil code, to state in writing, its conclusions of fact found, separately from its conclusions of law, and the court refuses so to do, and makes only one general finding of fact and of law, which finding is against the party making such request, and in favor of the other party, and judgment is rendered according to such finding, the court commits substantial error.

Error from Atchison District Court.

EGGAN, as plaintiff, had judgment at the March Term 1875, against Briggs and another. The errors complained of are fully stated in the opinion. Defendants bring the case here.

Aaron S. Everest, for plaintiffs in error.

T Melcalf, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action on a written guaranty for the payment of a certain promissory note. The action was commenced and first tried in a justice's court. It was then taken on appeal to the district court, where it was again tried. This second trial was before the court alone, a jury having been waived. After all the evidence was introduced on the trial, but before any finding was made by the court, the defendants below (plaintiffs in error) requested the court to state in writing its conclusions of fact found, separately from its conclusions of law. This the court refused, and then found generally in favor of the plaintiff below, and ordered that judgment be rendered accordingly for the sum of \$166.56, to all of which the defendants duly excepted. The defendants then made said request again, this time making it in a more

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formal and elaborate manner than before, and the court again refused, and the defendants again excepted. The defendants then in a very formal manner presented to the court seventeen written conclusions of fact, and one written conclusion of law, and requested the court to adopt then, or to adopt any part or portion thereof which the court might think proper; but the court wholly refused, and refused to even entertain the defendants' request, and the defendants again excepted. The court then rendered judgment in favor of the plaintiff and against the defendants for \$166.56, and costs, and the defendants again excepted. The defendants, within proper time, made a motion for a new trial, upon various grounds, one at least of which grounds would include the said supposed errors of the court in refusing to find separately and specially, which motion the court overruled, and the defendants again excepted. Defendants now, as plaintiffs in error, present said supposed errors of the court below to this court, and ask that the judgment of the court below shall be reversed because of such errors. The court below certainly erred in refusing to make said separate conclusions of fact, and conclusions of law, and for such error we think the judgment rendered in the case must be reversed. Section 290 of the civil code provides as follows:

"Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding, except generally, for the plaintiff or defendant, unless one of the parties request it with the view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state, in writing, the conclusions of fact found, separately from the conclusions of law." (Gen. Stat. 684.)

That the right of a party to have the court make separate conclusions of fact and of law is a substantial right, we would refer to the following cases: *Major v. Major*, 2 Kas. 387; *Lacy v. Dunn*, 5 Kas. 567; *Shelton v. Dunn*, 6 Kas. 182, 183; *Ulrich v. Ulrich*, 8 Kas. 402, 409; *St. L. & C. Rly. Co. v. Piper*, 13 Kas. 505; *Gest v. Kenner's Adm'r*, 7 Ohio St. 75; *C. & T. Rld.*

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Co. v. Johnson, 10 Ohio St. 591. And that a judgment should be reversed for a refusal to grant such right, see, *Russell v. Armador*, 2 Cal. 305; *Hoagland v. Clary*, 2 Cal. 474; *Brown v. Brown*, 3 Cal. 111; *Lee v. Marsh*, 19 Mich. 11; *Stancell v. Corning*, 21 Mich. 242; *Evans v. Kappes*, 10 Iowa, 586; *Ogden v. Glidden*, 9 Wis. 47. This court has held, under the laws of 1870, (page 173, § 7,) that it was substantial error for the court to refuse to direct the jury to find a special verdict when requested to do so by either party. (*L. L. & G. Rld. Co. v. Rice*, 10 Kas. 426, 435; *Bush v. Peake*, 14 Kas. 290; *National Bank v. Peck*, 8 Kas. 665.) And this court has also held, under the laws of 1874, (pages 140, 141, § 1,) that it was substantial error for the court to refuse to direct the jury to find upon particular questions of fact in addition to their general verdict, when requested so to do by either party. (*Bent v. Philbrick*, 16 Kas. 190.) And we think the court committed substantial error in this case by refusing to make special findings of fact and of law, as requested by the defendants below. Of course, the court is not bound to make special findings concerning immaterial facts; nor is the court bound to find the material facts in any greater detail than is really necessary for the correct decision, by a higher court, of the questions of law involved in the case. (*McCandliss v. Kelsey*, 16 Kas. 557; and cases applying to verdicts—*National Bank v. Peck*, 8 Kas. 661; *City of Wyandotte v. White*, 18 Kas. 190, 196; *Bent v. Philbrick*, 16 Kas. 190.) And of course, where the court attempts to make special findings, as requested by a party, and inadvertently fails to make a special finding upon some particular matter in controversy, or makes such finding in too general terms, the court does not thereby commit substantial error, unless its attention is first called to the omission to find, or to the defective finding, and it then fails or refuses to correct the same. (See cases with respect to verdicts, which are analogous; *Hazard Powder Co. v. Viergutz*, 6 Kas. 471; *Arthur v. Wallace*, 8 Kas. 267; *Copeland v. Majors*, 9 Kas. 104; *K. P. Rly. Co. v. Pointer*, 14 Kas. 51, 52; *Carlin v. Donegan*, 15 Kas. 496.)

Stanley v. Farmers' Bank.

The judgment of the court below in this case is reversed, and cause remanded for a new trial.

BREWER, J., concurring.

HORTON, C. J., not sitting in the case.

DAVID STANLEY *et al.* v. THE FARMERS' BANK.

1. CORPORATION; PLEADING; *Denials in Justices' Courts.* In a justice's court the existence of a corporation may be put in issue by the defendant without a denial under oath, and even without a written denial of any kind.
2. ——— *Proceedings and Rights, on Appeal.* On appeal from a justice of the peace to the district court, each party may, without filing new pleadings, prove any cause of action or defense which he might have proved before the justice, and each may introduce any evidence which he might have introduced before the justice. [See cases cited, *ante*, 240; also, *Ziegler v. Osborne*, 23-467; *Eggan v. Briggs*, 23-714; *Wagstaff v. Challiss*, 31-215; *Douglas v. Easter*, 32-497; *Wagstaff v. Challiss*, 29-506.]
3. ——— The district court may allow new pleadings to be filed, in cases appealed from a justice's court, only "in furtherance of justice." [*Robbins v. Sackett*, 23-304.]
4. INDORSER; DEMAND, AND NOTICE, *When to be Made, and Given.* Where a promissory note became due April 4th, and the last day of grace was April 7th, and two demands for payment were made—one on April 7th, by a general agent of the holder of the note, and the other on April 8th, by a notary public, and no notice of the first demand was ever given to the indorser, but only a notice of the second demand was given to him, which second demand was one day too late, held, that the indorser was discharged. [*Swartz v. Redfield*, 13-550; *Couch v. Sherrill*, post, 622; *Braley v. Buchanan*, 21-274; *Shelby v. Judd*, 24-161; *Selover v. Snively*, 24-672; *Bradford v. Pauly*, 18-216.]
5. ATTORNEY-FEE, *When Recoverable.* The court below committed no error in rendering judgment for an attorney-fee, which attorney-fee was stipulated for in the note. [See C. L. 1881, ch. 63, sec. 8a.]

Error from Jackson District Court.

THE Bank had judgment against Stanley and Rose, defendants, at the October Term 1874. The defendants bring the case here. The facts and proceedings are stated in the opinion.

Chas. Hayden, for plaintiffs in error.

H. J. Ransom, and C. Broderick, for defendant in error.

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The opinion of the court was delivered by

VALENTINE, J.: The following statement of facts is from the brief of plaintiffs in error:

"This case was originally commenced before a justice of the peace. The plaintiff below filed a bill of particulars, alleging in general terms that it claimed judgment against the defendants for \$218, and the further sum of \$25.98 for damages, protest-fees and attorney-fees, with interest, etc., upon a promissory note, a copy of which was set forth in a certificate of protest attached to and filed with the bill of particulars. Said note was dated March 5th 1874, was made by David Stanley, payable to order of E. D. Rose, due thirty days after the date thereof, and contained a stipulation to pay five per cent. as attorney-fees if suit be instituted on the note—negotiable and payable at the Farmers' Bank, to H. J. Ransom, cashier, and was indorsed by E. D. Rose. The certificate of protest showed that demand for payment was made, and the note protested for non-payment April 8th 1874. The defendants below did not appear at the trial before the justice, and judgment was rendered against them for the amount claimed. Defendants appealed, and the cause came on for trial in the district court at the October Term 1874. The defendants asked leave to file an answer, verified by affidavit of Stanley, denying that plaintiff was a corporation—which was refused by the court, and the ruling excepted to. At the trial in the district court, defendants moved to exclude all testimony, on the ground that plaintiff's bill of particulars did not state facts sufficient to constitute a cause of action—which motion was overruled, and the ruling excepted to. Plaintiff then offered in evidence the certificate of protest and copy of the note. Defendants' objections to the evidence overruled, and the ruling excepted to. Plaintiff then called as a witness, W. H. Dodge, who testified that he was a notary public, and demanded payment of the note on the 8th of April 1874, and the same day delivered to Rose a notice of the demand as stated in his certificate of protest." All of his evidence objected to; objections overruled, and the rulings excepted to. Plaintiff then called as a witness, H. J. Ransom, who testified that he was cashier of the Farmers' Bank; that Stanley had no money in the bank to pay the note, and that on the last day of grace he demanded payment from Stanley. Objections to this evidence overruled, and the rulings ex-

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cepted to. Ransom also testified that he made no demand on Rose, and never notified him that the note was not paid. The judgment of the district court was in favor of plaintiff below for \$226.25 debt, \$15.08 notarial fees and protest damages, \$10.90 attorney's fees, and costs of suit. New trial refused, and defendants excepted."

Upon this statement of facts, plaintiffs in error (defendants below) contended that the judgment of the district court should be reversed, for the reasons following—quoting from their brief:

"1st.—The district court erred in refusing to allow the defendants below to file their answer, verified by affidavit of Stanley, alleging that plaintiff was not a corporation. Although plaintiff below did not in terms allege that it was a corporation yet it sued in an appropriate corporate name, and in such case there is an implied averment that it is a corporation. (41 Barb. 571.) The second defense offered would therefore constitute a perfect defense.

"2d.—The bill of particulars filed by plaintiff below does not state facts sufficient to constitute a cause of action against E. D. Rose, one of the defendants below; and the district court erred in overruling the motion to exclude all evidence at the trial. The last day of grace of the note was the 7th of April 1874. The certificate of protest attached to, filed with, and treated as a part of the bill of particulars, states that a demand was made on the 8th of said April, and this is the only intimation contained in the bill of particulars, or the exhibits, that a demand was ever made.

"3d.—The court erred in admitting in evidence the notarial certificate of protest. The certificate states in effect that the indorser was notified that a demand had been made on the 8th of April—one day after the last day of grace. Such a demand is insufficient, and a notice showing that presentment was not made on the proper day, does not charge the indorser.

"4th.—The district court erred in receiving the testimony of H. J. Ransom, showing that he made a personal demand from Stanley on the last day of grace. The plaintiff below having alleged in its bill of particulars that the demand was made by the notary on the 8th of April, it was bound by the case made by its pleadings.

"5th.—The judgment is not supported by the evidence.

No evidence was offered in the district court to prove that defendant in error is a corporation. No notice was given to Rose that a demand was made on Stanley on the last day of grace. The notice of non-payment, to charge an indorser, must show that the presentment was made at the proper time. (4 Denio, 168; Edwards on Bills, 591.)

"6th.—The district court erred in rendering judgment against plaintiff-in-error Rose, as a principal debtor. The evidence of Ransom shows that Rose signed the note as surety for Stanley. (Gen. Stat. 720, § 470.)

"7th.—The court erred in allowing protest fees and damages. The protest being illegal, for reasons already given, no protest fees or damages could properly be allowed. (9 Kas. 640.)

"8th.—The district court erred in rendering judgment for an attorney-fee. The stipulation contained in the note to pay five per cent. attorney-fee, is usurious and void. (10 Ohio, 378.)"

The above and foregoing is taken from the brief of plaintiffs in error. The note sued on reads as follows:

"HOLTON, KANSAS, MARCH 5th 1874. \$218.00. Thirty days after date, I promise to pay to the order of E. D. Rose two hundred and eighteen dollars, and five per cent. attorney's fees if suit be instituted on this note, value received, and negotiable and payable at the Farmers' Bank, to H. J. Ransom, cashier.

DAVID STANLEY."

"Due April 7th, 1874."

Indorsed, "E. D. ROSE."

We shall now reply to the points made by the plaintiffs in error in their brief. Section 122 of the justices act, as amended in 1870, (Laws of 1870, page 184, § 7,) provides among other things, that any case appealed from a justice's court to the district court "shall be tried *de novo* in the district court upon the original papers on which the cause was tried before the justice, unless the appellate court, in furtherance of justice, allow amended pleadings to be made, or new pleadings to be filed." Now we suppose it can scarcely be claimed that it was necessary for the court below "*in furtherance of justice*" to allow the plaintiffs in error (defendant's below) to file their said answer. *First*, It was not necessary for any purpose for which they may have wanted to use it. If it had been filed, it would not

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have given them any new or more extended rights or privileges. In a justice's court the existence of a corporation may be put in issue by the defendant without a denial under oath, (Gen. Stat. 794, § 84,) and even without a written denial of any kind. (Gen. Stat. 791, §§ 71, 72, 73.) And on an appeal to the district court, the parties lose no rights, and gain none. Each party, without filing new pleadings, may prove any cause of action or defense which he might have proved before the justice, and each may introduce any evidence which he might have introduced before the justice. Therefore, the defendants in this case could have introduced on the trial any evidence to prove any defense which they might have had, just as well without said answer as with it. (*German v. Ritchie*, 9 Kas. 106, 111; *Sanford v. Shepard*, 14 Kas, 228, 231.) *Second*: But even if said answer would have been of any benefit to the defendants, still it would have been *against justice*, instead of being "in furtherance of justice," for the court to have allowed the defendants to file it. After the defendants got their money from said bank, and acknowledged the existence of the bank on the face of their note, and after being sued by the bank on the note in a justice's court, and judgment rendered against them, and after they appealed to the district court, and then waited until the case was called for trial in the district court before attempting to set up any such defense, and even then not making the slightest showing why they had been so long in default, it would not have been "in furtherance of justice" to have allowed them to file any such answer. It would seem that the bank had sufficient capacity to loan them the money, and they should not now attempt to deny its capacity to sue them for it.

II. The second to seventh points, inclusive, submitted by plaintiffs in error, may be considered together. The demand of payment made by the notary public, and the only demand of which the defendant Rose had any notice, was made one day too late, and was therefore ineffectual, and void. The note became due April 4th 1874. The last day of grace was April 7th. The only demand of which the defendant Rose

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had notice, was not made until April 8th. It was shown however on the trial, that H. J. Ransom, cashier of the bank, made a demand on the proper day. But of this demand the defendant Rose had no notice. The only notice of any demand ever given to him was a notice showing that W. H. Dodge, the notary public, made a demand on April 8th. Now we do not think that the defendant Rose ever had any sufficient notice of any sufficient demand, and therefore he cannot be held liable for the payment of said note. And therefore the judgment rendered against him must be wholly set aside and reversed. This decision does not infringe upon that rule of law often enunciated, that mistakes or irregularities not calculated to mislead the indorser, and which he could easily correct by facts within his own knowledge, will not render the notice invalid. Whether the defendant Rose was actually misled, or would be actually injured in this case if he were held liable, is not shown. It must be presumed however that he was misled. Evidently, he would not under such a notice take any steps to secure himself by giving notice to any of the prior indorsers, (if there were any such indorsers,) or by any other means, for evidently he would suppose that the demand itself was so far void that none of the indorsers prior or subsequent could be held as liable by reason of such demand. The following cases, though not directly in point, are to some extent analogous to this case: *Ransom v. Mack*, 2 Hill, (N. Y.) 587; *Walmsley v. Acton*, 44 Barb. 312; *Arnold v. Kimlock*, 50 Barbour, 44; *Wyman v. Alden*, 4 Denio, 163; *Etting v. Schuylkill Bank*, 2 Penn. St. 355; *Townsend v. Lorain Bank*, 2 Ohio St. 345, 359; *Routh v. Robertson*, 11 (S. & M.) Miss. 382. The above cases hold that the notice therein given was insufficient. The following cases hold it to be sufficient: *Crocker v. Getchell*, 23 Me. 392; *Ontario Bank v. Petrie*, 3 Wend. 456; *Journey v. Pierce*, 2 Houston (Del.) 176. In the last three cases the demand was in fact made on the right day, and notice of that very demand was given in due time. But there was a mistake in the date of the notice, making it appear that the demand was made too soon or too late by a day or two. The

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indorser however was not misled in either of the above three cases, and therefore it was held that he was not discharged. In the case at bar, there was sufficient evidence introduced on the trial from which the court could find that the plaintiff was a corporation, and there was no evidence to the reverse.

III. With respect to the 8th proposition of counsel, we do not think that the court below erred in rendering judgment for an attorney fee. (*Tholen v. Duffey*, 7 Kas. 405, 409, et seq.; *Sharp v. Barker*, 11 Kas. 381.)

The judgment of the court below will be reversed as to the defendant Rose, and will be modified as to the defendant Stanley by striking out the sum of \$15.08 allowed as "notary fees and protest damages." In other respects it will be affirmed as to the defendant Stanley.

BREWER, J., concurring.

HORTON, C. J., not sitting in the case.

C. H. TAYLOR *et al.* v. W. A. THOMAS & Co.

1. **NEW TRIAL; SURPRISE; New Witness on Second Trial.** In an action in which there have been two trials, and the material question in issue is, whether 200,000 hedge plants were delivered by the plaintiffs to one of the defendants, and on the second trial one M. is produced for the first time by the plaintiffs as a witness in their behalf, and M. testifies that he was present at the alleged delivery, gives evidence of the conversation had by the parties at the time, corroborates plaintiffs' witnesses, and defendants introduce evidence that said witness was not present at the time, and after a verdict for the plaintiffs, defendants file a motion for a new trial on account of "surprise which ordinary prudence could not have guarded against," supported by affidavits that they had no knowledge of M., that his name was not mentioned on the former trial; that they were surprised at his evidence; that at the trial they had not time to prepare a defense thereto, and that if a new trial was granted they could and would produce two or three witnesses to testify that no such man as M. was present or about at the time of the alleged conversation, *held*, that the action of the district court, in refusing a new trial, will not be reversed by this court. [*Swartzell v. Rogers*, 3-369; *Boyd v. Sanford*, 14-280; *Race v. Malony*, 21-31; *Osborne v. Young*, 28-769; *Parker v. Bates*, 29-597; *Regents v. Linscott*, 30-242; *Beal v. Coddington*, 32-107.]

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2. **NEW TRIAL; NEWLY-DISCOVERED EVIDENCE, When Immaterial.** Where several witnesses testify on a trial, in support of the plaintiffs' cause of action, to the effect that 200,000 hedge plants were delivered, on or about April 9th 1873, to one of the defendants by plaintiffs, the acceptance thereof, and to their being in good condition at the time, and the defendants, after a verdict against them, ask for a new trial because of newly-discovered evidence which they could not with reasonable diligence have ascertained and produced on the trial, and the newly-discovered evidence is the sworn statement of H. that one of said witnesses told him the latter part of April 1873 that said defendant had refused to accept the hedge plants, excepting 75,000, because they were damaged; that said witness then told H. the plants were damaged by frost, and wanted H. to see the defendant and try to have him come and get the rest of the plants, *held*, that such newly-discovered evidence is not sufficiently material as to authorize the supreme court to reverse the order of the district court overruling the application for a new trial therefor. [*Klopp v. Jull*, 4-482; *Clark v. Hall*, 10-81; *Kirby v. Childs*, 10-639; *Smith v. Williams*, 11-106; *Boyd v. Sanford*, 14-280; *Thom v. Davis*, 16-22; *Mitchell v. Penlon*, 20-276; *Harris v. Thompson*, 23-372; *Clark v. Norman*, 24-515; *Moon v. Helfer*, 25-139; *Mannell v. Turner*, 25-426; *State v. Kearley*, 26-77; *Sexton v. Lamb*, 27-432; *Wilkes v. Wolback*, 30-375; *Baughman v. Penn*, 33-504.]
3. **EVIDENCE; EXAMINATION OF WITNESSES; Error Without Prejudice.** The refusal of the court to overrule certain questions calling for conclusions of law of a witness, where the witness in response states acts and conversations, instead of giving any opinion of his own, is not necessarily such error as to cause a reversal of a judgment, even when the questions are asked in reference to the material issue in the case. The proper practice, however, is, under such circumstances, to allow only such interrogatories as will call forth all the particulars of the transaction, including the lesser and minor details. [*Gannon v. Stevens*, 13-447; *Donnel v. Clark*, 12-154.]

Error from Sedgwick District Court.

ACTION by C. H. Taylor, M. R. Moser, and W. H. Omealy, as partners, on a promissory note executed in their favor by W. A. Thomas, N. W. Ellis, and W. L. Thomas, for \$350. The consideration of the note was 200,000 hedge plants to be delivered by Taylor & Co. to Thomas & Co. The defense was, that the note had been placed in escrow only by defendants, and that the plaintiffs had not performed their part of the contract. The case was in this court at the July Term 1874, upon questions then raised; (13 Kas. 217.) On being remanded to the district court, a second trial was there had at

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the March Term 1875. Verdict and judgment for plaintiffs, for \$432.25. New trial refused, and defendants bring the case here.

Tucker & Fisher, and *Martin & Case*, for plaintiffs in error.

Sluss & Dyer, for defendants in error.

The opinion of the court was delivered by

HORTON, C. J.: This case is in this court for the second time; and for a statement of the facts, we refer to *Taylor v. Thomas*, 13 Kas. 217. Upon the trial had subsequent to the said decision, testimony was offered tending to show the delivery of the 200,000 hedge plants, and the acceptance of the same by Taylor. Judgment was rendered for Thomas & Co. for \$432.35, and costs.

I. Plaintiffs in error claim that they are entitled to a new trial on the ground of surprise. The surprise for which the demand was made for a new trial, was, that one R. M. Montgomery, a witness produced by Thomas & Co. for the first time on the second trial, testified, "he was present when

Thomas and Taylor came to the nursery. Morris and Taylor's men counted some of the plants before Taylor got there. They had counted over 100,000. He heard Thomas tell Taylor that he had come down to turn over the plants. Morris told Taylor that they were to take 50,000 out of the other lot. They then went over to the other lot, and counted the 50,000. They then went and finished counting the 150,000 in the orchard. The plants were all tied up in bunches of 200. He could'nt tell whether the plants were all alive or not. He set the same kind of plants in Sumner county, and they appeared to do well—taken from Morris' place, and treated in the same manner as Taylor's. He set them out for P. Foutz. There were 17,000 of them. He counted them in the fall of the same year, and only 27 plants in one-and-a-half miles were dead." And two of the plaintiffs in error, Taylor and Moser, made affidavit, that they were present at the former trial, and

1. Surprise, as ground for new trial.

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heard the evidence of Thomas and the other witnesses, and no mention was made that said Montgomery was present when the hedge plants were claimed to have been accepted, and they had no knowledge of Montgomery or his evidence until Thomas mentioned Montgomery in his evidence at the last trial; that Montgomery was not present at the time stated by him; that he did not hear the conversation narrated; and if they had known of said person being produced as a witness to give such testimony, they could and would have shown by two or three witnesses that Montgomery was not present or about at the time alleged. S. M. Tucker and B. H. Fisher, attorneys of defendants in the court below, also filed an affidavit of like character as to said Montgomery's name not being mentioned in the first trial; that they were surprised at his evidence, and expected to be able to disprove the same if "a new trial was granted." We hold that the affidavits filed on the question of surprise do not show any sufficient cause for a new trial. The witness testified substantially as W. L. Thomas and L. C. Morris. His evidence was only cumulative. On the trial, Warren Longley and C. H. Taylor contradicted the witness Montgomery as to his presence at the nursery as stated by him. The affidavits fail to disclose the names or residence of the two or three witnesses by whom the testimony of Montgomery could be disproved; for aught that appears, they may have lived at Wichita, the place of trial, and a mere request to the court for a few hours adjournment might have been granted, and thus the attendance of the witnesses needed could have been obtained. Again, if Montgomery had been duly subpoenaed, and there is nothing appearing to contradict this presumption, the plaintiffs in error may have had ample time to ascertain what was going to be the purport of his testimony, and thus been more fully prepared to meet the same, if preparation was requisite, and they could successfully show he was not present at the time and place he testified to on the trial. In fact, the only showing made upon this point is, the absence of Montgomery on the former trial, and his appearance on the second trial, as a

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material witness for Thomas & Co. There is nothing particularly strange or unusual in this procedure. The plaintiffs in the court below may have supposed the testimony of themselves sufficient to sustain their case, without any additional evidence. When they ascertained that they were flatly contradicted, it was their right to produce upon the second trial all other witnesses having knowledge of the facts in controversy, and, if Montgomery could corroborate the claim of Thomas & Co., no rule of law would force them to relinquish his use as a witness, or to acquaint the opposing party with the facts they intended to prove, before placing such witness on examination. Montgomery's evidence may have been unexpected to the plaintiffs in error, may have astonished them, and they may have been unprepared to meet the same at the time; but it was not of the character, under the circumstances, which the law denominates "a surprise which ordinary prudence could not have guarded against." In such a case, there remains only the best use of the evidence at hand, and an appeal to the jury with fitting comments on the circumstances under which the witness is produced, and the character of his testimony. Any different rule would work great injustice.

II. A claim is also made, that the court erred because a new trial was not granted for newly-discovered evidence. L. C. Morris had testified on this trial, as a witness for Thomas & Co., to the delivery of 200,000 hedge plants to Taylor on or about April 9th 1878, his acceptance thereof, and also to their being in good condition at the time. As newly-discovered evidence, plaintiffs in error stated that since the trial, they had ascertained that one Hope would testify, that said Morris told him, in the latter part of April 1878, that Taylor had refused to accept the hedge plants, with the exception of 75,000, because they were damaged; that Morris then said they were damaged by frost, and wanted him (Hope) to see Taylor, and try to have him come and get the rest of the plants. The question is, whether, for this additional evidence, the court, in the exercise of its proper discretion, ought to open the controversy by granting a new trial.

2. Newly-discovered testimony.

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The object of the evidence of Hope is to discredit Morris—to destroy the effect of his testimony with the jury. We do not think the newly-discovered evidence sufficiently material to grant a new trial. Thomas and Montgomery testified substantially as Morris—hence his evidence did not stand alone. It is sometimes difficult to determine the exact point where a court should interfere and open a case to give an opportunity to a defeated party to give additional testimony; but on the facts presented in the record, we are of the opinion in this case, that the evidence of Hope is not of that kind upon the discovery of which a new trial should be granted. Counsel for plaintiffs in error refer us to *Klopp v. Jill*, 4 Kas. 482, as an authority in point, and allege they have brought themselves within the rule therein adopted by this court. Such is not the case. In that case, the parties litigant were their own best witnesses; each party swore distinctly and circumstantially to a state of facts denied by the other, and the case rested almost entirely upon the individual testimony of Jill. The newly-discovered evidence was certain admissions of Jill, directly opposite to the testimony given by him on the trial. Nor does the case at bar, come within the rule of the decision cited in *Klopp v. Jill*, of *Kane v. Barrus*, 2 Smedes & Marsh. 313. In the latter case, an action was brought upon a promissory note against the maker, in favor of the plaintiff's intestate. After verdict for plaintiff, defendant produced the affidavit of witnesses that they had heard the intestate acknowledge the payment of \$900 on the note, and due diligence being shown, the maker was awarded a new trial upon this newly-discovered evidence. In both of these cases, the newly-discovered evidence tended to destroy completely all the testimony upon which the verdicts were based. In the case under review, although Morris was an important witness, and the parties to the suit swore contrary to each other, there was so much other material proof that we cannot say the newly-discovered evidence would change the result, nor that it would likely have such an effect. It is even doubtful as to what influence it would have upon

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the jury, in connection with the other testimony, even if a new trial had been granted.

III. Error is also alleged in the action of the court below in permitting the following questions to be asked, against the objections of the plaintiffs in error: "State whether or not said plants were delivered?" and, "What was to be considered the delivery of the plants?" To the first question the witness

s. Evidence; ex-
amination of
witnesses.

answered, "They were: after they were counted, as stated in my answer to question No. 5, Mr. Taylor proceeded to pull out certain bunches and see if the count was full in the bunches. He said that he found that the count would overrun from six to twelve in each bunch." To the second he replied, "I was to tie them up in bunches of two hundred each. He was to take them from my nursery in that shape." As the important question in litigation was, whether there had been any delivery of the 200,000 hedge plants to Taylor, the proper ruling would have been for the court to have sustained the objections to these questions, and only allowed such interrogatories as would have called forth all the particulars and minor details of the transaction. The witness however did not confine himself to any opinion, or conclusion of law, in his answers. He stated the facts, as he claimed them to be, and we see no substantial error committed.

Error is further alleged in the charge of the court, and in the action of the court in refusing certain instructions asked by plaintiffs in error. The instructions given by the court are substantially in accordance with the law as laid down in the opinion of this court when this case was first under review here, (18 Kas. 217,) and as no new principle of law is now raised it is unnecessary to comment thereon. As the court gave the law in its instructions, it was useless to repeat them in a different form.

We think there was no error in any of the proceedings that would authorize a reversal of the judgment of the court below. The judgment will therefore be affirmed.

All the Justices concurring.

Jackson v. Stoner.

H. A. JACKSON v. S. S. STONER, *as Adm'r, &c.*

BILL OF EXCEPTIONS; Practice; Original Bill must be Filed. The office of a bill of exceptions is to bring upon the record some portion of those proceedings in a cause which do not otherwise go upon the record. It must therefore be filed in the court in which the proceedings are had, and it then becomes itself a part of the record of the cause. If a party desires to use this part of the record in proceedings in error, he should obtain a certified transcript, and attach the same to his petition in error. He may not take the original bill of exceptions, signed, but never filed, and therefore never a part of the record, and attach that to his petition in error as sufficient evidence of the proceedings claimed to be erroneous. [*Gallagher v. Southwood*, 1-143; *Brown v. Rhodes*, 1-339; *State v. Montgomery*, 8-356; *Lounsberry v. Rakestraw*, 14-153; *Kahinka v. Cawker*, 16-65; *Pates v. Parkinson*, 18-465; *State v. Bohan*, 19-48; *Shumaker v. O'Brien*, 19-476, 335; *Whitney v. Harris*, 21-97; *Minnis v. Jordan*, 24-267; *State v. Schonewald*, 26-289, 290; *State v. Nickerson*, 30-546.]

Error from Neosho District Court.

STONER, as administrator of the estate of one Strayer, deceased, recovered a judgment before a justice of the peace against Jackson. Jackson removed the case to the district court by petition in error. The record shows that the trial before the justice was on the 27th of March 1874; that Jackson filed a petition in error in the district court the next day, March 28th, which petition was dismissed on Jackson's motion, and at his costs, April 17th 1874, and that he had leave to withdraw his petition and exhibit from the files; that on the 18th of April a second petition in error was filed in the district court by Jackson; that at the December Term 1874, said second petition in error was heard, and that the district court affirmed the judgment of the justice. From this judgment of affirmance Jackson now appeals, and brings the record to this court for review.

Carpenter & Jones, for plaintiff in error.

Allen & Allen, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: Defendant in error recovered a judgment in a justice's court. Plaintiff in error sought to review that judg-

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ment, by petition in error in the district court, but that court affirmed the judgment; and he now brings the case here. The first question we meet, and one which, after examination, we are compelled to decide against the plaintiff in error, is, whether there is any properly-authenticated bill of exceptions. The facts are these: Attached to the petition in error, as filed in the district court, was what appeared to be an original bill of exceptions, and a transcript from the docket of the justice. An examination of the transcript will fail to show that any bill of exceptions was ever taken. True, the justice states in his docket that such and such questions were asked, objected to, and objections sustained, and exceptions taken by defendant. This would seem to be simply his own recitation on his docket of what took place at the trial, and not a statement that a bill of exceptions had been duly prepared and signed. But conceding, under the liberal construction to be given to proceedings before justices, that the latter is the true import of the language, and was so intended by the justice, still there is nothing to show that the bill of exceptions was ever filed with him so as to become a part of his record. Upon the face of it, it purports to be an original document. It carries no file-marks of the justice. It bears no date. But in order to show that it must have been signed within the ten days provided by statute, (Laws 1870, p. 186, § 13,) counsel refer to the fact that it bears the file-marks of the clerk of the district court as of a date one day after the trial before the justice. While the file-mark may be sufficient for this purpose, it only makes more plain the fact that this paper, purporting to be a bill of exceptions, never became a part of the justice's record, for the certificate of the justice to the transcript which follows it bears date some twenty days thereafter. The fact doubtless is, as stated by counsel in their brief, that plaintiff in error filed a petition in error in the district court the day after the trial, with only the original bill of exceptions attached. Fearing that that did not contain a sufficient presentation of the case, he dismissed this proceeding and refiled his petition in error, adding to it a transcript from the justice's docket. The

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transcript therefore is dated long after the bill of exceptions **was first** filed in the district court. The office of a bill of exceptions is, to bring upon the record some portion of those **proceedings** in the case which do not of course and of right go upon the record. It is itself a part of the record; (Gen. Stat. p. 686, § 303; p. 798, § 112.) It is to be filed and left with the court in which it was taken, and is no more to be removed therefrom than any other part of the record. *Brown v. Rhodes*, 1 Kas. 359. If a party desires to use any part of the record, in other proceedings, in other courts, he is to take a certified copy. Now this bill of exceptions, though signed by the justice, does not appear to have ever been filed with him, or made a part of the record in the cause. And no transcript of any bill of exceptions certified to by the justice, was attached to the petition in error as it was filed in the district court. The plaintiff in error might with equal propriety have taken the leaf out of the justice's docket upon which the proceedings in this case were entered, and attached that to his petition, instead of obtaining a certified transcript. This may appear quite technical, and it may seem that if a certified transcript of a paper, after it had been filed was sufficient, the original, before it was filed, ought to be. But the law says a *transcript*; (Gen. Stat. p. 787, § 546;) and shall we hold that the district court erred when it followed the law? Nor is it an altogether arbitrary technicality. In this case it might not perhaps work any injury, but it can easily be seen that the due and orderly administration of justice might be interfered with if the records of a cause could be broken up, and a part removed from the court in which it was tried. Be that as it may, we cannot say that the district court erred in following the plain letter of the law.

The judgment will be affirmed.

All the Justices concurring.

Main v. Payne.

MARY W. MAIN v. MARTHA A. PAYNE *et al.*

1. **LIMITATION OF ACTIONS; Section 16 of Code, construed.** Section 16 of the civil code, relating to the limitation of actions, only applies to actions brought for the recovery of the possession of real property. [*Claggett v. Crall*, 12-393.]
2. ——— **Action for relief on the ground of Fraud; Implied Trusts; Section 18 of Code, construed.** Where A. purchases real estate as the agent of another, and pays for the same out of the funds of his principal, and without the knowledge and consent of his principal takes the deeds to the lands in his own name as the grantee, and thereafter retains the title to the property in himself to his death, and more than nine years after the purchase, and an action is brought after the decease of A. by his principal against the heirs-at-law of A. to have the heirs decreed trustees for the plaintiff's use and benefit of the legal title of such real estate, and to have them compelled to convey the legal title to the plaintiff, who is the equitable owner of the land, *held*, that such action comes within the provisions of subdivision third of section 18 of the civil code, as the action is for relief on the ground of fraud, and must be brought within two years after the cause of action has accrued. *Held*, also, that the statute excepts the principal from the limitation until a discovery of the fraud. [*Young v. Whittenhall*, 15-579; *Kennedy v. Kennedy*, 25-154; *Ryan v. R. R.*, 21-404; *Marbourg v. McCormick*, 27-39; *Woodman v. Davis*, 32-347.]

Error from Lyon District Court.

ACTION by *Mary W. Main* against *Martha Ann Payne*, *John W. Main*, and *Wm. T. Main*, to establish a trust and compel its execution. The facts and proceeding are sufficiently stated in the opinion. The order complained of, was made by the district court, at the September Term 1875.

Ruggles & Sterry, for plaintiff.

Buck & Kellogg, for defendants.

The opinion of the court was delivered by

HORTON, C. J.: This was an action brought by plaintiff in error against the defendants in error and others, the heirs-at-law of Daniel Main deceased, who died intestate May 1st 1875, being at the time of his death, and for more than thirty years prior thereto, the husband of plaintiff, to have his said heirs decreed to be trustees for

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the case.

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plaintiff's benefit and use of the legal title to all the real estate described in plaintiff's petition, lying in Lyon county, and to have a resulting trust decreed as to said lands, and said heirs decreed to execute said trust by conveying the legal title to the plaintiff, who claimed to be the equitable owner. The facts claimed by plaintiff, are, that while said Daniel Main was husband of plaintiff, and in February 1865, and March 1866, with plaintiff's sole and separate funds he purchased the lands in question as agent of plaintiff, and paid for the same solely out of her funds, and without her knowledge and consent took the deeds to the lands in his own name, and they remained in his name until his death. By reason of which facts, it is claimed that said Daniel Main was during his life, and his heirs-at-law since his death, are trustees of a resulting trust under sections 6 and 8 of the act relating to trusts and powers, (Gen. Stat. 1868, p. 1099.) This action was commenced on the 12th of July 1875. The defendants in error answered by setting up four defenses: 1st, a general denial; 2d, the five-years statute of limitations, with some averments to support the same; 3d, the three-years statute of limitations, with averments like unto the second defense; and, 4th, matters of contract as to one quarter-section of said land. The plaintiff demurred separately to the 2d and 3d defenses, on the ground that each wholly failed to state facts sufficient to constitute a defense, each of which demurrers were overruled, and plaintiff took exceptions, and she now brings the case here for review.

It is contended by the counsel for the plaintiff, that if any section of the statute of limitations applies, subdivision fourth of section 16, (Gen. Stat. 1868, p. 632,) is applicable, as the action is for the recovery of real property, and hence, the defenses which set up the three and five-years limitations are not good, as the plaintiff has fifteen years within which to bring her suit. Is the suit brought, an action for the recovery of real property? The petition does not allege the defendants are in the possession of the premises—does not state that plaintiff is entitled to the possession of the same,

Actions relating
to real estate,
distinguished.

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nor that the defendants unlawfully keep her out. It is not an ejectment action. Because the suit refers to real estate, does it necessarily follow that it is for the recovery of real property? An examination of the decisions of this court, and of the various provisions of the civil code, convinces us that an action may refer to real estate, and yet not come within the class of actions for the recovery of real property, and that the action in question is not an action of that character. It is held in *Swartzel v. Rogers*, 3 Kas. 374, that an action for partition is not an action for the recovery of real estate, and that the action for the recovery of real property, as used in sections 570 and 574, civil code of 1859, (Comp. Laws 1862, p. 224,) is a suit brought for the possession of real estate. In *Northrup & Chick v. Romary*, 6 Kas. 240, this court held that section 574, of the code of 1862, (sec. 599 of the code of 1868,) authorizing a new trial of course, in an action for the recovery of real property, applies only where the suit is brought to recover possession of real property under sec. 570 of the code of 1859, (or under sec. 595 of the code of 1868,) and does not apply to the action provided in sec. 569 of the code of 1859, and 594 of the code of 1868, by one in possession of real property against another claiming an adverse interest therein, for the determination thereof. Again, following the decisions cited, this court held in *Blackford v. Leveridge*, 10 Kas. 101, that an action to compel the specific performance of a contract for the sale and conveyance of real estate, and to quiet title and possession, by one in possession, is not an action for the recovery of real property, and that § 599, of the code of 1868, (Gen. Stat. 748,) does not give a party in such a case a new trial as a matter of right. In the case at bar, the plaintiff does not seek to obtain possession of the property; she has the equitable title, and for aught that appears, may now be in the possession of the premises. All that she seeks is, to have her title perfected. She asks that the legal title be conveyed to the equitable owner. The action does not come within the provisions of the fourth subdivision of section 16, civil code, and the fifteen-years limitation is not applicable. It is

1. Limitation of actions. Sec. 16 of civil code.

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claimed however that said § 16 of the code not only includes actions for the possession of real estate, but also such as determine any adverse right, or interest therein. It is true, if § 16 had been adopted without its subdivisions, which limit and circumscribe its meaning, the question would arise, whether this action under review, although not an action for possession, is an action for the determination of any adverse right or interest in real estate. Construing the whole section together, we can come to no other rational conclusion, than that the action therein referred to must include an action for the recovery of the possession of real property only. In such an action, the adverse right or interest of parties to real estate may be determined. As we find no limitation for the cause of action alleged in the petition in said section 16 of Sec. 16 of civil code. the code, we are compelled to examine and construe sec. 18, (page 633, Gen. Stat. 1868.) This section prescribes that—

“Civil actions, other than for the recovery of real property, can only be brought within the following periods after the cause of action shall have accrued and not afterwards; * * * *Third*, Within two years; * * * an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud. * * * *Sixth*, An action for relief, not hereinbefore provided for, can only be brought within five years after the cause of action shall have accrued.”

Having already concluded that this action is not one for the recovery of real property, and is not embraced in any of the provisions of section 16, it follows as a necessary sequence, that unless said action is provided for as to limitation in the subdivisions of section 18, prior to the sixth, said sixth subdivision is applicable. A cursory examination of the first, 2 Action for relief on the ground of fraud. second, fourth, and fifth subdivisions of section 18, is sufficient to establish that the cause of action under discussion is not included in any of them. But if the action is one for relief on the ground of fraud, subdivision third of section 18 covers the case. The facts stated in the petition are not consistent with fair dealing on the part of

Main v. Payne.

the agent towards his principal; nor that he was striving to honestly perform his duties. The agent being in a position to take advantage of the trust and confidence reposed in him, violates the trust, and takes to himself the title of property belonging to his principal. A fraud was actually committed against the rights of the principal, knowingly and purposely. The act of an agent under such circumstances, "is deemed fraudulent in law." It is not necessary that the action of the agent should be emphasized in the petition as having been done "fraudulently, or wrongfully." The acts themselves, being set forth, show this to be the fact. The intestate died in May 1875, more than nine years after the last purchase, and the retention of the title in himself only adds additional strength to the character of the fraud upon his principal. The fraud was consummated when the agent took the title to the property in his own name, at the time he made the purchase with the funds of his principal; but that an innocent party may not suffer while in ignorance of his rights, the statute excepts the plaintiff from the limitation, until a discovery of the fraud. *Young v. Whittenhall*, 15 Kas. 579. The gist of this action is, "for relief on the ground of fraud," and very clearly comes within the provision of said third subdivision of §18 of the code.

As the answer of the three-years statute and the five-years statute of limitations, states a time since the cause of action accrued which exceeds the time defined in said subdivision third for the limitation of an action for relief on the ground of fraud, the demurrer to the defenses of the three and five-years limitations was properly overruled. Both three and five include two. The greater includes the less, and either defense was sufficient. The code gives a party fifteen years in which to bring an action for the recovery of the possession of real property, and if the party seeks less than his full rights, or chooses to divide up his cause of action, a different and a lesser period of limitation is prescribed. In this case only two years. Under this view of the statute of limitations, as applied to the cause of action set forth in the plaintiff's petition, it is perhaps unnecessary to add, that the petition is defective in stating a

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cause of action which appears to be barred by the two-years statute. There is no allegation contained therein stating when the fraud was discovered, and as the title was taken to the intestate in 1865 and 1866, and as the action was not commenced till July 12th 1875, more than two years have elapsed since the cause of action accrued.

The judgment of the court below is affirmed.

All the Justices concurring.

JAMES Z. GAPEN *et al.* v. L. T. STEPHENSON.

1. *PURCHASER AT SHERIFF SALE; Assignment by Purchaser; Deed to Assignee.*

Where B. is the purchaser of real estate at a sheriff's sale, and before the return of the execution or order of sale, B. assigns his bid and right therein to W., and notifies the sheriff of such transfer, and directs the sheriff to insert in the report of his proceedings the name of W. as the purchaser, and thereafter the sheriff files the execution or order of sale with the court with a return thereon that he sold the property thereon at the sale to W., he being the highest bidder therefor, and that his bid was the highest and best price offered, *held*, that on a motion to set aside the sale on account of the substitution of the name of W. as the purchaser for that of B., the actual bidder, the court did not err in overruling such motion, and that the court, on confirming the sale, properly ordered the deed to be made to W. *Held, also*, That the sheriff could not contradict his official return in the case by his oral testimony to the court. [*Bond v. Wilson*, 8-228; *Starkweather v. Morgan*, 15-274.]

2. *MOTION TO SET ASIDE SHERIFF SALE; Appraiser; Disqualification; Appearance Cures Error.* The fact that an appraiser summoned at the time of the attachment to inventory and appraise the attached real estate, is disqualified to act, is not a ground to set aside a sale made under an execution upon a final judgment subsequently rendered in the same action, where there is an appearance by the defendant in the case prior to the judgment.

3. ——— *Homestead; Judgment Against Husband Alone.* Where an action is prosecuted against G., and an order of attachment is issued therein

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and a levy made thereunder upon real property claimed by G. to be his homestead, and G. files a motion to discharge the attached property for the reason that it is a homestead, and as such exempt from forced sale under any process in the case, which motion on due hearing is overruled by the court, and thereafter he and his wife interpose the same objection on a motion to set aside the sale after the judgment, *held*, that this court will not reverse the action of the court below in refusing to set aside the sale. [*Whitecrow v. Whitewing*, 3-276; *Harrison v. Andrews*, 18-535.] *Held*, also, That the order of the court below, overruling the motion of the husband and wife to set aside the sale of the property sold upon execution, will not affect the ultimate rights of said moving parties, nor be a bar to an action to determine whether said property is a homestead, and, as such, exempt from forced sale under the execution issued in the case. [*Treptow v. Buse*, 10-170.]

Error from Montgomery District Court.

ACTION by *Stephenson* against *James Z. Gapen*. An attachment at the commencement of the action (in August 1873) was issued, and levied on real estate. A motion by *Gapen* to discharge the attachment was overruled. Trial, and judgment in favor of *Stephenson*, at the September Term 1874, for \$3,000, and interest, and costs, and lien of attachment on real estate continued, and decree for the sale of attached property. Order of sale issued February 9th 1875. The sheriff's return shows that he "levied said writ" upon the real estate therein described, and caused the same to be duly appraised, and advertised, and that he sold the same on the 13th of March 1875, "for the sum of \$1,700, cash in hand, to Thos. H. Wills," etc. On the report of the sheriff being made, a motion to confirm said sale was filed, pending which said *Gapen*, defendant, and *Myra E.* his wife, moved to set aside said sale. (This latter motion is copied in the opinion, *infra*.) On the 27th of March 1875, at the March Term, the district court overruled and denied the motion of *Gapen* and wife, and thereupon, by proper order, confirmed the sale of said real property. *Gapen* and wife excepted, and now bring the case here for review.

Turner & Ralstin, for plaintiffs in error.

York & Humphrey, for defendant in error.

The opinion of the court was delivered by

HORROR, C. J.: Plaintiffs in error, by this proceeding, seek to reverse the order of the court below confirming the sale of the real estate made by the sheriff in the action. Upon the hearing of the motion to confirm, the plaintiffs in error interposed their motion to set aside the sale for the reasons—

“1st, That the sheriff returned Thomas H. Wills, as the purchaser at the sale, when in truth and in fact said Wills did not bid upon nor purchase the real estate at the sale, but one H. M. Bradley bid upon and was the purchaser of the property for himself, and not for Wills:

“2d, That the attachment proceedings in the suit, in which, after the judgment, the sale was made, were irregular, and not according to the provisions of law, as one of the persons selected and summoned by the sheriff to make an appraisement of the property attached was not a householder at the time of his selection, nor at the time of the appraisement under the attachment:

“3d, That the real estate was at the date of the attachment, at the time of judgment, and on the day of sale, the homestead of plaintiffs in error, and still continues to be their homestead, and is exempt from forced sale under any process of law; and that the judgment upon which the real estate was sold was not obtained for the payment of any obligation contracted for the purchase of the premises, nor for the erection of improvements thereon, nor was the execution issued to enforce any lien given by the consent of plaintiffs in error.”

The sale was ordered to satisfy a judgment wherein L. T. Stephenson was plaintiff, and James Z. Gapen was the only defendant. An order of attachment was issued and levied upon the land at the commencement of the action. Before the trial of the cause, the said James Z. Gapen moved to dissolve the attachment, assigning many causes, but including two of the grounds contained in the motion to set aside the sale, viz., that the land attached was the debtor's homestead, and that the appraisement in the attachment-proceedings was irregular, as one of the appraisers was not a householder.

L In support of the allegation that H. M. Bradley was the highest bidder at the sale and the purchaser, the court below

Gapen v. Stephenson.

permitted the sheriff to testify, that he made the return of sale in the name of Thos. H. Wills, upon the written order of Bradley, who was in fact the purchaser of the property sold upon execution. The order of Bradley to the sheriff was to the effect, that he had transferred the purchase made by him of the Gapen farm to Thos. H. Wills, and directing the sheriff to make his report of sale so that the confirmation would be in the name of Wills. The return upon the order of sale contradicts the statement of the sheriff, as therein the report is made, that he "sold at public auction the property for the sum of seventeen hundred dollars to Thomas H. Wills, he being the highest bidder, and the sum of \$1,700 being the highest and best price bid for the land." The sheriff might have been permitted by the court to have amended his return if it had been thought necessary, but the return could not be contradicted in this manner, and the first reason given for setting aside the sale is entirely insufficient. *Bond v. Wilson*, 8 Kas. 228; *Starkweather v. Morgan*, 15 Kas. 274. It seems also well settled, if the sheriff had made a return upon the order of sale, in accordance with the facts within his own personal knowledge, that upon a sale to Bradley, the deed could be made to Wills. The purchaser may at any time before the confirmation of the sale assign his bid to another, and the act will be confirmed by the court. *Lessee of Erving v. Higby*, 7 Ohio, 198, 204; *Thompson v. Manama*, 2 Disney's Rep. 213; *Jamison v. Indor*, 3 B. Mon. 357; *Frizzle v. Beach*, 1 Dana, (Ky.) 212.

II. The fact that an appraiser summoned at the time of the attachment to inventory and appraise the property, was disqualified under the law to act, is no ground to set aside a sale made under an execution upon a final judgment subsequently rendered in the action in which the property sold was levied upon under the order of attachment. Where there has been a general appearance by a defendant in the case prior to such judgment, any mere irregularity in the service, or proceedings under a writ of attachment, not taken advantage of by the defendant contesting the

1. Purchaser at
sheriff sale;
assignment of
bid. Deed to
assignee.

2. Appraiser;
attachment
proceedings;
error cured.

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action prior to the trial, is waived, and after judgment is no longer any matter of complaint. Sec. 228 of the code (Gen. Stat. 1868, p. 672,) giving authority to discharge an attachment as to the whole or a part of the property attached, prescribes that the defendant is to make the motion before judgment. After judgment, and a decree to sell the attached property, the object of the appraisalment under the process of attachment has been accomplished—the appraisalment has become, so to speak, *functus officio*. Before a sale can be made under the order of the court on the judgment, another appraisalment of the real estate must be had. In this case however, a motion to dissolve the attachment, and discharge the property attached, was made within the time prescribed, but as no error is assigned thereon we do not consider this question in this opinion.

III. The last question to be considered is, whether under the circumstances, the sale should have been set aside upon the motion that the property was the homestead of said James Z. and Myra E. Gapen. Myra E. Gapen was not a party to the action in which the attachment was issued, the judgment rendered, or the sale made. None of her rights could be prejudiced by any judgment, decree, or order of the court to which she was neither a party nor privy.

3. Homestead;
judgment
ag. last hus-
band alone.

If the farm in controversy is a homestead, in a proper proceeding the wife can be fully heard, and the law will give her a time, and place, and tribunal to establish her legal claims. This court has already held that a judgment rendered against the husband alone is not a lien on the homestead. *Morris v. Ward*, 5 Kas. 239. The fact that the wife joins her husband in the motion to set aside the sale, does not make her a party to the suit, and we must disregard her appearance in the matter, and consider the case the same as if the motion had been filed by James Z. Gapen alone. After Gapen had introduced all his evidence to support the motion to discharge the property as a homestead, Stephenson then offered in answer thereto the motion heretofore filed in the case to discharge the attachment, and the order of the court overruling the motion. The motion to set aside the sale, because the property was a home-

In re Ebenhack, Petitioner, dec.

stead, was virtually a renewal of the motion previously made by Gapen, and overruled by the court to discharge the attached property. While the doctrine of *res adjudicata*, in its strict sense, does not apply to this case, still, as the motion was once denied, and exceptions could have been taken thereto, and as the decision of the motion will not affect the ultimate rights of the parties in a regular suit involving the same issues, we see no cause for the interference of this court to reverse the order of the court below overruling the motion on the point presented, that the property is a homestead. "The court must be allowed a reasonable discretion in each case, in determining what shall, and what shall not be sufficient ground to set aside a sale." *White-Crow v. White-Wing*, 8 Kas. 276.

The order of the court below is affirmed.

All the Justices concurring.

In the matter of the Petition of JOHN EBENHACK, for a Writ of Habeas Corpus.

PROSECUTING WITNESS IN CRIMINAL CASES; *Liability for Costs, and to Imprisonment; Constitutional Law.* The legislature has power to provide that, when upon the trial of a misdemeanor the jury shall find the defendant not guilty, and shall also find that the prosecution was instituted from malice or without probable cause, the justice may adjudge the costs against the prosecuting witness, and, if he fail to pay or give security for their payment, may commit him to the county jail until they are paid. Such an imprisonment would be upon due process of law, and after the imprisoned party had had his day in court, and would not conflict with section 16 of the bill of rights, which prohibits imprisonment for debt except in cases of fraud. It follows, that § 18 of chapter 83 of the general statutes is constitutional and valid. [*Shields v. Comm'rs*, 5-590; *Comm'rs v. Whiting*, 4-278; *Comm'rs v. Hanback*, 4-282; *State v. Menhart*, 9-98; *State v. Campbell*, 19-481; *Comm'rs v. Wilson*, 19-485; *State v. Reimer*, 20-548; *Comm'rs v. Ballinger*, 20-590; *State v. Forney*, 31-635.]

Error from Greenwood District Court.

EBENHACK petitioned for a writ of *habeas corpus*. His petition (substituting the word "petitioner," for "plaintiff," with other necessary clerical corrections,) is as follows:

To the Honorable E. B. Peyton, Judge of the Fifth Judicial District, State of Kansas:

The petitioner respectfully represents to your honor; that he is now held in custody and restrained of his liberty by one J. L. Baker, sheriff of Greenwood county, state of Kansas, in the city of Eureka in the said county and state; that the cause and pretense of such restraint by said Baker is, that on the 12th of June 1875, your petitioner filed with one F. H. Clark an affidavit, subscribed and sworn to by petitioner, (the said Clark being at that time a justice of the peace in and for said Greenwood county,) charging John Homschidt, Herman Homschidt, and Perry Tuttle, with having willfully disturbed the peace and quiet of the petitioner and his family, on or about the 10th day of June 1875, and at divers and sundry times prior to and subsequent to said date, in said county of Greenwood, in violation of section 258 of chapter 31 of General Statutes of 1868, act defining crimes and punishments; that on the 2d and 3d days of August 1875, the said Herman Homschidt was tried on said charge by a jury of twelve men, before Ira P. Nye, a justice of the peace in and for said Greenwood county, (to whose court said action or proceeding had been duly changed and transferred;) that the said jury found the said Herman Homschidt "not guilty," and further found that the prosecution of the said Herman Homschidt was instituted without probable cause; that the said justice of the peace adjudged that the complainant (your petitioner, John Ebenhack,) pay the costs of said prosecution, taxed at \$135.55, and be committed to the county jail until said costs be paid; that your petitioner was by the said justice of the peace committed to the common jail of said Greenwood county, and to the custody of the said J. L. Baker, sheriff as aforesaid, until said costs were paid; and said Baker now restrains your petitioner under said commitment as aforesaid. Your petitioner further says, that said imprisonment is wholly illegal and unjustifiable in this: *First*, The law under which said petitioner was adjudged to pay said costs, and is held in custody, is unconstitutional and void. *Second*, The commitment under which he is held

In re Ebenhack, Petitioner, &c.

in custody, is not such an one as complies with the law, and is not a legal commitment. JOHN EBENHACK.

Said petition was duly sworn to by the petitioner, and the district judge allowed the writ, as prayed for. The sheriff made due return, stating that he held said *Ebenhack* in his custody, and restrained of his liberty, by virtue of a commitment, etc., a copy of which he annexed to and made a part of his return. This commitment is the one mentioned in the petition. It recites the proceedings before the justice, the judgment against *Ebenhack* for the costs, etc., and says:

"And whereas, the said *John Ebenhack* has failed to pay said costs, or any part thereof, or enter into the bond therefor, as provided by law, now therefore," etc.

The commitment is dated August 6th 1875, and is signed by Ira P. Nye, justice of the peace. Upon the hearing before the district judge, the following order was made:

"On this 10th of August 1875, this cause coming on to be heard by said judge at chambers, and said petitioner and said respondent appearing and being present, and the court having heard the same on the petition of said *Ebenhack*, and return thereto of said sheriff, it is by me, said judge, ordered and adjudged that said petitioner is illegally in custody, and that he be discharged, and that Greenwood county pay the costs hereof."

From this order an appeal was duly taken by and in the name of the sheriff, and the record is now brought to this court by petition in error for review.

Gillett & Forde, for the sheriff, contended, that said commitment was legal and valid, and that *Ebenhack* was lawfully imprisoned, and that the district judge erred in ordering the discharge of the petitioner.

T. L. Davis, for *Ebenhack*, contended, that the act under which the commitment was issued was unconstitutional and void.

The opinion of the court was delivered by

BREWER, J.: The single question in this case is, as to the constitutionality of section 18, page 881, of the General Stat-

Opinion of the Court.

utes. That provides in effect, that when upon a trial before a justice of the peace for misdemeanor it shall be found that the prosecution was instituted maliciously, or without probable cause, the prosecuting witness shall be adjudged to pay the costs, and unless a bond is given therefor shall be committed to the county jail until they are paid. It is objected that such an imprisonment would not be "upon due process of law," and that it could not be said that the prosecuting witness had had his "day in court." We do not consider the objections well taken. By coming into court and filing his complaint, he submits himself to the jurisdiction of the justice, and at the same time that the question of the guilt of the person, by his affidavit charged with crime, is tried, his own conduct in the premises is inquired into. True, he is not upon the record as a party plaintiff, or defendant; but the prosecution is instituted at his instance, and he appears upon the record as the complaining party. Many civil proceedings were formerly in the name of the state upon the relation of some one. The party plaintiff was the state, but the relator was none the less within the jurisdiction of the court, and might be reached and concluded by its order. In analogy to those proceedings the legislature has said in substance, that he who files a complaint for misdemeanor shall bring both himself and the defendant into court. It is true also, that no formal accusation is presented against the complainant upon which he is tried and found guilty, and that the first written statement of his wrong is in the finding and order; but the same is equally true in many cases in commitments for contempt. There, often the first writing is the order of the court committing the offender for the contempt. The proceeding is summary; but it is clear, that it is due process of law, and that the offender has had his day in court. Indeed, it may well be considered that he who maliciously, or without probable cause, invokes the process of a court to oppress and wrong an innocent party, by placing him under arrest and upon trial for violation of law, is guilty of a contempt of court. He has by his own wrong sought to prostitute the powers of the court to

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the injury of another; and that is conduct which merits, as it receives, the censure of all courts, and the condemnation of all persons.

Again, it is said that this is in conflict with section 16 of our bill of rights. "No person shall be imprisoned for debt except in cases of fraud." But these costs are cast upon him as a penalty—they do not constitute strictly and simply a debt, in the technical sense of the word, any more than the fine imposed upon a party convicted of assault and battery, is a debt. The legislature has in effect declared that an unwarranted appeal in this class of cases to the criminal law is itself a violation of law, and subjects the offender to punishment; and the penalty imposed is the costs of the unwarranted proceedings. *Shields v. Comm'rs of Shawnee County*, 5 Kas. 590; *State v. Donnell*, 11 Iowa, 452; *State v. Darr*, 63 N. C. 516.

The order of the district judge will be reversed, and the case remanded for further proceedings in accordance with the views herein expressed.

All the Justices concurring.

JOHN H. COUCH v. WM. B. SHERRILL.

INDORSER; PROTEST; NOTICE; Service of Notice; Sufficiency. Before an indorser can be held upon a note, it must appear that sufficient notice of protest was duly served upon him; and a finding that a notice, the contents of which are unknown, was served, is not equivalent to a finding that a notice of protest, much less that a sufficient notice of protest, was served. [*Swarts v. Redfield*, 13-550; ante, 592; *Brasley v. Buchanan*, 21-274; *Shelby v. Judd*, 24-161; *Selover v. Snively*, 24-672; *Bradford v. Pauly*, 18-216; *Bank v. Ober*, 31-607.]

Error from Bourbon District Court.

SHERRILL, as plaintiff, brought suit and recovered judgment against A. Hawkins and W. I. Linn, as makers, and J. H. Couch, as indorser, upon a promissory note for \$1,000, and interest, dated August 15th 1874, payable ninety days after date.

Briefs of Parties.

The plaintiff had judgment at the April Term 1875. Defendant *Couch* brings case here on error.

McComas & McKeighan, for plaintiff in error, contended, that the necessary steps were not taken by the holder of the note at its maturity, to make the indorser liable for its payment. The notary's certificate of protest was admitted in evidence. What does it prove? Simply, "a demand and refusal to pay at the time and the manner stated in such protest." (Sec. 18, p. 117, Gen. Stat.) There must be something more. The indorser must have notice of this demand and refusal to pay, and be informed that the holder looks to him for payment. This notice must contain a description of the note, an assertion that it has been duly presented to the maker and dishonored, and that the holder looks to the indorser for payment. (Story on Notes, § 348.) The court does not find that any such notice was given. In this matter the notary acts as agent for the holder, and he must see to it that proper notice is given. For aught that appears from the findings of the court, the notice sent to Couch might have been about patent medicines.

Harding & Buler, and *John Martin*, for defendant in error, submitted, that the certificate of protest, which is very full, and regular, sets forth demand, refusal, and notice of protest, of *all* of which facts it is *prima facie* evidence sufficient of itself to charge the indorser by the common law, independently of any statutory provisions. 41 Maine, 82; 36 N. H. 188; 1 Pars. Notes, 635, note *t*. The finding of facts shows that notice of the protest of the note was placed by the notary in the post-office at Fort Scott, in an envelope, postage paid, directed to "J. H. Couch, City." Notaries stand somewhat upon the same footing as mail carriers; so that all presumptions are in favor of the regularity of their official acts. 1 Pars. Notes, 480; *id.* 646, note *n*; 18 Kas. 462, 473.

The opinion of the court was delivered by

BREWER, J.: The plaintiff in error was indorser of a promissory note; and the only question in the case is, whether the findings show such notice of protest as will make him responsible to the holder. The testimony is not preserved, and the case stands alone upon the pleadings and findings. The only finding which bears upon the question of notice is this:

"4th. That upon the same day the said notary placed in the post-office in the city of Fort Scott, Kansas, in an envelope, postage paid, which envelope was addressed as follows: '*J. H. Couch, City,*' a notice, the contents of which he does not remember."

Does this finding show notice of protest? and such a notice as will bind the indorser? We think not. It was the duty of Sherrill, as plaintiff, and holder of the note, to prove that notice of protest was given to the indorser. There is no presumption in favor of the action of the notary, as official action, because it is no part of his duty as notary to serve notice. If he serve any notice, it is as agent of the holder, and not as notary. Hence, the finding as to notice is to be treated as though notice had been served by the holder. Now, what notice was served? Who can tell from these findings? It does not even appear to have been a notice of protest. It may have been, for all that the finding shows, as counsel for plaintiff in error suggest, a notice about patent medicines. We cannot presume that the notice given was a notice of protest, and also that it was a sufficient notice of protest to charge the indorser.

As the case stands upon findings of fact unquestioned by plaintiff or defendant, we must reverse the judgment, and remand the case with instructions to enter judgment upon the findings in favor of the plaintiff in error, defendant below.

All the Justices concurring.

N. J. SWAYZE V. C. A. BRITTON.

1. **NOTARY PUBLIC; Service of Notice of Protest; Agent of Party.** It is no part of the official duty of a notary public, by the general law-merchant, or the statute of this state, to give notice of the protest or dishonor of a bill, or note; and although it is usual and convenient for the notary to give the notice in such case, he is the mere agent of the holder or party authorized to give the notice. [*Couch v. Sherrill*, ante, 624; *Seaton v. Scofield*, 18-433, 436, et seq.; *Bank v. Ober*, 31-599.]
2. **CONSTITUTIONAL LAW; Title of Acts; Ch. 110, Laws of 1871.** Section one of chapter 110 of the laws of 1871, is unconstitutional and void, because in conflict with section 16 of article 2 of the constitution of the state, as the subject-matter therein contained is not expressed in the title to the act. [*Evans v. Adams*, 21-124; *Shepherd v. Helmers*, 23-508; *State v. Barrett*, 27-218, 222; *R. R. v. Long*, 27-692; *Philpin v. McCarty*, 24-402.]

Error from Chase District Court.

ACTION by *Swayze* against two parties as makers, and two others as indorsers, of a promissory note. The note was for \$1,500, dated 1st May 1875, payable ninety days thereafter, with interest from maturity at twelve per cent. per annum. The makers pleaded usury. The indorsers answered separately, and each a general denial. Trial at the December Term 1875. Findings and judgment for plaintiff against both makers and one indorser, for \$1,498.80, and costs, and finding in favor of defendant *Britton*, and judgment in his favor for costs. *Swayze*, plaintiff, brings the case here, seeking a reversal of the judgment as to defendant *Britton*.

Gillett & Forde, for plaintiff.

Ruggles & Sterry, for defendant Britton.

The opinion of the court was delivered by

HORTON, C. J.: In May 1869, this court in the case of *Hume v. Watt*, 5 Kas. 84, decided that when the indorser of a bill of exchange or promissory note resided in the same city or town where the protest thereof was made, notice of the dishonor of the bill or note must be personal, or by leaving it, if the party be absent, at his dwelling-house, or usual place of business.

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In 1871 the legislature attempted to change this rule, or rather to avoid this decision, by passing an act entitled "An act concerning notaries public," approved March 2d 1871, (Laws 1871, p. 270,) by the first section of which it is provided, that "services of notices of protest on parties residing in the town or city where such protest is made, may be by depositing such notice in the post-office, in a sealed envelope, addressed to such person, with the postage prepaid." The question is raised in this case, that the legislature was not successful in its attempt, because it is alleged that said section 1 of said law, (ch. 110, Laws of 1871,) is in conflict with that part of section 16 of article 2 of the constitution of the state, which prescribes, "No bill shall contain more than one subject, which shall be clearly expressed in its title." The facts in the case are that on May 1st 1875, John McDowall and Alex. Hughan made their promissory note to James Rayburn, whereby they agreed to pay to Rayburn or order, ninety days after date, fifteen hundred dollars, payable at the office of the Chase County Bank, in the city of Cottonwood Falls, in Chase county, Kansas, with interest at the rate of twelve per cent. per annum after maturity, and reasonable attorney-fees if collected by suit. The payee of the note, for a valuable consideration, and before its maturity, indorsed the note and delivered it to C. A. Britton, who for a valuable consideration indorsed the same and delivered it to plaintiff in error, who afterward brought suit thereon against the makers and indorsers. Britton answered separately. The case was tried by the court, a jury being waived, and in addition to the general finding for the defendant Britton, the court also made special findings of fact, and conclusions of law.

The question of law presented by the findings of fact is, whether the service of notice of protest by placing it in an envelope addressed to C. A. Britton, Cottonwood Falls, Kansas, and deposited, duly stamped, in the post-office, at said Cottonwood Falls, is sufficient notice to bind the said Britton as an indorser, who lived in the same town at date of protest. If section 1 of the law of 1871 above quoted is valid, the

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service of the notice of protest made was sufficient; if said section is in conflict with §16 of article 2, of the constitution, then there was a want of legal notice, in the absence of any finding that the indorser actually received such notice on the same day, or the next after the note was dishonored. This court has held that the constitutional provision, that "no bill shall contain more than one subject, which shall be clearly expressed in its title," is mandatory. *Comm'rs of Sedgwick County v. Bailey*, 13 Kas. 600; and hence our examination of the question presented will be to ascertain whether said section is clearly expressed in the title of the act. The act, as above stated, is entitled, "An act concerning notaries public." The first question which naturally suggests itself in the determination of this matter is, Whose duty is it to give the notice of protest? The doctrine is well settled, that any party to the instrument, whose liability is fixed, or who, on the paper being returned to him when he pays it, will be entitled to reimbursement from some prior party, may personally give this notice. Thus, if the holder duly notifies the sixth indorser, and he the fifth, and he the fourth, and so on, to the first, the latter will be liable to all the parties. (2 Daniel on Negotiable Instruments, 42.) It is equally well settled, that the notice given by an agent is the same as if by the holder himself; and it may be in the agent's name, or in the name of another party. The notice is usually in writing, but it is sufficient if it be given verbally. Hence, as service of notice of dishonor can be given without the intervention of a notary public, after the protest is made, by any person who stands in any relation to the paper as above stated, we cannot conceive how it can be claimed that said section can apply to all notices of protest served through the post-office on parties residing in the town or city where such protest is made. The title of the act is limited to "notaries public." No reference is made therein to "notes," or "bills," or the "service of notices of protest." Holders, indorsers, or their agents (not notaries public) giving notices of protest, are not included in any part of the title of the act. As to all notices

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of protest given by persons not notaries public, in accordance with the provisions of said section, without further argument, we think it will be conceded that they are insufficient to charge the parties on whom it is intended to fix liability, unless actual notice is shown. As to this class of notices, section 1 is absolutely void, as being in conflict with section 16 of article 2 of the constitution of the state. Indeed, the learned counsel for the plaintiff in error almost admit this conclusion in their brief, as they state, "It seems to us that the most that can be fairly claimed (if anything) on the other side would be, that said section 1 would only be unconstitutional (if at all) in so far as applied to validate notices served in this way by persons other than notaries public." Under this conclusion the usefulness or importance of said section 1 is almost entirely destroyed, if by any reasoning it could be held valid as to notices of protest served, as therein provided, by notaries public.

The next question for consideration is, in what capacity does a notary public act in giving notices of protest? Is it an *official act*, or does he simply act as the *agent of the party* for whom he makes the protest? By the law-merchant the notary to whom the bill or note has been given for presentment, may, as the agent of the holder, give notice; but it is no part of his official duty. *Burk v. McKay*, 2 How. 66; *Harris v. Robinson*, 4 How. 336; 2 Daniel on Negotiable Instruments, § 991, page 45; 1 Parsons on Notes, ch. 12, § 5, page 506. Unless then the statutes of our state have conferred upon notaries public this official duty, it would be a misnomer to say that "an act concerning notaries public" clearly expresses in its title the manner of serving notices of protest, or even directs by its title an examination of the provisions of the act to ascertain anything in relation to such service. The duties and powers of notaries public in relation to bills and notes are stated in section 6, ch. 71, Gen. Stat. 1868, page 597, and are as follows:

"SEC. 6. Notaries public shall have authority * * * to demand acceptance, or payment, of foreign and inland bills of

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exchange, and of promissory notes, and protest the same for non-acceptance, or non-payment, as the case may require, and to exercise such other powers and duties as by the law of nations and commercial usage may be performed by notaries public."

Section 18, ch. 14, Gen. Stat. 1868, page 117, provides, "that a notarial protest shall be evidence of a demand and refusal to pay a bond, promissory note, or bill of exchange, at the time and in the manner stated in such protest, until the contrary is shown." Technical words, by our statute, must be construed according to their peculiar and appropriate meaning; and the word "protest," has a well-known and well-defined signification in law. It means only, the formal declaration drawn up and signed by the notary. It is stated by Daniel, vol. 2, § 929, page 4, of his work on negotiable instruments, "that a protest is the solemn declaration on the part of the holder against any loss to be sustained by him by reason of the non-acceptance, or even non-payment, as the case may be, of the bill in question; and the calling of the notary to witness that due steps have been taken to prevent it." Burrill's Law Dictionary defines it as follows:

"A formal statement in writing, by a public notary, under seal, that a certain bill of exchange or promissory note (describing it) was on a certain day presented for payment, or acceptance, and that such payment or acceptance was refused. Whereupon the notary *protests* against the parties for the loss or damage which may arise therefrom." 2 Burrill, 349.

A like meaning is given in Bouvier's Law Dictionary, vol. 2, § 8, page 890. The section of the statute above quoted, declaring that a notarial protest is evidence only of a demand and refusal, is in accordance with the legal definitions of *protest*, and additional authority that the protest does not include the giving of the notices thereof; and as a necessary conclusion, that such act is no part of the official duty of the notary. If the notary gives the notice, he is the mere agent of the holder or party authorized to give the notice. *Pinkham, Ex-ecutrix, v. Macy*, 9 Metcalf, 176; *Smedes v. Utica Bank*, 20 Johns. 372; *Crawford v. Branch Bank*, 7 Ala. 205; *Shed v.*

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Brett, 1 Pick. 401; *Fulton v. McCracken*, 18 Md. 528; *Renick v. Robbins*, 28 Mo. 339. And so held by this court, at the present term, in *Couch v. Sherrill*, ante, page 624. Again, section 5 of the act respecting notaries public (Gen. Stat. 1868, page 597,) prescribes that every "notary shall provide a notarial seal, containing his name and place of residence, and he shall authenticate all his official acts, attestations, and instruments therewith." If the counsel for plaintiff in error are right in their conclusion, that the term "protest," as used in section 6 of the notary act, above quoted, includes not only presentment and demand, but also notice of dishonor, then such notices should be authenticated by the seal of the notary. Such is neither the practice, nor does the law require it. Indeed, we do not think any one will seriously contend that the notary, when giving written notice of dishonor of a bill or note, should authenticate such notice with his official seal. It is not an official act. No seal is necessary. Nor need the notice purport to be issued under the official seal of the officer. From these deductions we arrive at the result, that a notary public in giving a notice of protest of paper is not acting officially, and only performs the act as the agent of the party having the right to give such notice, and therefore that section 1 of ch. 110, laws of 1871, is unconstitutional and void, as the matters therein contained are not expressed in the title to the bill, as required by § 16 of article 2 of the constitution of the state.

It is argued in the brief of counsel of the plaintiff in error, that it is usual and customary for notaries to give the notice of dishonor, and as there is a fee of ten cents provided by the law of 1875, ch. 99, for notaries public for each notice of protest, (which was formerly fifty cents, Gen. Stat. § 9, page 480,) therefore notaries should be held as officially empowered to act in that respect. In reply we answer, that while it is true that usually such notices are thus given, it is not infrequently the case that the notary makes out the notices, and sends them to the holder, or the bank from which he receives the note for protest, and thereupon the holder himself, or the officers of

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the bank, make due service of the notices of dishonor. In all cases, where the residence of the indorsers to the paper are unknown to the notary, this is done. If the holder, or other party interested, wishes the notary to give the notice as his agent, the statute fixes the compensation, but does not thereby make the giving such notice the official act of the notary; nor do we think the frequency with which notaries give notice of dishonor of paper a sufficient reason for holding the title of the act as expressive of the subject-matter in section 1, as the act of giving the notice is one of *agency*, and not a *notarial* one. A title relating to agents would be more expressive of section 1 than the one adopted by the legislature; and yet such a title would be insufficient within the meaning of the constitution. We hold that the cases cited, of *Turner v. Rogers*, 8 Ind. 140, and *Fisher v. State Bank*, 7 Blackf. 611, are not in point, as the certificates of notaries in that state are evidence of the facts therein set forth, and the laws of Indiana differ from ours in this and other respects.

Neither are we convinced that we should, for fear of causing disastrous results, as counsel who ask us to reverse the action of the court below suggest, reach a different conclusion than we have as to the constitutionality of said section 1. We do not think that the effect of this decision will be very calamitous in the state. The section under ban, could not possibly apply to other notices than those given by notaries, by any stretch of judicial power; and in no future case will this decision have any effect to discharge an indorser, or other party liable to be charged on a bill or note, by protest, and notice thereof, where the actual receipt of such notice, within the proper time, can be shown. We cannot presume that parties who have received such notices as the one sent in this case, will under oath deny the fact. In the case at bar, on the trial of the same, it does not appear that any effort was made to show that Britton actually received the notice, and no finding is made, or asked for by any party, thereon. Whether the circumstances of the case prevented such proof, or whether it was not thought necessary, we are not informed. Hereafter

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when cases of this exact character are tried, we suppose an attempt, at least, will be made to show the actual reception of the notice of dishonor; and when a notice, placed in a sealed envelope, duly addressed, with the postage prepaid, is deposited in the post-office of the town or city where the party to whom it is directed resides, but little difficulty ought to be experienced in obtaining sufficient evidence to support a finding that such person actually received the same. In further opposition to the doctrine advanced by counsel for plaintiff in error, that this court ought, if possible, to hold said section 1 constitutional, to conserve important pecuniary interests resting thereon, we reply, that it would be favoring pernicious legislation to say that notices of dishonor given by one person, in one way, are good, and like notices given in the same way by another person who has the same right to give them, are bad. Such a ruling would lead to "confusion worse confounded." The legislature never intended to make this distinction in the manner of serving notices of protest.

The judgment will be affirmed.

VALENTINE, J.: The "subject" contained in section 1 of the "act concerning notaries public," (Laws of 1871, page 270,) is not only not "clearly expressed" in the title of said act, as required by the constitution, (art. 2, §16,) but it is clearly, as I think, not expressed in the title in any manner whatever. Therefore said section 1 has no force.

BREWER, J., *dissenting*: I think the majority of the court are giving to the constitutional provision concerning the title of bills, a more technical and stringent construction than it should receive. The purpose of this provision was, to prevent surreptitious legislation by incorporating into a bill matters entirely foreign to the general subject of the act, and of which the title would to the ordinary understanding give no indication. But if there is such a connection between the general subject of the act, as indicated by its title, and the particular section, as

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would make the one suggest the other, although the connection arises, not from any strict legal relation between the two, but from the general customs of business, and the common understanding and use of certain terms which in strict legal sense may have a more limited signification, this constitutional provision has no application. Now I agree with most of the propositions of law stated by the Chief Justice in the opinion of the court. It is no part of the official duty of the notary public to serve notices of protest. His official action ends with the protest. Anybody may serve the notice, and serving, serves it as the agent of the holder or party authorized to give the notice. The term "protest," in its strict legal sense, does not include "notice." That is a separate and independent act. Yet it is equally true, that, generally, the notary does serve the notice. He makes the protest, and serves the notice, in fact does everything necessary to charge the indorser. And in common parlance the term "protest" is used to include the entire proceedings necessary to charge the indorser. If a business man hands a note to a notary, with the request that he "protest it," he expects him, without further words, to give notice. It is his customary act. And if one business man asks another whether a note has been protested, in his thought he includes *notice* as well, and expects an answer accordingly. Now it seems to me, that legislation may properly rest on the customary methods of transacting business, and the common use and understanding of terms. I venture the assertion, that not one business man in a thousand would be astonished to find in an act concerning notaries public a provision concerning notices of protest, and that only the ingenious and critical lawyer would ever think of this constitutional provision working a prohibition upon such legislation. I think that §1 of said act of 1871 is valid, and should be upheld.

WILLIAM H. CLARK v. WASHINGTON LIBBEY.

CONTRACT, WITHOUT CONSIDERATION, *Void*; *Deed of Ottawa Indian, When Void*.

Where H., a councilman and headman of the Ottawa Indians, for \$1,800 makes a warranty deed to K. to certain land patented to H. under the first clause of article 3 of the treaty with said Indians proclaimed July 28th 1862, which deed is null and void at time of its execution, and said H., after he has become a citizen of the United States by the terms of the treaty, executes a quitclaim deed to C. of the same land, for the consideration of \$200, and thereafter C. delivers to H., voluntarily, and without any consideration, a written agreement to the effect that he will notify certain parties who claim to have title to said lands from H. that he has the same, and that he will offer to perfect their title thereto, but if said parties refuse and neglect to purchase the title of C. within sixty days, then C. is to be released from any obligation to convey the title to said parties, *held*, that such agreement is a promise for which there is no consideration, and that it cannot be enforced at law. Such agreement, under such circumstances, is no defense to an action brought by C. against the grantee of K. to recover the possession of the real property deeded to C. by H. [*Baldwin v. Squires*, 20-281; *Libbey v. Clark*, 25-496.]

Error from Franklin District Court.

EJECTMENT brought by *Clark*, for 240 acres of land in Franklin county—part of the lands patented to one Wm. Hurr, a councilman and headman of the Ottawa tribe of Indians, under the provisions of the 3d article of the Ottawa treaty of 1862. *Clark* claimed title in fee, under a deed from said Hurr and wife to himself, dated November 13th 1872. *Libbey* claimed title in fee, as grantee of I. S. Kalloch, whose title was evidenced by a deed from said Hurr and wife, dated December 1st 1865. The case was in this court at the January Term 1875; (14 Kas. 435.) On being remanded to the district court, a retrial was there had, at the November Term 1875. Findings and judgment for defendant, and the plaintiff brings the case here on error.

W. H. Clark, plaintiff, for himself.

J. W. Deford, and *H. P. Welsh*, for defendant.

The opinion of the court was delivered by

HORTON, C. J.: Action of ejectment. After Clark had offered in evidence on the trial in the court below, to sustain his cause of action, and title to the premises in controversy, a patent to the premises from the United States to Wm. Hurr of the date of December 1st 1865, and a quitclaim deed from Wm. Hurr and Emily W. Hurr to himself of the same property, of date November 13th 1872, for the consideration of \$200, he rested his case. The defendant on his part then called the plaintiff as a witness for the defense, who testified that he made the agreement attached to the amended answer on the evening of November 13th 1872, some six or eight hours after the deed from Hurr and wife to himself was executed and delivered to him; that when he made the purchase from Hurr of the lands, and when the deed was executed and delivered, nothing had been said about the agreement, but that afterward, at the request of Hurr, and without any consideration therefor, he (Clark) executed the said agreement. The agreement is as follows:

"KNOW ALL MEN by these presents, that I, W. H. CLARK, of Ottawa, Franklin county, Kansas, have this day received from Wm. Hurr of the Ottawa Nation, Indian Territory, a quitclaim deed to the following-described tracts or parcels of land situated in Franklin county, state of Kansas, to-wit, the E. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of section 80, and the E. $\frac{1}{2}$ of the N.W. $\frac{1}{4}$ of section 81, both tracts of land in township 16, range 20; also, the E. $\frac{1}{2}$ of the N.W. $\frac{1}{4}$ of section 7, township 17, range 20, all of said tracts containing 320 acres of land; and I do hereby agree to notify certain parties who claim to have title to said lands from William Hurr, that I now have the same, and to offer to perfect their title to said land. And it is hereby agreed and understood, that in case said parties refuse and neglect to purchase said title within sixty days from the date of notification, then in that case I am to be released from any obligations to convey the said title to said parties.

"In witness whereof, I have hereunto set my hand this 18th day of November, 1872.

WM. H. CLARK."

The said agreement was then read; and the defendant offered in evidence, against the objections of the plaintiff, a

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warranty deed from Wm. Hurr and wife to I. S. Kalloch, of December 1st 1865, for the same lands, the consideration being \$1,300; and a warranty deed from I. S. Kalloch and wife to the defendant, the execution of which was acknowledged and certified, December 9th 1865. Both of said deeds were duly filed for record in the office of the register of deeds of Franklin county in June 1866. Defendant then rested. Plaintiff in rebuttal testified, that on December 3d 1872, and soon after he made the agreement with Wm. Hurr, he wrote a letter which he addressed to Washington Libbey, at his street and number, in Chicago, Illinois, and mailed the same in Ottawa, Kansas. The following is a copy of the letter which was read in evidence:

OTTAWA, KANSAS, DECEMBER 3d, 1872.

WASHINGTON LIBBEY, Esq.—*Dear Sir:* On the 13th of last month I purchased from Wm. Hurr the following-described lands, to-wit, the E. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of section 30, and the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 31, township 16, range 20, Franklin county, Kansas; and I find from the record in the office of the register of deeds of this county, that you claim to have some kind of a title to said lands; and in order to perfect your title to said lands, I hereby offer to sell you my title at the price of ten dollars per acre, and in order to give you time to investigate my title, and satisfy yourself of its validity, I will give you until the 10th day of February 1873, to complete the purchase of my title.

I am yours very truly, WM. H. CLARK.

Witness then testified that he did not receive any direct answer to his letter from Mr. Libbey, and on February 17th 1873, he wrote and sent to Washington Libbey the following letter:

OTTAWA, KANSAS, FEBRUARY 17th, 1873.

W. LIBBEY—*Dear Sir:* I wrote you in December last, in regard to the land here, which you bought of Kalloch, and I have since learned from Mr. Kalloch that you intend to fight me to the bitter end; and as there is a question as to who has the better title, you or I, and as I don't feel able to fight you, I would much rather settle that fight. When I bought the land from Hurr I only gave him \$200 for it, but I don't feel able to lose that sum; and as I agreed with Hurr to give you

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the first chance to buy me out, I would like you to make me an offer of what you will give, and I assure you that any offer that you may make me will be favorably considered. At least write me, and tell me the best you will do, for I am anxious to get clear of the thing.

Yours truly, W. H. CLARK.

And that on March 7th 1873, at Ottawa, Kansas, he received in the post-office the following letter, which was identified and admitted in evidence as the letter of Washington Libbey:

CHICAGO, MARCH 5th, 1873.

W. H. CLARK, Esq.—*Dear Sir:* Your favor of the 17th has come to hand, and contents noted. The land you refer to I have had a warranty deed for, several years, from I. S. Kalloch.

Yours truly, WASHINGTON LIBBEY.

Clark then testified, that on the next day he commenced this action. It was then admitted in court by both parties, that I. S. Kalloch was a white man, and that William Hurr was an Indian, a headman, and councilman of said tribe; and also, that said land in plaintiff's petition mentioned was a part of the five sections of land set apart for the chiefs, headmen, and councilmen of said tribe under the provisions of art. 3. of the Ottawa treaty of 1862. The above was all the evidence introduced on the trial. The case was submitted to the court, a jury having been waived. The court found generally for the defendant, and rendered judgment accordingly.

This is the second time that this case has been in this court; *Clark v. Libbey*, 14 Kas. 435; and the decision in the case on the former hearing here, disposes of the deed from Wm. Hurr and wife to I. S. Kalloch, the grantor of defendant, of date of December 1st 1865. This deed was then held null and void, under art. 7. of the Ottawa treaty of 1862; and no sufficient reasons are presented in the brief of counsel for the defendant to induce us to revoke or change the views therein expressed. We adhere to the former decision, and hold that said deed of December 1st 1865 transferred no title to the grantor of the defendant. At the date of the deed to Kalloch, Wm. Hurr had not become a citizen of the United States by the terms of

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the said treaty, nor had the restrictions upon his power to alienate his property been removed; but at the date of the deed from Hurr to the plaintiff, November 13th 1872, he had become such citizen by the conditions thereof, and said restrictions had been removed. With the deed from Hurr to the grantor of the defendant stricken from the record, defendant must stand alone on the agreement of Clark of November 13th 1872; and unless this agreement sustains the finding and judgment of the court below, the same must be judged to be erroneous.

Counsel for defendant insist that upon all the evidence the realty in dispute must be held to be trust property, and that the relation of trustee and *cestui qui trust* subsists between Clark and Libbey, and they cite the case of *Lane v. Ewing*, 31 Mo. 75, and the authorities therein named, as specially in point. We do not think the decisions referred to applicable. The agreement was without consideration—was no part of the deed from Hurr to Clark, was not brought into existence until after the deed to Clark had been delivered, and was not made in pursuance of any prior understanding. The most that can be said of it, is, that it was a promise for which there was no consideration. The action of Clark, after the execution of the said agreement, favors in no respect the relation of trustee on his part. His intentions and intimations were exactly the reverse. The fact that Hurr executed a void deed to the grantor of defendant, does not sustain in any way the agreement of Clark to Hurr. This court, in the case of *Clark v. Akers*, 16 Kas. 166, held that the execution of a second deed to another grantor for the same land, where a prior deed under similar circumstances as the one from Hurr to Kalloch had been made, was not such a legal fraud upon the first grantor as to prevent the second deed from having full force and effect. The evidence in the case at bar does not sustain the finding and judgment for the defendant, and the judgment of the district court must therefore be reversed, and the case remanded for a new trial.

· All the Justices concurring.

R. C. CAMPBELL *et al.* v. E. H. PARAMORE.

OTTAWA INDIANS, and *Ottawa Treaty; Minors; Removal of Restrictions.* An allottee, under the provisions of the treaty with the Ottawa Indians of 1862, belonging to the Ottawa tribe of Indians, who was only sixteen years of age when the treaty with the Ottawas and other Indians of 1867-8 took effect, was nevertheless entitled, under the provisions of article 17 of the last-mentioned treaty, to a patent for the land previously allotted to him as soon as he became of full age; and when he so became of full age, all the restrictions imposed by the former treaty upon his power to alienate his land, were removed. [*Clark v. Akers*, 16-166; *Clark v. Libbey*, ante, 634; *Baldwin v. Squires*, 20-281; *Libbey v. Clark*, 25-496.]

Error from Franklin District Court.

EJECTMENT for forty acres of land, brought by *Paramore*. The land is the north-half of the tract described in the agreed statement of facts, quoted in the opinion, *infra*. Defendants *Campbell* and wife denied plaintiff's title, admitted their own possession, and claimed title in fee. Trial at the November Term 1875. Finding and judgment for plaintiff, and defendants bring the case here.

Wm. H. Clark, for plaintiffs in error.

H. P. Welsh, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action in the nature of ejectment, brought by E. H. Paramore, against R. C. Campbell and Helen Campbell, for the recovery of certain real estate. The court below rendered judgment in favor of Paramore and against the Campbells on the following agreed statement of facts:

"It is agreed by the parties to this action that the following are the facts in this case:

"1st. That the E. $\frac{1}{2}$ of the S.W. $\frac{1}{4}$ of section 10, township 17, range 19, Franklin county, Kansas, was allotted to Shah-nab-na-se, an Ottawa Indian, under the provisions of article 8 of the treaty between the United States and the Ottawa In-

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dians, ratified July 28th 1862, (12 U. S. Stat. at Large, 1237,) and that this was the only land he received under said treaty.

"2d. That said lands were patented to said Shah-na-nib-na-se, under the provisions of art. 7 of said treaty, which patent contains the restrictions upon alienation in said article 7 provided.

"3d. That at the time said lands were allotted to Shah-na-nib-na-se, he was nine years of age; and that, on October 14th 1868, he was a minor, of the age of sixteen years, and that he was not a chief, headman or councilman, nor head of a family.

"4th. That on May 18th 1875, Shah-na-nib-na-se, then of full age, for a consideration of \$500, sold and conveyed by warranty deed the whole of said E. $\frac{1}{4}$ of the S.W. $\frac{1}{4}$ of section 10, township 17, range 19, to E. H. Paramore, plaintiff herein.

"5th. That the defendants are and have been for several years in the possession of said lands, and have made lasting and valuable improvements thereon.

"6th. That the only question in this case is: Were the restrictions upon alienation upon Shah-na-nib-na-se, contained in art. 7 of Ottawa treaty of 1862, removed by art. 17 of Ottawa treaty of 1867, proclaimed October 14th 1868? (15 U. S. Stat. at Large, 517.) If so, the deed from Shah-na-nib-na-se to E. H. Paramore, plaintiff, is valid, and plaintiff ought to recover; if not, judgment should be for the defendants."

We think the judgment of the court below is correct. Under the treaty of 1862, (12 U. S. Stat. at Large, 1237, et seq.,) various allotments of lands were made, to-wit: 2640 acres for a school; 10 acres for a church; 80 acres for each of the two children of the Rev. J. Meeker; five sections for the chiefs, councilmen and headmen of the Ottawa tribe of Indians; 160 acres to each head of a family of said tribe, and 80 acres to each and every other member of said tribe. Article 7 of said treaty provides for issuing patents, with certain restrictions upon alienation, to each of the different persons to whom land was allotted. These restrictions applied, with more or less force, to all the Indians, and to the two Meeker children. (*Clark v. Libbey*, 14 Kas. 435, et seq.) One of said restrictions is as follows:

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"And forty acres, including the houses and improvements of the allottee, shall be inalienable during the natural lifetime of the party receiving the title," etc.

By article 17 of the treaty of 1867-8, (15 U. S. Stat. at Large, 517, 518,) these restrictions were to be removed from the Indians in the following words:

"In order to enable the tribe to dispose of their property in Kansas, and remove to their new homes, and establish themselves thereon, patents in fee simple shall be given to the heads of families, and to all who have come of age, among the allottees under the treaties of 1862, so that they may sell their lands without restrictions."

Now it is true, these restrictions were not and could not be removed from Shah-na-nib-na-se under the provisions of said treaty at the time that said treaty took effect; for, at that time, he was only sixteen years of age; and the treaty provided for issuing patents to those only, and removing restrictions from those only, who were at the time of full age. But still we think the treaty applied to Shah-na-nib-na-se, and to every other member of his tribe, and that when he arrived at full age he was entitled to the patent, and then said restrictions were removed. The treaty of 1867-8 evidently intended to remove the restrictions from all of the allottees under the treaty of 1862 who were members of the Ottawa tribe of Indians, and probably did not intend to remove the restrictions from such of the allottees as were not members of such tribe. And the object of removing such restrictions, as expressed in the treaty itself, was, that all the members of the tribe might be able to sell their lands and remove to their new homes in the Indian country. That clause of the treaty above quoted starts out by saying that, "In order to enable the *tribe* to dispose of *their* property," etc. Now the word "tribe," in this place, evidently means the *members* of the tribe, and *all such members*; and the pronoun "their," evidently means and stands for the same thing; and so do the succeeding pronouns, "their," and "themselves." Said clause does not provide for issuing patents at the time of making the treaty, or at any other particular or definite time; but it provides for issuing

patents at some indefinite time in the future—that is, any time in the future. We should therefore read that portion of said clause directly applicable to this question (leaving out that portion not applicable,) as follows: At any time hereafter “patents in fee simple shall be given” “to all who have come of age.” And reading the clause in this way, patents should issue to all the allottees of the tribe who are of age, and to all others as they become of age; and the pronouns “they,” and “their,” in the words, “so that *they* may sell *their* lands without restrictions,” would represent all members of the tribe, (including Shah-na-nib-na-se, as well as others,) and would mean the same thing as the previous words “tribe,” “they,” “their,” and “themselves.” It would be strange if such were not the case. It would be strange if it was intended that Indians, who were minors when said treaty was made, should never be able to take their property, or the proceeds thereof, “to their new homes” in the Indian country. But this is what the plaintiffs in error (defendants below) claim. We think that when Shah-na-nib-na-se became of full age he was entitled to the patent provided for in said treaty of 1867–8, and that he then had power to sell his land. We presume that the patent was then in fact issued to him. It therefore follows that the title of the defendant in error (plaintiff below) is good, and that the judgment of the court below must be affirmed.

All the Justices concurring.

EXTRA ANNOTATION
TO
PRECEDING VOLUME

NOTES

ON THE

KANSAS REPORTS

CASES IN 17 KANSAS

17 KAN. 9, WATERSON v. KIRKWOOD

Limitation of actions—Mortgage and debt secured thereby.—Cited in *Clark v. Grant*, 26 Okl. 398, 109 Pac. 234, 28 L. R. A. (N. S.) 519, Ann. Cas. 1912B, 505, holding that, where actions on a note and mortgage are barred by limitations, a payment on the note revives both as to the payors; *Du Bois v. First Nat. Bank of Denver*, 43 Colo. 400, 96 Pac. 169; *Pears v. Wilson*, 23 Kan. 343—holding that a mortgagor can prevent ruining of limitations in favor of his grantee; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Perry v. Horack*, 63 Kan. 88, 64 Pac. 990, 88 Am. St. Rep. 225; *Skinner v. Moore*, 64 Kan. 360, 67 Pac. 827, 91 Am. St. Rep. 244; *McLane v. Allison*, 7 Kan. App. 263, 53 Pac. 781—holding that, if action on a note is not barred, neither is foreclosure of the mortgage securing it; *City of Ft. Scott v. Schulenberg*, 22 Kan. 648, holding that, if action on the bond is barred, so is the action on the mortgage; *Ordway v. Cowles*, 45 Kan. 447, 25 Pac. 862; *Mulvane v. Sedgley*, 63 Kan. 105, 64 Pac. 1038, 55 L. R. A. 552; *Lincoln Mortgage & Trust Co. v. Parker*, 65 Kan. 819, 70 Pac. 892—holding that a plea of limitation is a personal privilege.

Cited in note in 21 L. R. A. 557, on effect of statutory bar of principal debt on right to foreclose mortgage or deed of trust; in 55 L. R. A. 683, 688, on extension of mortgage lien by renewal of secured debt; in 26 L. R. A. (N. S.) 902, on effect of mortgagor's absence from state to toll limitations as against foreclosure against his grantee.

Change of venue.—Followed in *Vaughn v. Hixon*, 50 Kan. 778, 82 Pac. 858, holding that the discretionary action of the district court in granting change of venue will not be reversed, though such court was not bound to grant the change.

Cited in *Maharry v. Maharry*, 5 Okl. 371, 47 Pac. 1051, on discretion in granting change.

Conveyance by mortgagor.—Cited in *Stough v. Badger Lumber Co.*, 70 Kan. 713, 79 Pac. 737, holding that the grantee of a mortgage has the rights of his grantor.

17 KAN. 15, CONVERSE v. SAFFORD

Chattel mortgage—Duress.—Distinguished in *McCartney v. Wilson*, 17 Kan. 294, holding invalid a chattel mortgage given to an officer to secure release of mortgagor from custody.

17 KAN. 18, WILLIAMS v. HERSEY

Bill of exceptions—Allowance.—Cited in *State v. Fry*, 40 Kan. 311, 19 Pac. 742, holding that failure of the clerk to make journal entry showing allowance of bill of exceptions did not invalidate the bill.

17 KAN. 22, NICKLISSON v. HOLMAN

Knowledge of agent imputable to principal.—Cited in *Westerman v. Evans*, 1 Kan. App. 1, 41 Pac. 675, holding that knowledge of the agent is knowledge of the principal; *Hården v. State*, 32 Kan. 637, 5 Pac. 212, holding that a wife, who has made her husband her general agent, is bound by his knowledge of the use made of her premises leased by him; *Despain v. Pacific Mut. Life Ins. Co.*, 81 Kan. 722, 106 Pac. 1027, holding that a corporation is presumed to know all that comes to the knowledge of its agent relating to the agency.

Effect of findings.—Cited in *De Vitt v. City of El Reno*, 28 Okl. 315, 114 Pac. 253, discussing the effect of a general finding in favor of one party.

17 KAN. 24, GAMBLE v. HODGES

Appeal—Assignment of error.—Cited in *Chicago Lumber & Coal Co. v. Smith*, 84 Kan. 190, 114 Pac. 372, holding mere assignment of error in rendering the judgment rendered does not specify error.

17 KAN. 26, MITCHELL v. WOODS

Rights of persons ousted without authority—Damages.—Cited in *Wallace v. Hall*, 22 Kan. 271, holding that a stranger, claiming independently of defendant, should not be ousted under a writ of restitution in forcible detainer; *Shaffer v. Austin*, 68 Kan. 234, 74 Pac. 1118, holding that a person not party to a writ in ejectment, on being expelled without injury, could recover only nominal damages for the assault.

Cited in note in 52 L. R. A. 45, on damages for tort as affected by loss of profits.

17 KAN. 29, ATCHISON, T. & S. F. R. CO. v. JEFFERSON COUNTY COM'RS

Elections—Requisites.—Cited in *Constitutional Prohibitory Amendment Cases*, 24 Kan. 700, discussing requisites of a valid election.

Cited in note in 90 Am. St. Rep. 84, on irregularities avoiding elections.

Municipal bonds in aid of railroads.—Cited in *Leavenworth, L. & G. R. Co. v. Commissioners of Douglas County*, 18 Kan. 169, holding that a county or other municipality has power to issue bonds in aid of railroads, and discussing validity of election to issue bonds in aid of railroad.

Statutes legalizing municipal contracts.—Cited in note in 27 L. R. A. 704, on statutes legalizing invalid municipal contracts.

17 KAN. 47, MUSICK v. BEEBE

Conclusiveness of administrator's settlements.—Cited in *Calnan v. Savidge*, 68 Kan. 620, 75 Pac. 1010, holding that an administrator's annual settlements are not final, but are prima facie correct; *Brown v. Baxter*, 77 Kan. 97, 94 Pac. 155, 574, holding final settlement of an estate must be on notice; *Smith v. Eureka Bank*, 24 Kan. 528; *Proctor v. Dicklow*, 57 Kan. 119, 45 Pac. 86; *Lewis v. Woodrum*, 76 Kan. 384, 92 Pac. 306—holding that the final settlement of an estate is a final and conclusive judicial determination; *Gafford v. Dickinson*, 37 Kan. 287, 15 Pac. 175, holding that the final settlement is impeachable for fraud.

Cited in note in 86 Am. Dec. 143, 144, on effect as res judicata of annual settlements by personal representative.

Liability of administrator to successor.—Cited in *American Surety Co. of New York v. Platt*, 67 Kan. 294, 72 Pac. 775, holding an administrator de bonis non can maintain an action against the former administrator and the sureties on his bond for property or for proceeds of assets sold by the administrator; *Young v. Scott*, 59 Kan. 621, 54 Pac. 670, holding that annual settlements do not preclude the action.

Cited in note in 40 L. R. A. 42, on assets passing to administrator de bonis non.

Claims against estate—Classification.—Cited in *McPherson v. Wolfley*, 9 Kan. App. 67, 57 Pac. 257, holding that a probate court's classification of claims against an estate, like annual accounts, is subject to correction while the court retains jurisdiction of subject-matter.

Jurisdiction of probate courts.—Cited in *Klemp v. Winter*, 23 Kan. 699, discussing jurisdiction of probate courts.

17 KAN. 58, COMMISSIONERS OF POTTAWATOMIE COUNTY v. O'SULLIVAN

Eminent domain—Damages to landowner—Set-off of benefits.—Cited in *Tobie v. Commissioners of Brown County*, 20 Kan. 14; *Roberts v. Board of Com'rs of Brown County*, 21 Kan. 247; *Trosper v. Board of Com'rs of Saline County*, 27 Kan. 391; *Central Branch Union Pac. R. Co. v. Andrews*, 80 Kan. 590; *Beekman v. Jackson County*, 18 Or. 283, 22 Pac. 1074; *Bauman v. Ross*, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270—holding that damages to a landowner from location of a highway can be diminished by setting off such benefits as result directly and specially from the location, but not such benefits as he receives in common with the community; *Travelers' Ins. Co. v. Oswego Tp.*, 59 Fed. 58, 7 C. C. A. 669; *Callen v. City of Junction City*, 43 Kan. 627, 23 Pac. 652, 7 L. R. A. 736—holding that Const. art. 12, § 4, relating to compensation for rights of way, irrespective of benefits, applies only to railway and canal corporations, etc.

Cited in notes in 9 L. R. A. (N. S.) 831; 45 Am. Dec. 532, 534—on right to set off benefits against damages on condemnation.

17 KAN. 62, COMMISSIONERS OF LEAVENWORTH COUNTY v. HIGGINBOTHAM

County bonds in aid of railroads.—Cited in *Leavenworth, L. & G. R. Co. v. Commissioners of Douglas County*, 18 Kan. 169; *Hannon v. Houston*, 18 Kan. 561—holding that a county may issue bonds in aid of railroads.

Enactment of statutes—Legislative journals.—Cited in *State ex rel. Attorney General v. Francis*, 26 Kan. 724; *Weyand v. Stover*, 35 Kan. 545, 11 Pac. 355; *Homrighausen v. Knoche*, 58 Kan. 646, 50 Pac. 879; *Chesney v. McClintock*, 61 Kan. 94, 58 Pac. 993—holding that a bill formally enrolled should be deemed to have been validly enacted, though there are omissions or ambiguities in the legislative journals, unless the journals conclusively show it was not regularly passed; *Missouri, K. & T. R. Co. v. Simons*, 75 Kan. 130, 88 Pac. 551, holding that the legislative journals may be resorted to in determining whether a statute was validly enacted; *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 670 (dissenting opinion), arguing that an enrolled act is not conclusive evidence that it was validly enacted; *In re Gunn*, 50 Kan. 155, 32 Pac. 470, 948, 19 L. R. A. 519 (dissenting opinion), on the conclusiveness of the enrolled act.

Cited in note in 51 Am. Dec. 621 (par. 1), on legislative journals as evidence; in 85 Am. Dec. 358, 359, 360, on right to attack statutes showing illegal enactment; in 23 L. R. A. 346, on conclusiveness of enrolled bill.

Same—Signing.—Cited in *State v. Robertson*, 41 Kan. 200, 21 Pac. 882; *Aikman v. Edwards*, 55 Kan. 751, 42 Pac. 366, 30 L. R. A. 149; *State ex rel. Cardwell v. Glenn*, 18 Nev. 34, 1 Pac. 186—holding that an act may be valid, though the signatures of the presiding officers of the Legislature are omitted;

State ex rel. Cardwell v. Glenn, 18 Nev. 84, 1 Pac. 186, holding the signatures of the presiding officers of the Legislature necessary to the validity of a bill; *State ex rel. Hynds v. Cahill*, 12 Wyo. 225, 75 Pac. 438, discussing necessity of signature to an act of the presiding officers of the Legislature.

Same—Acquiescence.—Held inapplicable in *State v. Guiney*, 55 Kan. 532, 40 Pac. 928, holding that the fact that a statute had remained long unchallenged did not require it to be deemed valid where property rights had not accrued thereunder.

Same—Irregularities.—Cited in Constitutional Prohibitory Amendment Cases, 24 Kan. 700, holding an amendment to the Constitution valid, notwithstanding irregularities in the proceedings of the Legislature submitting the proposition to the people.

Same—Presumption as to enactment.—Cited in *Downing v. City of Miltonvale*, 36 Kan. 740, 14 Pac. 281, applying the presumption that an ordinance was regularly enacted.

17 KAN. 81, HOSTETTER v. HOKE

Actions against administrators.—Cited in *Black v. Drake*, 30 Kan. 25, 1 Pac. 25, construing a petition to be against defendants personally and not as administrators.

Necessity of exception for review.—Cited in *City of Atchison v. Byrnes*, 22 Kan. 65, holding that failure to except is waiver of objection on appeal.

17 KAN. 84, SQUIRES v. CLARK

Tenancy in common—Partition.—Cited in *Sanders v. Devereux*, 60 Fed. 311, 8 C. C. A. 629, holding an alleged rule permitting a tenant in common out of possession to maintain partition, inapplicable to federal courts, which can entertain such bill only according to the general practice in equity; *Gilbert v. Hopkins*, 171 Fed. 704, holding that in the federal court a complainant in partition, whose title is denied, must first establish it at law.

Same—Adverse possession.—Cited in *Sparks v. Bodensick*, 72 Kan. 5, 82 Pac. 463; *Schoonover v. Tyner*, 72 Kan. 475, 84 Pac. 124—discussing what constitutes adverse possession by a cotenant.

Followed in *Sparks v. Bodensick*, 72 Kan. 5, 82 Pac. 463, holding that purchase of a cotenant's rights is recognition rather than repudiation.

Cited in note in 109 Am. St. Rep. 620, on creation of prescriptive title by adverse possession by one cotenant; in 13 Am. Dec. 141, on ouster by cotenant; in 29 Am. Dec. 485, on trespass against cotenant.

17 KAN. 89, STATE v. ANDERSON

Sending up original complaint on appeal from justice of the peace.—Cited in *State v. English*, 34 Kan. 629, 9 Pac. 761; *State v. Allison*, 44 Kan. 423, 24 Pac. 964—holding that the objection that the justice did not certify that the complaint sent up on appeal to the district court was the original complaint was waived by going to trial; *City of Topeka v. Raynor*, 8 Kan. App. 279, 55 Pac. 509, conceding that an inferior court should, on appeal to the district court, send up the original complaint, but holding that no formal certificate to that effect is necessary, if the record show it; *State v. Anderson*, 34 Kan. 116, 8 Pac. 275, holding that, if the defendant objects that the complaint is not the original, he cannot be tried thereon.

17 KAN. 92, KANSAS PAC. RY. CO. v. THACHER

Attorney's lien.—Cited in *Holmes v. Waymire*, 73 Kan. 104, 84 Pac. 558, 9 Ann. Cas. 624, holding that an attorney has not a lien on land.

Cited in note in 51 Am. St. Rep. 275, 278, on lien of attorneys; in 3 L. R. A. (N. S.) 379, 380, on attorney's lien in action for tort.

Same—Notice.—Followed in *Noftzger v. Moffett*, 63 Kan. 354, 65 Pac. 670, holding that notice of attorney's lien may be served on the attorney of the adverse party, but not on a depot agent of a railroad company.

Cited in *Jackson v. Stearns*, 48 Or. 25, 84 Pac. 798, 5 L. R. A. (N. S.) 390, holding that the rule that an attorney may establish his lien whenever an action is pending in which money was due could not there be invoked to prevent a compromise and dismissal defeating an attorney's lien, no money being in the hands of the adverse party, and no notice of lien being given.

Notice to railroad companies.—Cited in *Atchison, T. & S. F. R. Co. v. Sage*, 49 Kan. 524, 31 Pac. 140, holding that service of notice to take depositions cannot be made on a station agent of a railroad company.

Held inapplicable in *St. Louis & S. F. R. Co. v. Burgess*, 72 Kan. 454, 83 Pac. 991, holding that notice to a railroad company of injury to an employé may be served on a ticket agent.

Necessity of written notice.—Followed in *Bauder's Heirs v. Bryan*, 20 Kan. 367, holding that notices required in legal proceedings must ordinarily be in writing.

17 KAN. 104, **WILSON v. SCHOOL DIST. NO. 2**

Mechanics' liens on public buildings.—Cited in *School Dist. No. 2 v. Conrad*, 17 Kan. 522; *Sullivan v. School District No. 39 of Brown County*, 39 Kan. 347, 18 Pac. 287; *Board of Com'rs of Jewell County v. Snodgrass & Young Mfg. Co.*, 52 Kan. 253, 34 Pac. 741; *City of Topeka v. Thomas*, 1 Kan. App. 113, 40 Pac. 930—holding a public building subject to mechanics' liens; *Badger Lumber Co. v. Marion Water Supply, Electric Light & Power Co.*, 48 Kan. 187, 30 Pac. 117, 30 Am. St. Rep. 306, holding that the property of an electric lighting company with franchise to furnish public lights was subject to mechanics' liens.

Cited in note in 35 L. R. A. 145, on mechanics' liens on public property; in 78 Am. Dec. 697, on structures subject to mechanic's lien.

17 KAN. 113, **OLIVER v. FORBES**

Patents to Indian lands.—Cited in *Baldwin v. Letson*, 6 Kan. App. 11, 49 Pac. 619, approving the rule that a patent relates back to the earliest moment when it should have been issued; *Briggs v. McClain*, 43 Kan. 653, 23 Pac. 1045, holding that patent should issue to the heirs of an allottee; *De Graffenreid v. Iowa Land & Trust Co.*, 20 Okl. 687, 95 Pac. 624, holding that a patent issued to an heir of the one who had taken the allotment and received the certificate vested title in the heir; *Briggs v. Wash-puk-qua*, 37 Fed. 135, holding that the heirs of an allottee are estopped by their warranty deed executed before the patent issued.

17 KAN. 131, **O'KEEF v. SEIF**

Mechanics' liens—Statement.—Cited in *Sharon Town Co. v. Morris*, 39 Kan. 377, 18 Pac. 230, holding that a statement of mechanic's lien may be signed and sworn to by one as the agent of the lienor.

17 KAN. 142, **CHAPIN v. BROWN**

Waiver of omission in pleading.—Cited in *Kansas Pac. Ry. Co. v. Taylor*, 17 Kan. 506, holding that omission of an averment essential to a cause will be deemed waived, where the cause was tried below as though the averment were made, and the fact was proved and found.

17 KAN. 145, **KANSAS PAC. RY. CO. v. KUNKEL**

Review of evidence—Evidence to support verdict.—Cited in *Cross v. Burlington Nat. Bank*, 17 Kan. 336; *Kansas Pac. Ry. Co. v. Brady*, 17 Kan.

380; Gibbs v. Gibbs, 18 Kan. 419; George & Bros. v. Myers & Green, 18 Kan. 430; Union Pac. Ry. Co. v. Young, 19 Kan. 488; City of Ft. Scott v. Brothers, 20 Kan. 455; Race v. Malony, 21 Kan. 31; Central Branch Union Pac. R. Co. v. Young, 21 Kan. 532; Central Branch Union Pac. R. Co. v. Holcomb, 21 Kan. 533; Fanson v. Harris, 21 Kan. 734; Kansas Pac. Ry. Co. v. Richardson, 25 Kan. 391; Allison v. Ahlers, 26 Kan. 582; Doggett, Bassett, Hills & Co. v. Bell & Stevens, 32 Kan. 298, 4 Pac. 292; State v. Rohrer, 34 Kan. 427, 8 Pac. 718; Missouri Pac. Ry. Co. v. Dwyer, 36 Kan. 58, 12 Pac. 352; Higginbotham v. Fair, 36 Kan. 742, 14 Pac. 267; McAbey v. Talbot, 37 Kan. 19, 14 Pac. 536; Beanbien v. Hindman, 37 Kan. 227, 15 Pac. 184; Radway v. Ellis, 37 Kan. 256, 15 Pac. 220; D. M. Osborne & Co. v. Ehrhard, 37 Kan. 413, 15 Pac. 590; Elerick v. Braden, 38 Kan. 83, 15 Pac. 887; Martin v. Hopkins & Nicodemus, 40 Kan. 63, 19 Pac. 311; Wilcox & White Organ Co. v. Lasley, 40 Kan. 521, 20 Pac. 228; Peacock v. Boyle, 41 Kan. 492, 21 Pac. 586; Union Pac. Ry. Co. v. Fray, 43 Kan. 750, 23 Pac. 1039; Sickinger v. State ex rel. Hutchins, 45 Kan. 414, 25 Pac. 868; Tripp & Moore Boot & Shoe Co. v. Martin, 45 Kan. 765, 26 Pac. 424; Atchison, T. & S. F. R. Co. v. Dill, 48 Kan. 210, 29 Pac. 148; Neerman v. Caldwell, 50 Kan. 61, 31 Pac. 608; Donaldson v. Everhart, 50 Kan. 718, 32 Pac. 405; Vaughn v. Hixon, 50 Kan. 773, 32 Pac. 358; Eckert v. Rule, 51 Kan. 703, 32 Pac. 657; Cheney v. Hovey, 56 Kan. 637, 44 Pac. 605; Sun Ins. Office of London v. Western Woolen Mill Co., 72 Kan. 41, 82 Pac. 513; Holt v. Murphy, 15 Okl. 12, 79 Pac. 285; Miller v. Dumon, 24 Wash. 648, 64 Pac. 804—holding a verdict supported by evidence and approved by the trial court is conclusive on appeal though the evidence may seem to preponderate against it.

Same—To support finding.—Cited in Greer v. Greer, 24 Kan. 101; Weir v. Travelers' Ins. Co., 32 Kan. 325, 4 Pac. 267; Victor B. Buck & Co. v. J. G. Panabaker & Co., 32 Kan. 466, 4 Pac. 829; Marbourg v. Lewis Cook Mfg. Co., 32 Kan. 629, 5 Pac. 181; Hargrove v. Woolf, 34 Kan. 101, 8 Pac. 192; Thompson v. Pfeiffer, 60 Kan. 409, 56 Pac. 763; Ellison v. Beannabia, 4 Okl. 847, 46 Pac. 477—holding that the finding of a court on oral testimony is conclusive.

Same—As result of prejudice.—Cited in Kansas City, Ft. S. & G. R. Co. v. Kelly, 36 Kan. 655, 14 Pac. 172, 59 Am. Rep. 596, holding the jury's belief of one set of witnesses and disbelief of another is not of itself evidence of passion or prejudice.

New trial for insufficiency of evidence.—Cited in State v. Bridges, 29 Kan. 138; Atchison, T. & S. F. R. Co. v. Keller, 31 Kan. 439, 2 Pac. 771; Jarrett v. Apple, 31 Kan. 693, 3 Pac. 571; Union Pac. Ry. Co. v. Diehl, 33 Kan. 422, 6 Pac. 566; Kansas City, W. & N. W. R. Co. v. Ryan, 49 Kan. 1, 30 Pac. 108; Cherokee & P. Coal & Mining Co. v. Stoop, 56 Kan. 426, 43 Pac. 766; McCauley v. Atchison, T. & S. F. Ry. Co., 70 Kan. 895, 79 Pac. 671; Chicago, R. I. & P. Ry. Co. v. Reardon, 1 Kan. App. 114, 40 Pac. 931; Yarnell v. Kilgore, 15 Okl. 591, 82 Pac. 990; Serles v. Serles, 85 Or. 289, 57 Pac. 634; City of Tacoma v. Tacoma Light & Water Co., 16 Wash. 288, 47 Pac. 738; Clark v. Great Northern R. Co., 37 Wash. 537, 79 Pac. 1108, 2 Ann. Cas. 760—holding that where the evidence is nearly balanced a new trial should not be granted, but if the court is convinced that it is against the fair preponderance of the evidence it is his duty to set it aside.

Same—Report of referee.—Cited in Nutt v. Gaddis, 10 Kan. App. 358, 59 Pac. 727, holding that the report of a referee occupies the place of a verdict as to setting aside and granting new trial for insufficient evidence.

Amendment of pleadings—Discretion of court.—Followed in Kennett v. Van Tassell, 70 Kan. 841, 79 Pac. 665; Kibby v. Hensel, 81 Kan. 229, 105 Pac. 696—holding discretion not abused by permitting a correction of a mistake which

rescued the action from the bar of limitations, where it ought not have been interposed.

Cited in *Burtis v. Walt*, 33 Kan. 478, 6 Pac. 788; *Matson v. Chicago, R. I. & P. R. Co.*, 80 Kan. 272, 102 Pac. 254—holding amendment of pleadings largely discretionary.

Province of jury.—Cited in *State v. Groning*, 33 Kan. 18, 5 Pac. 446, in approving an instruction to the jury that they were to weigh the evidence.

Nature of action.—Cited in *Winfield Nat. Bank v. Railroad Loan & Savings Ass'n*, 71 Kan. 584, 81 Pac. 202, holding a petition against a bank to recover a misapplied remittance to state a cause of action on an implied contract.

17 KAN. 173, *HOPKINS v. COTHRAN*

Pleading—Waiver of failure to reply.—Cited in *Quimby v. Boyd*, 8 Colo. 194, 6 Pac. 462; *Netcott v. Porter*, 19 Kan. 131; *Nooner v. Short*, 20 Kan. 624; *Clay v. Hildebrand Bros. & Jones*, 34 Kan. 694, 9 Pac. 466; *Holt v. Holt*, 23 Okl. 639, 102 Pac. 187; *Minard v. McBee*, 29 Or. 225, 44 Pac. 491—holding that failure to reply was waived, where the case was tried as though a reply had been filed.

Same—Delay.—Cited in *Clark v. White*, 17 Kan. 180, holding that a pleading filed out of time without leave of court or consent of adversary might be treated as a nullity; In *re Davis' Estate*, 15 Mont. 347, 39 Pac. 292, in counsel's brief, on delay in pleading.

17 KAN. 180, *CLARK v. WHITE*

Costs unnecessarily made.—Cited in *Mylius v. St. Louis, Ft. S. & W. Ry. Co.*, 31 Kan. 232, 1 Pac. 619, holding that a party should not be taxed with costs unnecessarily made.

17 KAN. 185, *LIFE ASS'N OF AMERICA v. DALE*

Attorney's fee for foreclosing mortgage.—Distinguished in *Jennings v. McKay*, 19 Kan. 120, holding that a stipulation in a mortgage for attorney's fee for "foreclosure" differed from a stipulation for "action brought," and that the attorney's fee was avoided by settlement before decree of foreclosure of the mortgage.

17 KAN. 189, *CASEY v. CITY OF LEAVENWORTH*

Special assessments for public improvements.—Distinguished in *City of Atchison v. Leu*, 48 Kan. 138, 29 Pac. 467, holding a city of the first class primarily liable on warrants issued to a paving contractor, and that it was incumbent on the city to collect the assessment therefor.

Held inapplicable in *Barber Asphalt Paving Co. v. City of Harrisburg*, 64 Fed. 283, 12 C. C. A. 100, 29 L. R. A. 401, holding that a city was liable to a contractor to whom it had agreed to assign assessments in payment of a paving contract on its transpiring that it had not power to make the assessment.

Cited in note in 32 L. R. A. (N. S.) 175, on liability of municipality failing to enforce assessments for improvements.

17 KAN. 195, *YANDLE v. KINGSBURY*, 22 AM. REP. 282

Damages in replevin.—Cited in *Bell v. Campbell*, 17 Kan. 211; *Kennett v. Fickel*, 41 Kan. 211, 21 Pac. 93; *Chase County Nat. Bank v. Thompson*, 54 Kan. 307; *State Bank of Stockton v. Showers*, 65 Kan. 431, 70 Pac. 832; *Reeves & Co. v. Bascue*, 76 Kan. 388, 91 Pac. 77, 123 Am. St. Rep. 187, holding the value of the use recoverable for damages for detention in replevin; *Ladd v. Brewer*, 17 Kan. 204, holding that the value of the use of property is recoverable in replevin without special allegation; *Palmer v. Meiners*, 17 Kan. 478, holding that

the measure of damages in replevin for detention of property was the interest on the value of the property; *Cunningham v. Stoner*, 10 Idaho, 549, 79 Pac. 228, stating the measure of damages for detention of sheep.

17 KAN. 204, LADD v. BREWER

Replevin—Damages.—Cited in *Bell v. Campbell*, 17 Kan. 211; *Palmer v. Meiners*, 17 Kan. 478; *Kennett v. Fickel*, 41 Kan. 211, 21 Pac. 93—holding that the measure of damages in replevin for property having usable value was the value of the use, otherwise interest on the value of the property; footnote to *Yandle v. Kingsbury*, 17 Kan. 195, 22 Am. Rep. 282, on measure of damages in replevin.

Same—Possession to sustain.—Cited in *Moses v. Morris*, 20 Kan. 208; *Davis v. Van De Mark*, 45 Kan. 130, 25 Pac. 589; *Redinger v. Jones*, 68 Kan. 627, 75 Pac. 997—holding replevin does not lie against one not having possession.

Cited in note in 18 L. R. A. (N. S.) 1267, on right to maintain action to recover property in specie against one not in possession.

Evidence to sustain verdict on appeal.—Cited in *Wood v. Dickinson*, 34 Kan. 137, 8 Pac. 205, holding that, where there is clear and direct evidence on essential facts, the verdict will not be disturbed on appeal for seeming preponderance of evidence.

17 KAN. 211, BELL v. CAMPBELL

Damages in replevin.—Cited in *Palmer v. Meiners*, 17 Kan. 478, holding the interest on the property to be the measure of damages in replevin, in absence of negligence, fraud, etc., or proof of special damages or value of use; footnote to *Yandle v. Kingsbury*, 17 Kan. 195, 22 Am. Rep. 282, on measure of damages in replevin; *Winstead v. Hulme*, 32 Kan. 568, 4 Pac. 994, holding that a sheriff wrongfully seizing property is not ordinarily liable for exemplary damages in replevin therefor; *Smith v. Stevens*, 33 Colo. 427, 81 Pac. 35; *Kennett v. Fickel*, 41 Kan. 211, 21 Pac. 93; *Werner v. Graley*, 54 Kan. 383, 38 Pac. 482—holding the value of the use the measure of damages in replevin for property shown to have usable value.

Effect of judgment in trover.—Cited in *Meixell v. Kirkpatrick*, 29 Kan. 679; *Ellis & Osborn v. Crowl*, 46 Kan. 100, 26 Pac. 454—holding that a judgment of trover against a single defendant, when satisfied, releases all of plaintiff's claim to the property or its value.

17 KAN. 218, POWERS v. CLARKSON

Grass as part of realty.—Cited in *Hefley v. Baker*, 19 Kan. 9; *Ross v. Cook*, 71 Kan. 117, 80 Pac. 38; *Gilland v. Union Pac. Ry. Co.*, 6 Wyo. 185, 43 Pac. 508—holding grass a part of the land, requiring conveyance in writing.

Held inapplicable in *Central Branch Union Pac. R. Co. v. Hotham*, 22 Kan. 41, on the question of ownership of hay in stack near a railroad.

Parol lease.—Cited in *Bard v. Elston*, 31 Kan. 274, 1 Pac. 505, holding a parol lease of land void.

Parol sale of growing crops.—Cited in note in 23 L. R. A. (N. S.) 1221, as to whether contract for sale of growing crops or reservation thereof by a grantor must be in writing.

17 KAN. 221, CITY OF BURLINGTON v. JAMES

Trial in police court.—Cited in *City of Burlington v. Stockwell*, 56 Kan. 208, 42 Pac. 826, holding prosecution for violation of city ordinance ordinarily to be treated as criminal proceeding.

Same—Appeal.—Cited in *City of Topeka v. Kerach*, 70 Kan. 840, 79 Pac. 681, 80 Pac. 29, holding that, where defendant was tried in police court on a

verbal charge, a certified transcript gave the court on appeal jurisdiction; *City of Topeka v. Durein*, 78 Kan. 661, 97 Pac. 967, holding that on appeal from police court defendant can be tried only on the original complaint; *City of Lincoln Center v. Linker*, 6 Kan. App. 369, 51 Pac. 807, holding that, though a witness testified in the police court as to only one illegal sale by defendant, but testified to two on the final trial, the conviction would stand.

17 KAN. 224, KANSAS PAC. RY. CO. v. MIHLMAN

Necessity of objections in trial court.—Cited in *Bashor & Marx v. Nurdyke & Marmon Co.*, 25 Kan. 222; *Healy v. Loofbourrow*, 2 Okl. 458, 37 Pac. 523—holding that the Supreme Court will not consider objections not raised below.

Duty to reduce damages.—Cited in *Western Real Estate Trustees v. Hughes*, 172 Fed. 206, 96 C. C. A. 658; *Sherman Center Town Co. v. Leonard*, 46 Kan. 354, 26 Pac. 717, 26 Am. St. Rep. 101; *Brown v. Cairns*, 63 Kan. 584, 66 Pac. 639; *Sweeney v. Montana Cent. Ry. Co.*, 25 Mont. 543, 65 Pac. 912—holding that a negligent failure of a plaintiff to lessen his damages loses him the amount he failed to prevent.

Damages recoverable in condemnation proceedings.—Cited in *Leavenworth, N. & S. Ry. Co. v. Herley*, 45 Kan. 535, 26 Pac. 23, holding that an owner cannot recover in condemnation proceedings for independent trespasses.

Cited in note in 59 Am. Rep. 352-355, on recovery of future damages in eminent domain; in 5 Am. St. Rep. 540, on damages recoverable for injuries by operation of railroad which has exercised right of eminent domain.

Right of trespasser to repair injury.—Cited in *Chicago, K. & W. R. Co. v. Willits*, 45 Kan. 110, 25 Pac. 576, holding that a trespasser has no right to re-enter the land to repair an injury.

Prospective damages.—Cited in note in 53 Am. Rep. 134, on recovery of prospective damages.

Accrual of cause of action.—Cited in *Missouri Pac. Ry. Co. v. Houseman*, 41 Kan. 304, 21 Pac. 284, holding that a party may recover for timber destroyed for two years preceding the action; *Frankle v. Jackson*, 30 Fed. 398, holding that a cause of action accrues against a railroad company at the time of its occupation of a street, and each day's continuance thereof does not give a new cause of action; *St. Louis, K. & S. W. R. Co. v. Nyce*, 61 Kan. 394, 59 Pac. 1040, 48 L. R. A. 241, holding that the right to recover for damages to land from a railroad accrues to the owner at the time, and does not pass to a subsequent vendee; *Kansas N. & D. Ry. Co. v. Cuykendall*, 42 Kan. 234, 21 Pac. 1051, 16 Am. St. Rep. 479; *Hardesty v. Ball*, 43 Kan. 151, 23 Pac. 937—to the effect that a continuing nuisance gives rise to new causes of action.

Differentiated in *Western Union Telegraph Co. v. Moyle*, 51 Kan. 203, 32 Pac. 895, holding that additional wires placed on wires theretofore wrongfully placed on land gave a new cause of action.

Cited in note in 20 Am. St. Rep. 176, on running of limitations as to nuisances; in 126 Am. St. Rep. 952, on operation of statute of limitations where cause of action for nominal damages subsequently ripens into right to actual damages.

17 KAN. 237, ADAMS v. RUGGLES

Partner's power to bind firm as sureties.—Cited in note in 13 Am. Dec. 118, on partner's power to bind firm as sureties.

17 KAN. 239, ST. LOUIS, L. & D. R. CO. v. WILDER

Necessity of objections in trial court.—Cited in *Board of Com'rs of Lyon County v. Kiser*, 26 Kan. 279, holding that a verdict supported by incompetent evidence will not be reversed, no objection being made below.

Effect of appeal bond and of defects therein.—Cited in *Bond v. White*, 24 Kan. 45; *St. Louis & S. F. Ry. Co. v. Hurst*, 52 Kan. 609, 35 Pac. 211; *Anderson v. Haslett*, 81 Kan. 532, 106 Pac. 296; *Queen Ins. Co. of America v. Cotney*, 25 Okl. 125, 105 Pac. 651—holding that filing an appeal bond perfects an appeal, whether or not the clerk files the transcript on time; *Smith v. Nescatunga Town Co.*, 36 Kan. 758, 14 Pac. 246; *Chicago, K. & N. Ry. Co. v. Marshall*, 47 Kan. 614, 28 Pac. 701; *Ryndak v. Seawell*, 23 Okl. 759, 102 Pac. 125—holding failure of sufficiency on the bond does not justify dismissal of appeal.

Eminent domain—Measure of damages.—Cited in *Chicago, K. & W. R. Co. v. Parsons*, 51 Kan. 408, 32 Pac. 1083, holding the difference between the fair market value of land before and after the taking by a railroad the measure of damages; *Kansas Central Ry. Co. v. Allen*, 24 Kan. 33, holding that damages were allowable for actual value of land taken by a railroad and for consequential diminution in value of the balance of the land.

Same—Nature of judgment or award.—Cited in *Lawrence & T. Ry. Co. v. Moore*, 24 Kan. 323; *Kansas City, E. & S. R. Co. v. Merrill*, 25 Kan. 421; *Parsons Water Co. v. Knapp*, 33 Kan. 752, 7 Pac. 568; *Wichita & W. R. Co. v. Kuhn*, 38 Kan. 104, 16 Pac. 75; *Kansas City, W. & N. W. R. Co. v. Kennedy*, 49 Kan. 19, 30 Pac. 126; *Florence, E. D. & W. V. R. Co. v. Lilley*, 3 Kan. App. 588, 43 Pac. 857; *Oregonian R. Co. v. Hill*, 9 Or. 377—holding that judgment on appeal in condemnation proceedings should be in the nature of an award of damages as by commissioners and not an ordinary judgment against the railroad company; *Chicago, K. & W. R. Co. v. Abilene Town-Site Co.*, 42 Kan. 97, 21 Pac. 1112, on the nature of the award or judgment; *Leavenworth, N. & S. Ry. Co. v. Herley*, 45 Kan. 535, 26 Pac. 23, holding that the judgment can only be an award of damages not enforceable by execution, and hence cannot include damages for independent trespasses committed in constructing a railroad on a right of way condemned.

Same—Rights of creditors of owner.—Cited in *Armstrong v. Moore*, 1 Kan. App. 450, 40 Pac. 834, holding that a mortgagee should appear in condemnation proceedings to protect his equities; *Williams v. Hutchinson & S. Ry. Co.*, 62 Kan. 412, 63 Pac. 430, 84 Am. St. Rep. 408, holding a judgment creditor not an owner within the statutes relating to eminent domain; *Haggood v. Morten*, 28 Kan. 764, to sustain counsel's contention that one taking with notice of a bond for title to another could only be considered an equitable mortgagee; *Goodrich v. Board of Com'rs of Atchison County*, 47 Kan. 355, 27 Pac. 1006, 18 L. R. A. 113, holding that mortgagees not in possession are not owners within the statutes on condemnation proceedings.

Same—Parties.—Cited in *Brigham City v. Chase*, 30 Utah, 410, 85 Pac. 436; *State ex rel. Trimble v. Superior Court of King County*, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897—holding that it is not essential, to the validity of condemnation proceedings as to those made parties, that all interested be joined.

Same—Passing of title.—Cited in *Atchison, T. & S. F. Ry. Co. v. Wilson*, 66 Kan. 238, 69 Pac. 842, discussing a railroad company's right to abandon condemnation proceedings; *Central Branch Union Pac. R. Co. v. Atchison, T. & S. F. R. Co.*, 28 Kan. 453, to the effect that there is no final appropriation and transfer of title in eminent domain proceedings until the end of litigation over damages.

17 KAN. 248, ROBINSON v. PERRY

General and special laws.—Cited in *Travelers' Ins. Co. v. Oswego Tp.*, 59 Fed. 58, 7 C. C. A. 669; *Rathbone v. Board of Com'rs of Kiowa County*, 73 Fed. 395; *Rathbone v. Board of Com'rs of Kiowa County*, 83 Fed. 125, 27 C. C. A. 477; *Board of Com'rs of Norton County v. Shoemaker*, 27 Kan. 77;

Gray v. Crockett, 30 Kan. 188, 1 Pac. 50; *Midland Elevator Co. v. Stewart*, 50 Kan. 378, 32 Pac. 33; *Cheaney v. McClintock*, 61 Kan. 94, 58 Pac. 993; *Rambo v. Larrabee*, 67 Kan. 684, 73 Pac. 915; *Inlow v. Board of Comrs. of Graham County*, 6 Kan. App. 391, 51 Pac. 65—on the right to enact special laws, and on the uniform operation of laws of a general nature.

Cited in note in 21 Am. St. Rep. 789, on what is a general law.

17 KAN. 251, KANSAS PAC. RY. CO. v. REYNOLDS

Limitation of carrier's liability.—Cited in *Atchison, T. & S. F. R. Co. v. Dill*, 48 Kan. 210, 29 Pac. 148, holding that a shipper cannot be compelled to accept a contract altering common-law liability of a carrier, but he may accept if he desires; *Atchison, T. & S. F. R. Co. v. Mason*, 4 Kan. App. 391, 46 Pac. 31, holding that a special contract with a carrier, requiring notice in writing of damages or injuries, fairly entered into, is valid.

Cited in note in 18 Am. St. Rep. 783, on extortion of unauthorized stipulations from shippers and their effect; in 68 Am. St. Rep. 90, 91, on limitation of carrier's liability in bills of lading; in 28 L. R. A. (N. S.) 639, on effect of shipping contract limiting common-law liability, signed under compulsion.

17 KAN. 256, JOSEPH v. FIRST NAT. BANK

Evidence as to handwriting.—Cited in *Holmberg v. Johnson*, 45 Kan. 197, 25 Pac. 575; *State v. Ryno*, 68 Kan. 348, 74 Pac. 1114, 64 L. R. A. 308—holding that a writing shown to be genuine may be used for comparison in determining genuineness of other writings; *Gaunt v. Harkness*, 53 Kan. 405, 36 Pac. 739, 42 Am. St. Rep. 297, holding that false signatures cannot be used in examining experts on handwriting, but only writings shown to be genuine; *Abbott v. Coleman*, 22 Kan. 250, 31 Am. Rep. 186, holding that comparison of handwritings may be made, both by experts and by the jury; *Ort v. Fowler*, 31 Kan. 478, 2 Pac. 580, 47 Am. Rep. 501, holding that on the genuineness of a signature witnesses acquainted with the party's writing may testify, as may also witnesses testifying only from comparison with signatures admittedly genuine.

Cited in note in 62 L. R. A. 842, 867, on comparison of handwriting.

Testimony of experts—Conclusiveness.—Cited in note in 42 L. R. A. 771, on conclusiveness of testimony of experts.

Necessity of exceptions to instructions.—Cited in *Kerr v. Reece*, 27 Kan. 338; *State v. Asbell*, 10 Kan. App. 368, 59 Pac. 727—holding that instructions will not be reviewed on appeal, unless exceptions are saved.

Instruments signed in blank—Filling blank.—Cited in *Roberson v. Elevins*, 57 Kan. 50, 45 Pac. 63, holding a surety who signs a blank note liable, if the principal fills it out in a larger sum than was agreed.

Cited in note in 11 Am. St. Rep. 316 (par. 2), on blank negotiable instruments wrongfully filled up; in 35 L. R. A. 467, on alteration of note as affecting bona fide holders.

17 KAN. 263, DELAHAY v. GOLDIE

Mechanics' liens—Contract price as trust fund.—Cited in *Fossett v. Rock Island Lumber & Mfg. Co.*, 76 Kan. 428, 92 Pac. 833, 14 L. R. A. (N. S.) 918, holding that where the cost of a building exceeds the contract price, and the owner makes payments to certain subcontractors, who on that account do not file liens, in a suit to enforce other subcontractors' liens, he is entitled to credit therefor to the extent of the pro rata amount which these paid would have been entitled to, had they filed liens, and that this holding is not contrary to *Delahay v. Goldie*.

Same—Verification of statement.—Cited in *Sharon Town Co. v. Morris*, 39 Kan. 377, 18 Pac. 230; *Chicago Lumber Co. v. Osborn*, 40 Kan. 168, 19 Pac. 656—holding that verification of a mechanic's lien statement may be made by a "manager," denoting agency.

Same—Time for filing.—Cited in *Clough v. McDonald*, 18 Kan. 114, holding that a subcontractor has 60 days after completion of building to file his lien.

Same—Payment to contractors as affecting subordinate claimant.—Cited in note in 20 L. R. A. 565, on payment to contractors or subcontractors as affecting liens of subordinate claimants.

Same—Lien of materialmen.—Cited in note in 79 Am. Dec. 272, on lien of materialmen.

Review of order granting new trial.—Cited in *Brown v. Atchison, T. & S. F. R. Co.*, 29 Kan. 186, on the review of the orders of the district court granting new trials.

Followed in *Day v. Harris*, 28 Kan. 216, holding that the order of the district court granting new trial for insufficiency of evidence will not be disturbed, where it is not clear that the verdict should stand.

Rights on breach of contract.—Cited in *George O. Richardson Machinery Co. v. Swartzel*, 70 Kan. 778, 79 Pac. 660, holding that a party breaching a contract cannot set it up to defeat the other party.

17 KAN. 266, **BARRETT v. BARNES**

17 KAN. 271, **SOUTHWESTERN STAGE CO. v. PECK**

Installment contracts—Rescission.—Cited in note in 32 L. R. A. (N. S.) 5, on rescission of sale for failure to pay for installment.

17 KAN. 275, **WASHINGTON v. HOBART**

Verifying denial in suit on written instrument.—Cited in *Pattie v. Wilson*, 25 Kan. 326, holding that where plaintiff claimed as assignee, and no written assignment of the note was shown, a parol assignment was not admitted by failure to verify a denial; *J. E. Hayner & Co. v. Eberhardt & Sudendorf*, 37 Kan. 308, 15 Pac. 168, holding a mechanic's lien within Code, § 108, requiring an allegation of execution of a written instrument to be put in issue by a verified denial; *Johnston v. Johnson*, 44 Kan. 666, 24 Pac. 1098, holding that a denial that the account in suit was due when the action was commenced need not be verified; *Sawyer & Austin Lumber Co. v. Champlain Lumber Co.*, 16 Okl. 90, 84 Pac. 1093, holding that an answer, not denying the correctness of a verified account, but setting up counterclaim, need not be verified; *Doughty v. Funk*, 24 Okl. 312, 103 Pac. 634, holding that an allegation that plaintiff is the owner and holder of the note in suit as receiver may be put in issue by an answer not verified.

Cited in note in 66 L. R. A. 533, on sufficiency of answers denying ownership of plaintiff in actions on negotiable instruments.

Presumption of ownership of note.—Cited in *O'Keeffe v. First Nat. Bank of Frankfort*, 49 Kan. 347, 30 Pac. 473, 33 Am. St. Rep. 370, holding that plaintiff, who alleged he had bought and owned the note sued on, which was not indorsed, by producing the note raised a presumption of ownership against the denial thereof.

Assignment of written contract.—Cited in *Strong v. Moore*, 75 Kan. 437, 89 Pac. 895, on assignment of a contract by transferring possession thereof.

17 KAN. 278, ST. JOSEPH & D. C. R. CO. v. DRYDEN

Demurrer to evidence.—When granted.—Cited in *Avery v. Union Pac. R. Co.*, 73 Kan. 563, 85 Pac. 600, holding that a demurrer to the evidence should be sustained only where the adverse party has wholly failed to introduce any substantial evidence on a material point; *Sullivan v. Phenix Ins. Co. of Brooklyn*, 34 Kan. 170, 8 Pac. 112, holding that, though the evidence is weak, a demurrer thereto should not be sustained, if it fairly tends to establish the cause of action; *Lee v. Ryder*, 1 Kan. App. 293, 41 Pac. 221, holding that, if there is evidence tending to sustain the essentials of the cause of action, the court should not sustain a demurrer to the evidence; *Frick v. Reynolds*, 6 Okl. 638, 52 Pac. 391, holding that the case should be taken from the jury and judgment rendered where the party having the burden of proof has failed to present any evidence to sustain his case.

Same—Effect of demurrer.—Cited in *Kansas Pac. Ry. Co. v. Couse*, 17 Kan. 571, holding the sustaining of a demurrer to the evidence a final disposition of the case; *Schäfer v. Weaver & Bill*, 20 Kan. 294, holding that the submitting of a demurrer to the evidence is final only on condition that it is sustained, and that the court does not reopen the case for further evidence.

Same—Reopening cause after demurrer.—Cited in *Oberlander v. Confrey*, 38 Kan. 462, 17 Pac. 88; *State v. Sowders*, 42 Kan. 312, 22 Pac. 425; *German Fire Ins. Co. v. Thompson*, 43 Kan. 567, 23 Pac. 608; *Farmers' & Merchants' Bank of Cawker City v. Bank of Glen Elder*, 46 Kan. 376, 26 Pac. 680—holding that reopening the cause for further evidence, after sustaining a demurrer to the evidence, is discretionary.

Dismissal of cause.—Cited in *Pugsley v. Chicago, R. I. & P. R. Co.*, 69 Kan. 599, 77 Pac. 579, holding, after demurrer to the evidence is sustained, the plaintiff cannot dismiss without prejudice; *Dickerman v. Crane*, 8 Kan. App. 795, 57 Pac. 305, holding that, where the jury had returned findings and the cause was ready for judgment, there was a final submission, precluding plaintiff's right to dismiss without prejudice; *Hargis v. Robinson*, 70 Kan. 589, 79 Pac. 119, holding that a dismissal "with prejudice" is final on the issue tried.

Former adjudication.—Cited in *Dryden v. St. Joseph & D. C. R. Co.*, 23 Kan. 525, a subsequent action between the same parties, holding that the former refusal to grant the railroad company an injunction against threatened interference with its right of way was not an adjudication that the right of way did not belong to the railroad company.

Injunction against trespass.—Cited in note in 11 Am. Dec. 506, on injunction against trespass.

17 KAN. 283, McLAUGHLIN v. STATE

Conclusiveness of judgment.—Followed in *Hover v. Cockins*, 17 Kan. 514, holding that if a defendant has a defense, and knows it, and fails to set it up, he forever loses it.

Same—Against dead person.—Cited in note in 49 L. R. A. 158, 171, on effect of judgment entered against dead person.

17 KAN. 287, MERRITT v. WILLIAMS

Cited in note in 26 Am. Dec. 292, on notice of dissolution of partnership.

17 KAN. 291, MORRILL v. DOUGLASS

Tax sale—Second sale.—Cited in *Belz v. Bird*, 31 Kan. 139, 1 Pac. 246, holding that, where a sale of land to a county for delinquent taxes is voidable for defects, a second sale to it for subsequent taxes is voidable also; *Millbank v. Ostertag*, 24 Kan. 462, holding that, if a sale to the county for taxes is invalid,

another sale may be made to it; *Ewing v. Baldwin*, 24 Kan. 82, on the validity of a sale for taxes of school lands pending the delinquency of the original purchaser from the state.

Same—Irregularities.—Cited in *Harris v. Curran*, 32 Kan. 580, 4 Pac. 1044, holding that a tax deed reciting that sale was on May 6th at a sale begun and held on the first Tuesday of May was not invalid because May 6th was Friday, the recital meaning that the sale begun Tuesday was concluded on Friday, May 6th; *Clarke v. Tilden*, 72 Kan. 574, 84 Pac. 139, holding that, if under any statute a sale on which a tax deed is based may have been legally held on the day recited therein, the deed is not void on its face; *Baughman v. Harvey*, 76 Kan. 767, 93 Pac. 146, holding that irregularities will not avoid a tax deed, and omission of word "publicly" from recital of sale is not fatal.

Same—Deed as prima facie evidence.—Cited in *City Ry. Co. v. Chesney*, 30 Kan. 199, 1 Pac. 520, holding a regular tax deed only prima facie evidence of regularity of prior proceedings; *Douglass v. Dickson*, 31 Kan. 310, 1 Pac. 541, on the prima facie validity of a tax deed.

Cited in note in 4 Am. St. Rep. 189, on power of Legislature to make tax deeds presumptive or conclusive evidence.

Same—Who may purchase and enforce tax titles.—Cited in note in 15 Am. Dec. 684, on who may purchase at tax sale; in 75 Am. St. Rep. 235, on who may purchase and enforce a tax title.

17 KAN. 294, *MCCARTNEY v. WILSON*

Effect of duress.—Cited in *Applegate v. Young*, 62 Kan. 100, 61 Pac. 402, holding that money taken by a justice of the peace in lieu of a recognizance of one under arrest remains his property and may be recovered.

Presumptions on appeal.—Cited in *State v. Daugherty*, 63 Kan. 473, 65 Pac. 695, holding that on appeal presumptions favor the regularity of proceedings below.

17 KAN. 298, *STATE v. WINNER*

Preliminary proof to admit declarations of co-conspirators.—Cited in *State v. Miller*, 35 Kan. 328, 10 Pac. 865, holding that prima facie evidence of conspiracy cannot always be first required before admitting the acts and declarations of co-conspirators; *State v. Lewis*, 51 Or. 467, 94 Pac. 831, holding that error in admitting evidence without preliminary proof is cured by subsequently introducing the preliminary evidence; *State v. Dilley*, 44 Wash. 207, 87 Pac. 133, holding that acts and declarations of conspirators may be admitted without first proving the conspiracy, if it is afterwards proved; *Taylor v. United States*, 89 Fed. 954, 32 C. C. A. 449; *State v. Rogers*, 54 Kan. 683, 39 Pac. 219—holding that necessity of first proving a conspiracy to permit evidence of declarations and acts of conspirators is not absolute, but rests in the discretion of the court; *State v. Moore*, 32 Or. 65, 48 Pac. 468, holding that the sufficiency of the preliminary proof to permit evidence of declarations of conspirators is largely in the discretion of the court.

Cited in note in 95 Am. Dec. 60, on admissibility of declarations.

Harmless error.—Cited in *State v. Carey*, 56 Kan. 84, 42 Pac. 371, holding that the Supreme Court will give judgment without regard to technical errors, or to exceptions not affecting substantial rights, in capital cases as in others.

Insurance without interest.—Cited in *Missouri Valley Life Ins. Co. v. Sturges*, 18 Kan. 93, 26 Am. Rep. 761, on validity of life insurance policy to party without interest.

Cited in note in 52 Am. Rep. 145, on wager policies.

Circumstantial evidence.—Cited in *State v. Nordmark*, 84 Kan. 628, 114 Pac. 1068, on the value of circumstantial evidence.

Cited in note in 97 Am. St. Rep. 786, on circumstantial evidence; in 7 L. R. A. (N. S.) 182, on sufficiency of circumstantial evidence to identify remains as of person charged to have been killed.

Res gestæ.—Cited in *State v. Power*, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902, holding evidence of declarations of decedent as she was preparing to leave home to go to another city to be treated by defendant, charged with killing decedent in committing an abortion, admissible as *res gestæ*.

Proof of corpus delicti.—Cited in note in 78 Am. Dec. 253, on proof of corpus delicti.

17 KAN. 306, SHULTZ v. SMITH

Execution sale after return day.—Cited in *Norton v. Reardon*, 67 Kan. 302, 72 Pac. 861, 100 Am. St. Rep. 459, as not distinguishing between ordinary execution sales and those specially ordered by the court, and holding that a confirmation operated as a special order for sale, and cured a sale made after return day.

Distinguished in *First Nat. Bank of Arkansas City v. Farmers' Nat. Bank*, 61 Kan. 620, 60 Pac. 324, holding that lands advertised for sale at a date beyond the return day may be sold under a second or alias writ.

17 KAN. 308, MALTBY v. EISENHAUER

17 KAN. 313, SMITH v. SCHOOL DIST. NO. 2

17 KAN. 316, NESBIT v. HINES

Motion for new trial—Necessity—Time of filing.—Cited in *Fowler v. Young*, 19 Kan. 150; *City of Atchison v. Byrnes*, 22 Kan. 65; *Gruble v. Ryus*, 23 Kan. 195; *City of Osborne v. Hamilton*, 29 Kan. 1; *Decker v. House*, 30 Kan. 614, 1 Pac. 584; *McNally v. Keplinger*, 37 Kan. 556, 15 Pac. 534; *Mercer v. Ringer*, 40 Kan. 189, 19 Pac. 670; *Thomas v. Kansas City Elevated R. Co.*, 76 Kan. 141, 90 Pac. 816; *Atchison, T. & S. F. R. Co. v. Osburn*, 79 Kan. 348, 100 Pac. 473; *Golding v. Eidson*, 2 Kan. App. 307, 43 Pac. 104; *Bardrick v. Dillon*, 7 Okl. 535, 54 Pac. 785; *City of Perry v. National Sewing Mach. Co.*, 13 Okl. 211, 74 Pac. 189; *Stanard v. Sampson*, 23 Okl. 13, 99 Pac. 796; *Joiner v. Goldsmith*, 25 Okl. 840, 107 Pac. 733; *McKinney v. State*, 3 Wyo. 719, 30 Pac. 293, 16 L. R. A. 710—holding error waived by failure to file motion for new trial, or to file it within required time; *Ingersoll v. Yates*, 21 Kan. 90; *Jarrett v. Apple*, 31 Kan. 693, 3 Pac. 571; *Ritchie v. Kansas, N. & D. Ry. Co.*, 55 Kan. 36, 39 Pac. 718—holding errors for which a new trial may be granted not available on appeal, unless a new trial was refused below.

Same—Making of application.—Cited in *Freelove v. Gould*, 3 Kan. App. 750, 45 Pac. 454, holding that timely filing of a motion for new trial with the clerk is a sufficient "making," and it is not necessary to make direct application.

Same—Ruling on motion.—Cited in *State v. Summers*, 44 Kan. 637, 24 Pac. 1099; *Larabee v. Hall*, 50 Kan. 811, 31 Pac. 1062—holding that the court should not overrule motion for new trial *pro forma*.

Discussed in *Pinson & Sunday v. Prentise*, 8 Okl. 143, 56 Pac. 1049; holding that *Nesbit v. Hines* does not sustain the proposition, to which it has been cited, that it is error to overrule a motion for new trial *pro forma*.

Same—Errors not included in motion.—Cited in *McDonald v. Cox*, 12 Ariz. 171, 100 Pac. 457; *State v. Riddle*, 20 Kan. 711; *State v. Benson*, 22 Kan. 471; *Clark v. Imbrie*, 25 Kan. 424; *D. M. Osborne & Co. v. Ehrhard*, 37 Kan. 413, 15 Pac. 590; *St. Louis, Ft. S. & W. R. Co. v. Grove*, 39 Kan. 731, 18 Pac. 958; *Leavenworth, N. & S. Ry. Co. v. Whitaker*, 42 Kan. 634, 22 Pac. 733;

Glaser v. Glaser, 13 Okl. 389, 74 Pac. 944—holding alleged errors forming a ground for new trial, not mentioned in the motion for new trial, are waived.

Same—Necessity of exception to ruling on motion.—Cited in Wilson v. Kestler, 34 Kan. 61, 7 Pac. 793; Great Spirit Springs Co. v. Chicago Lumber Co., 47 Kan. 672, 28 Pac. 714; St. Louis & S. F. R. Co. v. Werner, 70 Kan. 190, 78 Pac. 410; Reed v. United States, 2 Okl. Cr. 652, 103 Pac. 371; United States v. Trabing, 3 Wyo. 144, 6 Pac. 721—holding error waived by failure to except to the overruling of the motion for new trial.

Same—Recitals in record as to motion.—Cited in Hover v. Cockins, 17 Kan. 518; Typer v. Sooy, 19 Kan. 593; Central Branch R. Co. v. Phillips, 20 Kan. 9 (concurring opinion); Lucas v. Sturr, 21 Kan. 490; Morse v. Brunswick & Co., 34 Kan. 378, 8 Pac. 398; United States ex rel. Search v. Choctaw, O. & G. R. Co., 3 Okl. 404, 41 Pac. 729; Swank v. Tallman, 25 Okl. 424, 106 Pac. 644—holding that, unless the record shows motion for new trial properly filed, the court on appeal cannot pass on questions forming a ground for such a motion; Hover v. Tenney, 27 Kan. 133; Burtiss v. La Belle Wagon Co., 45 Kan. 413, 25 Pac. 352; City of Eskridge v. Lewis, 51 Kan. 376, 32 Pac. 1104—holding that where the record is silent as to the time of filing of a motion for new trial, which was overruled, the court on appeal will presume it was not filed in time.

Same—Before justices of the peace.—Cited in Rice v. Harvey, 19 Kan. 144; Holland v. Mudenger, 22 Kan. 731—holding that the district court cannot reverse the rulings of a justice of the peace on writ of error, where no motion for new trial was made; Greenwell v. Greenwell, 28 Kan. 413, holding that where defendant's demurrer to plaintiff's evidence is overruled by a justice of the peace, judgment entered for plaintiff, and defendant's motion for new trial overruled, he cannot take the case to the district court on petition in error.

17 KAN. 320, **PRESCOTT v. BEEBE**

Title of acts.—Cited in Philip v. McCarty, 24 Kan. 393, holding the constitutional requirement as to expression of subject in the title of an act mandatory; Colorado Farm & Live Stock Co. v. Beerbohm, 43 Colo. 464, 96 Pac. 443; State v. Bankers' & Merchants' Mut. Ben. Ass'n, 23 Kan. 499; State v. Barrett, 27 Kan. 213; Missouri Pac. Ry. Co. v. City of Wyandotte, 44 Kan. 82, 23 Pac. 950—on expression of subject of an act in its title.

Taxation of public and state lands.—Cited in Board of Com'rs of Russell County v. Mahoney, 69 Kan. 661, 77 Pac. 692, holding school lands, when sold, are subject to taxation pending payment, but that purchaser at tax sale takes only the estate of the original purchaser from the state; Morgan v. Board of Com'rs of Clay County, 27 Kan. 229, holding lands sold by the state in aid of a railroad are taxable pending payment of balance of price; Board of Com'rs of Dickinson County v. Baldwin, 29 Kan. 538 (dissenting opinion), on taxation of Agricultural College lands; Logan, Rand & Co. v. Board of Com'rs of Clark County, 51 Kan. 747, 33 Pac. 603—holding the Osage Indian trust and reserve lands, after sale by the government, subject to taxation as against the purchaser; Courtney v. Missoula County, 21 Mont. 591, 56 Pac. 359; Washington Iron-Works v. King County, 20 Wash. 150, 54 Pac. 1004—holding that purchaser of state lands under executory contract must pay taxes thereon.

Cited in note in 132 Am. St. Rep. 347, on exemption from taxation or assessment of lands owned by governmental bodies, or in which they have an interest; in 35 L. R. A. (N. S.) 670, 674, on property granted with reservation of title or lien in favor of public as subject of taxation.

17 KAN. 325, **BLISS v. CARLSON**

Continuance.—Cited in Hockett v. Turner, 19 Kan. 527; Clonston v. Gray, 48 Kan. 31, 28 Pac. 933; Gurney v. Steffens, 56 Kan. 295, 43 Pac. 241—hold-

ing granting or refusing a continuance is in the discretion of the court, and will not be disturbed, save for abuse.

Cited in note in 74 Am. Dec. 141, on continuance of civil causes.

17 KAN. 326, HOGG v. GREEN

17 KAN. 328, HERMAN v. MILLER

Set-off of judgments.—Cited in *Hills v. First Nat. Bank*, 54 Kan. 421, 38 Pac. 565, holding it permissible for a bank to pay a judgment against it to the judgment creditor's attorney, and then serve him with garnishee summons to obtain the amount of a judgment in its favor against the client, obtained in another court, and the bank was not bound to resort to set-off of the judgments; *Kansas City, Ft. S. & M. R. Co. v. Murray*, 57 Kan. 697, 47 Pac. 835, holding that a party who procures an order for the partial satisfaction of a judgment against him by a set-off of a judgment in his favor for a less sum recognizes the judgment against him and is estopped from appealing therefrom; *Schuler v. Collins*, 63 Kan. 372, 65 Pac. 662, holding set-off of judgments rests on equitable considerations, and is allowed in the interest of substantial justice; *First Nat. Bank of Atchison v. Price*, 65 Kan. 853, 70 Pac. 938, holding a bank wrongfully taking funds in custodia legis, on order of restitution, was not entitled to set off a personal judgment against the claimant of the fund.

Cited in note in 109 Am. St. Rep. 141, on setting off one judgment against another.

17 KAN. 333, HOUCK v. KELSEY

Right to attack title of holder of public lands.—Followed in *Lapham v. Head*, 21 Kan. 332; *Atchison, T. & S. F. R. Co. v. Pracht*, 30 Kan. 66, 1 Pac. 319—holding that, so long as the government treats a pre-emption right as valid, no other can object to it.

Cited in *Marysville Inv. Co. v. Holle*, 5 Kan. App. 408, 49 Pac. 332 (dissenting opinion), on right of a stranger to question a title; *De Toro v. Robinson*, 91 Cal. 371, 27 Pac. 671, holding that fraud in extending the boundaries of a Mexican grant on public land can be complained of by the government alone.

17 KAN. 336, CROSS v. BURLINGTON NAT. BANK

Exceptions to evidence.—Cited in *Humphrey v. Collins*, 23 Kan. 549; *Long v. Kasebeer*, 28 Kan. 226; *Smith v. Leighton*, 38 Kan. 544, 17 Pac. 52, 5 Am. St. Rep. 778—holding general objections to evidence are not as a rule available.

Partnership—Incoming partners.—Followed in *Jones v. Davies*, 60 Kan. 309, 56 Pac. 484, 72 Am. St. Rep. 354, holding that slight testimony is sufficient to show that an incoming partner has made himself liable for prior debts; *Rohlfing & Co. v. Carper*, 53 Kan. 251, 36 Pac. 336, holding that an instruction that slight "circumstances" would be sufficient to prove assumption of debts by an incoming partner was properly refused, and that the question of such assumption was for the jury, where the evidence was in substantial conflict.

Cited in note in 9 L. R. A. (N. S.) 58, 65, on assumption of debts on dissolution of partnership.

Same—Relation to firm.—Cited in *Re Telfer*, 184 Fed. 224, 106 C. C. A. 366, on a partnership as an entity distinct from its membership, as to claims against it by its members on its insolvency.

Evidence of general reputation to establish character of company.—Cited in *State v. International Harvester Co. of America*, 79 Kan. 371, 99 Pac. 608, on the admissibility of evidence of general repute to show the corporate and business character of certain companies.

17 KAN. 341, BAKER v. LONG

Election contests.—Cited in *Wildman v. Anderson*, 17 Kan. 344; *Lawrence v. Wheeler*, 77 Kan. 209, 93 Pac. 602—holding pleadings in nature of answer and reply are proper in election contests.

Pleadings.—Cited in *Johnson v. State Bank of Seneca*, 59 Kan. 250, 52 Pac. 860, defining departure in pleading.

17 KAN. 344, WILDMAN v. ANDERSON

De facto corporations.—Cited in *Voss v. Union School Dist. No. 11*, 18 Kan. 467, holding that the organization of a school district long existing as a de facto district cannot be questioned on validity of taxes; *Commissioners of Saline County v. Anderson*, 20 Kan. 298, 27 Am. Rep. 171; *School Dist. No. 25 v. State*, 29 Kan. 57—holding that the law recognizes a corporation de facto, as well as an officer de facto.

Constitutionality of "Australian ballot" statutes.—Cited in note in 16 L. R. A. 755, on constitutionality of "Australian ballot" statutes.

Election contests.—Cited in *Buckland v. Goit*, 23 Kan. 327, holding a county board of canvassers, organized to try a contested election, is a judicial board, to which writ of error will lie from the district court; *Constitutional Prohibitory Amendment Cases*, 24 Kan. 700, holding mere irregularities will not defeat an election.

17 KAN. 351, MOONLIGHT v. BOND

Election contest.—Cited in *Buckland v. Goit*, 23 Kan. 327, holding writ of error will lie to the county board of canvassers in election contest.

Cited in note in 90 Am. St. Rep. 88, on irregularities avoiding elections.

Bribery.—Cited in note in 97 Am. Dec. 716, on bribery.

17 KAN. 355, PRITCHETT v. MITCHELL, 22 AM. REP. 287

Usury a personal defense.—Cited in *Blakeman v. Busby*, 61 Kan. 745, 60 Pac. 1064, holding an assignee for benefit of creditors is not a stranger to transactions by assignor, and may set up a defense of usury; *Tidball v. Schmeltz*, 77 Kan. 440, 94 Pac. 794, 127 Am. St. Rep. 424; *Irwin v. Washington Loan Ass'n*, 42 Or. 105, 71 Pac. 142—holding purchaser of lands subject to mortgage cannot set up usury in the mortgage; *Higbee v. Aetna Bldg. & Loan Ass'n*, 26 Okl. 327, 109 Pac. 236, Ann. Cas. 1912B, 223, holding purchaser at bankrupt sale of premises subject to mortgage cannot set up usury in mortgage; *Fenby v. Hunt*, 53 Wash. 127, 101 Pac. 492, holding usury must be pleaded, and that it is a defense personal to the debtor; *Beach v. Guaranty Sav. Ass'n*, 44 Or. 530, 76 Pac. 16, 1 Ann. Cas. 418, holding right to plead usury is personal; *In re Worth*, 130 Fed. 927, holding that under the laws of Iowa creditors of a bankrupt cannot set up defense of usury to defeat the claim of another creditor.

Cited in note in 28 Am. Rep. 491, on personal nature of defense of usury.

What constitutes usury.—Cited in note in 55 Am. Dec. 399 (par. 1), on what constitutes usury.

Mortgages.—Cited in *Goodrich v. Board of Com'rs of Atchison County*, 47 Kan. 355, 27 Pac. 1006, 18 L. R. A. 113, on the estate and rights of a mortgagee.

17 KAN. 360, HAYS v. HILL

Parties.—Cited in *Beyer v. Reed*, 18 Kan. 80, holding it error to permit a plaintiff, suing members of a school board to contest bonds, to amend, setting forth new facts, and to litigate at the cost of the original defendants, who had meanwhile passed out of office; *Commissioners of Pawnee County v. Atchison*,

T. & S. F. R. Co., 21 Kan. 748, on defects in parties; *Atchison, T. & S. F. R. Co. v. Wilhelm*, 33 Kan. 206, 6 Pac. 273; *Cassatt v. Board of Com'rs of Barber County*, 39 Kan. 505, 18 Pac. 517—holding that in a suit to restrain the county treasurer and sheriff from collecting a tax levied by a school district, or to compel the levying of a tax, the officers of the school district are necessary parties; *McCarthy v. Marsh*, 41 Kan. 17, 20 Pac. 479, holding that in a suit to compel the auditor of state to issue two certificates of indebtedness, one to plaintiff and one to a third person made a party defendant, judgment could not be entered until such third person appeared or was summoned; *City of Anthony v. State*, 49 Kan. 248, 30 Pac. 488, holding that to a suit to enjoin a city and its officers from levying taxes to pay bonds the bondholders were necessary parties; *Union Terminal R. Co. v. Board of Railroad Com'rs*, 52 Kan. 680, 35 Pac. 224, holding a suit to enjoin the Railroad Commission from proceeding with a rehearing concerning crossing rights of various railroads could not be entertained, unless the railroad companies interested were made parties; *Jeffries-Ba Som v. Nation*, 63 Kan. 247, 65 Pac. 228, holding that to a suit to restrain issuance of a tax warrant, brought against the treasurer and sheriff, the board of county commissioners is a necessary party; *Allison v. Hatton*, 46 Or. 370, 80 Pac. 101, on parties to suit to enjoin collection of taxes, brought to determine in what county plaintiff's lands were located.

17 KAN. 363, TITUS v. HOWARD COUNTY COM'RS

Sheriff's fees on tax warrant.—Followed in *Thralls v. Board of Com'rs of Sumner County*, 24 Kan. 594, holding a sheriff not entitled to fees for mileage in endeavoring to serve a personal property tax warrant, where he returns "no property found."

17 KAN. 365, PETERS v. BOARD OF STATE CANVASSERS

Term of office.—Extension.—Cited in *Wilson v. Clark*, 63 Kan. 595, 65 Pac. 705; *Pruitt v. Squires*, 64 Kan. 855, 68 Pac. 643—holding that, when the Constitution fixes a term of office, it is not in the power of the Legislature to change it; *Smith v. Holt*, 24 Kan. 771; *State v. Holcomb*, 83 Kan. 256, 111 Pac. 188; *Wendorff v. Dill*, 83 Kan. 782, 112 Pac. 588—as to term of office of district judge; *State ex rel. Little v. Wentworth*, 55 Kan. 208, 40 Pac. 648, holding that, where a term of office is fixed at three years, no fractional terms are recognized, but each incumbent serves three years from time of appointment.

Cited in note in 3 L. R. A. (N. S.) 887, on power to extend term of office by postponing time for election.

Mandamus.—Cited in *Rice v. Board of Canvassers of Coffey County*, 50 Kan. 149, 32 Pac. 134, refusing mandamus as unavailing; *Rice v. Robson*, 83 Kan. 252, 111 Pac. 186, holding that mandamus to compel a canvass cannot be had, save on an authorized election for an existing office; *State ex rel. Bennett v. Barber*, 4 Wyo. 56, 32 Pac. 14, on mandamus to compel issuance of election certificate.

17 KAN. 369, MEDBERRY v. SOPER, Same case on subsequent appeal, 24 Kan. 128

Payment by note or check.—Cited in *Hurd v. G. C. Hixon & Co.*, 27 Kan. 722, holding that acceptance of a note does not ordinarily extinguish the original debt, independently of any agreement; *Groat v. Pracht*, 31 Kan. 656, 3 Pac. 274, holding that, if the parties so agree, a note may be in payment of an account; *Mullins v. Brown*, 32 Kan. 812, 4 Pac. 305, holding a bank check not prima facie evidence of payment of a debt, it not being a payment without agreement; *Hershfild v. Lowenthal*, 35 Kan. 407, 11 Pac. 173, holding that acceptance of new notes in settlement of an open account is the creation of a new

debt; *Bradley, Wheeler & Co. v. Harwi*, 43 Kan. 314, 23 Pac. 566, holding that a note is not prima facie payment of a pre-existing debt, and the burden of showing an agreement that it was a payment is on defendant debtor; *Topeka Capital Co. v. Merriam*, 60 Kan. 397, 56 Pac. 757; *Webb v. National Bank of Republic*, 67 Kan. 62, 72 Pac. 520—holding that the giving of a note does not of itself discharge a pre-existing debt, the intention controlling.

Cited in note in 35 L. R. A. (N. S.) 57, on payment by commercial paper.

17 KAN. 378, *HOFFMIRE v. HOLOOMB*

Estoppel to question judgment.—Cited in *Bradley v. Rogers*, 33 Kan. 120, 5 Pac. 374; *Price v. Allen*, 39 Kan. 476, 18 Pac. 609; *Guaranty Sav. Bank v. Butler*, 56 Kan. 267, 43 Pac. 229; *Fidelity & Deposit Co. of Maryland v. Kepley*, 66 Kan. 343, 71 Pac. 818; *Smith v. Powell*, 5 Kan. App. 652, 47 Pac. 992—holding that a party accepting benefits under a judgment cannot seek its reversal; *State Journal Co. v. Commonwealth Co.*, 43 Kan. 93, 22 Pac. 982, holding that a defendant, at his option executing a bond for costs to secure discharge of a receiver, cannot contest the costs of receivership on grounds of irregularity of appointment; *Seaverns v. State*, 76 Kan. 920, 93 Pac. 163, holding that an occupant of school lands, appealing from refusal of his petition for permission to purchase as a settler, acts inconsistently by purchasing at a public sale, and is estopped to further question the judgment.

17 KAN. 380, *KANSAS PAC. RY. CO. v. BRADY*

Railroad fires—Contributory negligence.—Cited in *Walker v. Chicago, R. I. & P. R. Co.*, 76 Kan. 32, 90 Pac. 772, 12 L. R. A. (N. S.) 624, 123 Am. St. Rep. 119, 13 Ann. Cas. 1204, holding that a farmer, who permitted dry grass and cornstalks to remain in the field where they were grown, was not precluded from recovering for loss from fire set by railroad engine.

Cited in note in 78 Am. Dec. 185 (par. 3), on railroad company's liability for fire.

Same—Questions for jury.—Cited in *Kansas City, Ft. S. & G. R. Co. v. Owen*, 25 Kan. 419; *Missouri Pac. Ry. Co. v. Cornell*, 30 Kan. 35, 1 Pac. 312—holding that whether an owner of premises near a railroad track was negligent, precluding a recovery for damage from fire set by the railroad, was for the jury.

Sufficiency of evidence to support verdict.—Cited in *Behrens v. Kansas Pac. Ry. Co.*, 5 Colo. 400; *Missouri Pac. Ry. Co. v. Kincaid*, 29 Kan. 654; *Kansas City, Ft. S. & G. R. Co. v. Foster*, 39 Kan. 329, 18 Pac. 285; *Acker v. Norman*, 72 Kan. 586, 84 Pac. 531—on the sufficiency of evidence to support the verdict.

Negligence.—Cited in *Atchison, T. & S. F. R. Co. v. Plaskett*, 47 Kan. 107, 26 Pac. 401, on what constitutes negligence; *Central Branch Union Pac. R. Co. v. Henigh*, 23 Kan. 347, 33 Am. Rep. 167, holding that all must use their property with reference to the rights of others, and that even trespassers have a right to rely on this.

Cited in note in 15 L. R. A. 41, on presumption of negligence from occurrence of accidents.

Same—Injury to infant.—Cited in note in 31 Am. Rep. 210, on liability for negligent injury to infant.

Same—Questions for jury.—Cited in *Central Branch Union Pac. R. Co. v. Hotham*, 22 Kan. 41, holding that, where reasonable minds might differ, the question of negligence is for the jury.

17 KAN. 390, *STATE v. LOFLAND*

17 KAN. 392, STATE v. COOK

Preliminary evidence—Expert testimony.—Cited in *State v. McAnarney*, 70 Kan. 679, 79 Pac. 137, holding evidence of identity of the thing analyzed or examined and that it had not been tampered with pending the examination, is necessary; *State v. Groning*, 33 Kan. 18, 5 Pac. 446, holding the sufficiency of preliminary evidence is primarily for the court.

Cited in note in 66 Am. Dec. 239, on expert testimony.

Proof of poisoning.—Cited in note in 65 Am. Dec. 588, 590, on proof of poisoning.

17 KAN. 396, STATE v. CROSBY

Criminal law—Appeal by state.—Cited in *State v. Phillips*, 33 Kan. 100, 5 Pac. 436; *State v. Moon*, 45 Kan. 145, 25 Pac. 614; *State v. Lee*, 49 Kan. 570, 31 Pac. 147; *State v. Hickerson*, 55 Kan. 133, 39 Pac. 1045; *City of Lyons v. Wellman*, 56 Kan. 285, 43 Pac. 267; *State v. Rook*, 61 Kan. 382, 59 Pac. 653, 49 L. R. A. 186—holding that the state cannot appeal from a judgment discharging defendant.

Cited in note in 19 L. R. A. 347, on right of state to appeal in a criminal case; in 27 Am. Dec. 479, on power to set aside verdict of acquittal.

17 KAN. 402, STATE v. BEHEE

Offenses and degrees included in indictment.—Cited in *State v. Adams*, 20 Kan. 311, holding that where the information charged burglary in the second degree, entering a store in the nighttime, defendant could not be convicted thereunder of any other degree, and a verdict of guilty as charged supported judgment; *State v. Nolan*, 48 Kan. 723, 29 Pac. 568, 30 Pac. 486, holding arson in the nighttime does not include arson in the daytime; *In re Black*, 52 Kan. 64, 34 Pac. 414, 39 Am. St. Rep. 331; *State v. Treadwell*, 54 Kan. 513, 38 Pac. 813—holding that burglary in the first degree includes the second degree, and a verdict not specifying the degree is erroneous, but a judgment thereon is not void; *People v. Smith*, 136 Cal. 207, 68 Pac. 702; *State v. Copenhaver*, 35 Mont. 842, 89 Pac. 61—holding that on a charge of burglary in the first degree, in the nighttime, a verdict of second degree, necessarily implying daytime, could not stand; *State v. Bellamy*, 63 Kan. 144, 65 Pac. 274, holding that a defendant has a right to have the charge against him clearly and specifically set out.

17 KAN. 407, CITY OF BURLINGAME v. KANSAS VAL. NAT. BANK**17 KAN. 408, NASON v. BEST**

Notice in forcible entry and detainer—Necessity.—Cited in *Stuller v. Sparks*, 51 Kan. 19, 31 Pac. 301; *Smith v. Finger*, 15 Okl. 120, 79 Pac. 759—holding that plaintiff in forcible entry and detainer must give written notice to the adverse party to leave the premises; *Wolfer v. Hurst*, 47 Or. 156, 80 Pac. 419, 82 Pac. 20, 8 Ann. Cas. 725, holding that the notice to quit required of a landlord to a tenant may be waived.

Same—Sufficiency.—Cited in *Best v. Frazier*, 16 Okl. 523, 85 Pac. 1119, holding that the notice must show clearly who claims the premises and who makes the demand; *Conaway v. Gore*, 22 Kan. 216, holding a simple notice to leave, signed by the party subsequently bringing forcible entry and detainer, is sufficient; *Oklahoma City v. Hill*, 4 Okl. 521, 46 Pac. 568, holding it not necessary that the name of claimant appear in the body of the notice to quit, if it is signed by him.

Right to action for forcible entry and detainer.—Cited in note in 121 Am. St. Rep. 402-404, on right to civil action for forcible entry and detainer.

17 KAN. 410, BOND v. WEBER

Amercement of sheriff.—Cited in *Graves v. Bulkley*, 25 Kan. 240, 37 Am. Rep. 249, holding a plaintiff, accepting money realized on an execution sent to the clerk without return of the writ, waived right to amerce for neglect; *Fisher v. Franklin*, 38 Kan. 251, 16 Pac. 341, holding that the statute relating to amercement is penal, and must be strictly followed; *Fuller v. Wells, Fargo & Co.*, 42 Kan. 551, 22 Pac. 561, holding the proceedings to amerce are barred after one year.

17 KAN. 413, RETTMAN v. RICHARDSON

Stare decisis.—Cited in *Missouri Pac. R. Co. v. Stone*, 80 Kan. 7, 101 Pac. 666, holding the opinion on appeal is the subsequent law of the case; *Lucas v. Sturr*, 21 Kan. 480, in passing questions, without discussion.

17 KAN. 414, STATE v. YOUNG

Followed in *City of Marion Centre v. Toomy*, 21 Kan. 439, reversing the judgment on authority of *State v. Young*.

Liquor license.—Cited in *State v. Simmons*, 21 Kan. 685, holding cities of the third class empowered to issue liquor licenses; *Welsford v. Weidlein*, 23 Kan. 601, holding cities of the third class, in issuing liquor licenses, must comply with the dramshop law, and cannot issue same without petition by majority of the residents; *In re Jahn*, 55 Kan. 694, 41 Pac. 956, holding cities may punish, in pursuance of ordinance, illegal sales of intoxicating liquor.

Statutes—Construction.—Cited in *Wenger v. Taylor*, 39 Kan. 754, 18 Pac. 911; *Missouri Pac. R. Co. v. Board of Railroad Com'rs of Kansas*, 85 Kan. 229, 116 Pac. 896; *Territory ex rel. Sampson v. Clark*, 2 Okl. 82, 35 Pac. 882—holding part of a statute should be construed with reference to other parts.

Same—Repeal.—Followed in *City of Wichita v. Missouri & K. Telephone Co.*, 70 Kan. 441, 78 Pac. 886, holding repeals by implication not favored.

Power of city to punish act which is offense under state statute.—Cited in note in 17 L. R. A. (N. S.) 50, 72, on power of municipality to punish act also an offense under state law.

17 KAN. 419, PHILLIPS v. GEORGE**17 KAN. 425, WALTERS v. VAN DERVEER****17 KAN. 427, WEATHERWAX v. STATE****17 KAN. 429, HADDEN v. RODKEY**

Transfer of note without indorsement.—Cited in *Third Nat. Bank v. Harrison*, 10 Fed. 243; *De Hass v. Roberts*, 59 Fed. 853; *Calvin v. Sterritt*, 41 Kan. 215, 21 Pac. 103; *Snyder v. Moon*, 5 Kan. App. 447; *Warren v. Gruwell*, 5 Kan. App. 523, 48 Pac. 205—holding that transfer without indorsement of a note payable to order is subject to defenses good against the payee, such as payment, etc.

Cited in note in 17 L. R. A. (N. S.) 1109, on transferee, without indorsement, of bill or note payable or indorsed "to order," as bona fide purchaser.

Same—Parties.—Cited in *State v. Lee*, 32 Kan. 360, 4 Pac. 653, holding transferee can maintain action in his own name.

Same—Pleading.—Cited in *First Nat. Bank of Ft. Scott v. Elliott*, 46 Kan. 32, 26 Pac. 487, holding setting out a copy of all indorsements on a note payable to order, with the allegation that plaintiff is the owner, shows title transferred by indorsement.

17 KAN. 432, SNIDER v. KOEHLER

Intoxicating liquor—Consideration for notes.—Cited in *Glass v. Alt*, 17 Kan. 444, holding notes given for intoxicating liquor sold contrary to law not collectible.

Same—Conflict of laws.—Cited in note in 61 L. R. A. 419, on conflict of laws as to sales of liquor.

17 KAN. 433, McCARDELL v. McNAY

Right to trial by jury.—Cited in *Houston v. Commissioners of Cloud County*, 19 Kan. 396, holding an action to restrain transfer of tax sale certificates and set aside tax sale is not a case in which a jury may be had; *Bennett v. Wolverton*, 24 Kan. 284, holding that where a party interpleads, claiming title to real property attached, there is no right to a jury trial; *Rich v. Bowker*, 25 Kan. 7, holding a jury trial not demandable in a statutory will contest; *Keith v. Keith*, 26 Kan. 26, holding that, where plaintiff's action of ejectment was by amendment virtually changed to an action to quiet title, a trial by jury was not to be had; *Woodman v. Davis*, 32 Kan. 344, 4 Pac. 262, holding a jury trial not a matter of right in equity, and the court may send any portion of the issues it pleases to the jury; *Morgan v. Field*, 35 Kan. 162, 10 Pac. 448, holding a suit on a note and to foreclose a mortgage was not triable by jury, the indebtedness being admitted, and right to subject the premises to the debt being the only issue; *Shahan v. Tallman*, 39 Kan. 185, 17 Pac. 823, holding a party entitled to a jury in action against a garnishee because his answers were not true and satisfactory; *Henderson v. New England Loan & Trust Co.*, 6 Kan. App. 279, 51 Pac. 61, holding a suit to foreclose a mortgage, with an answer asking to have the title quieted, not a case in which the parties were entitled to a jury; *Gulley v. Territory*, 19 Okl. 187, 91 Pac. 1037, holding in an action by the territory to cancel defendant's license to practice medicine on ground of fraud, defendant was not entitled to a jury.

17 KAN. 436, COMER v. KNOWLES

False imprisonment.—Cited in *Whitman v. Atchison, T. & S. F. R. Co.*, 85 Kan. 150, 116 Pac. 234; 34 L. R. A. (N. S.) 1029, holding that unlawful restraint may be by restraining one without sufficient cause, and by words or acts which he fears to disregard, and that it is not necessary that he be confined or assaulted or even touched; *Kroeger v. Passmore*, 36 Mont. 504, 93 Pac. 805, 14 L. R. A. (N. S.) 988, holding evidence that plaintiff was informed she could not leave an office until she surrendered deed, and was detained three-quarters of an hour, sufficient to show false imprisonment; *Garnier v. Squires*, 62 Kan. 321, 62 Pac. 1005, holding judicial proceedings or warrant, or manual touching or taking into custody, necessary.

Cited in notes in 54 Am. Dec. 270, 271; 67 Am. St. Rep. 408, 410 (par. 2); 118 Am. St. Rep. 720, 724—on false imprisonment; in 7 L. R. A. (N. S.) 576, on words alone as effecting false imprisonment.

17 KAN. 444, GLASS v. ALT

License to do business.—Cited in note in 16 L. R. A. 424, on effect of failure to procure license for business on validity of contract therein.

17 KAN. 447, DEXTER v. COCHRAN

Appeal and error—Error apparent of record.—Cited in *N. B. Brown & Co. v. Tupenny*, 24 Kan. 29; *Arn v. Hoppin*, 25 Kan. 707; *St. Louis & S. F. Ry. Co. v. Shoemaker*, 27 Kan. 677; *Columbia Land & Cattle Co. v. Daly*, 46 Kan. 504, 26 Pac. 1042; *Board of Com'rs of Wyandotte County v. Arnold*, 49 Kan.

279, 30 Pac. 486—holding error apparent on the record may be reviewed without appearance, exception taken, or motion to set aside judgment.

Same—Presumptions.—Cited in *National Bank of America v. Home Security Co.*, 65 Kan. 642, 70 Pac. 646; *Core v. Smith*, 23 Okl. 909, 102 Pac. 114—holding a judgment to be presumed valid unless the record contains evidence to the contrary.

Seal of court on summons and orders.—Cited in *Kelso v. Norton*, 74 Kan. 442, 87 Pac. 184, holding a summons without seal void and subject to collateral attack; *Harpold v. Doyle*, 16 Idaho, 671, 102 Pac. 158, holding an alias summons without seal not invalid; *Lindsay v. Board of Com'rs of Kearny County*, 56 Kan. 630, 44 Pac. 603; *Sharman v. Huot*, 20 Mont. 555, 52 Pac. 558, 63 Am. St. Rep. 645—holding summons not signed by the clerk invalid; *Gordon v. Bodwell*, 59 Kan. 51, 51 Pac. 906, 68 Am. St. Rep. 341; *Frankhouser v. Dewitt*, 9 Kan. App. 636, 58 Pac. 1027—holding an order of sale without seal invalid, and not capable of being amended after sale; *Taylor v. Buck*, 61 Kan. 694, 60 Pac. 736, 78 Am. St. Rep. 346, holding an execution for sale, not signed by the clerk, may be amended after its return by order of court; *Mattocks v. McLain Land & Investment Co.*, 11 Okl. 433, 68 Pac. 501, holding that the warrant to the county treasurer to collect taxes must be sealed.

Cited in note in 20 L. R. A. 427, on effect of writ or process issued without seal of court.

Same—Presentation in record on appeal.—Followed in *Morris v. Bunyan*, 58 Kan. 210, 48 Pac. 864; *Metzger v. Burnett*, 5 Kan. App. 374, 48 Pac. 509—holding it necessary that the record on appeal affirmatively show there was no seal on the summons below, in order to sustain an objection to that effect, and the Supreme Court will not presume there was no seal, because the word "seal" or a scroll with a pen was omitted.

Sheriff's sale in gross.—Cited in *Bernhard v. Hovey*, 9 Kan. App. 25, 57 Pac. 245, holding a sheriff's sale in gross of two business lots, one improved and the other not, was invalid.

17 KAN. 452, DRYFOOS v. CULLINAN

Presumption in favor of jurisdiction.—Cited in note in 83 Am. Dec. 451 (par. 2), on presumption in favor of courts of general jurisdiction.

17 KAN. 455, BLAKE v. JOHNSON COUNTY COM'RS

17 KAN. 458, STATE v. GREBE

Failure to testify or produce evidence.—Followed in *Fowler Packing Co. v. Enzenperger*, 77 Kan. 406, 94 Pac. 995, 15 L. R. A. (N. S.) 784, holding failure of a defendant to produce important evidence known to him raises a presumption that the evidence is unfavorable to him; *State v. Wilson*, 66 Kan. 472, 71 Pac. 849, holding it proper to instruct that, while the statute permits a defendant to testify in his own behalf, he need not do so, and that the statute expressly declares that his neglect to testify shall not create any presumption against him.

Evidence to sustain conviction.—Cited in *State v. Diebolt*, 54 Kan. 129, 37 Pac. 992, holding that to sustain a conviction the evidence accepted by the jury must not only be consistent with the guilt of defendant, but inconsistent with his innocence.

Cited in note in 81 Am. Dec. 503 (par. 2), on circumstantial evidence.

Possession of stolen property.—Cited in note in 101 Am. St. Rep. 510, on possession of stolen property as evidence of guilt.

Uncontradicted statement as confession.—Cited in note in 25 L. R. A. (N. S.) 543, 566, on uncontradicted statement in presence of accused as confession.

17 KAN. 462, STATE v. BYBEE

Urging or coercing agreement by jury.—Differentiated in *State v. Furbeck*, 29 Kan. 532, holding that when the testimony justifies the verdict, and no undue influence or pressure was exerted, it will not be disturbed because it was the result of concessions.

Cited in *State v. Witt*, 34 Kan. 488, 8 Pac. 769 (dissenting opinion by Horton, J.), disagreeing with the majority holding that in a capital case, depending on circumstantial evidence, it was reversible error to refuse an instruction that, if any one of the jury had a reasonable doubt, they could not convict although an instruction on reasonable doubt was given; *State v. Rogers*, 56 Kan. 362, 43 Pac. 256, criticising the practice of calling in a jury to urge an agreement, but holding that the remarks there set forth were not the producing cause of the verdict, not arrived at until the day following; *State v. Chambers*, 9 Idaho, 673, 75 Pac. 274; *State v. Tulip*, 9 Kan. App. 454, 60 Pac. 659; *State v. Ivanhoe*, 35 Or. 150, 57 Pac. 317—holding the language of the court in urging the jury to an agreement reversible error.

Cited in note in 105 Am. St. Rep. 575, on urging or coercing verdict.

17 KAN. 468, BRAIDY v. THERITT

Officers de facto—Who are.—Cited in *Re Gunn*, 50 Kan. 155, 32 Pac. 470, 948, 19 L. R. A. 519, defining officer de facto; *Morton v. Lee*, 23 Kan. 286, holding one recognized as a justice of the peace and never ousted by process of court after original appointment was an officer de facto; *Merced Bank v. Rosenthal*, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732; *Butler v. White*, 83 Fed. 578—holding one claiming an office and in possession of it, functioning under color of appointment, is a de facto officer.

Cited in notes in 19 Am. Dec. 66; 140 Am. St. Rep. 191—on de facto officers.

Same—Title and possession.—Cited in *Morton v. Broderick*, 118 Cal. 474, 50 Pac. 644; *Neeland v. State*, 39 Kan. 154, 18 Pac. 165; *State ex rel. Wells v. Cline*, 29 Okl. 157, 116 Pac. 767, 35 L. R. A. (N. S.) 527; *Hamlin v. Kassarfer*, 15 Or. 456, 15 Pac. 778, 3 Am. St. Rep. 176—holding that, if an officer is in possession, another claiming the office cannot become an officer de facto by seizing the office, or part of it, and that two persons cannot be officers de facto at the same time; *Hunt v. Pleasant Hill Cemetery Ass'n*, 27 Kan. 724, holding quo warranto the proper method of trying title to office of a corporation; *Pridie v. Thompson*, 82 Fed. 186; *Butler v. White*, 83 Fed. 578; *State ex rel. Fairbanks v. Superior Court of Snohomish County*, 17 Wash. 12, 48 Pac. 741, 61 Am. St. Rep. 893—holding a court had jurisdiction to enjoin interference with an officer de facto, not determining the title.

17 KAN. 472, CARVER v. SHELLY

Appearance.—Cited in *Holderman v. Jones*, 52 Kan. 743, 34 Pac. 352, on what constitutes general appearance; *Bury v. Conklin*, 23 Kan. 460; *Bentz v. Eubanks*, 32 Kan. 321, 4 Pac. 269—holding a voluntary appearance waives irregularities in getting the party into court; *Anglo-American Packing & Provision Co. v. Turner Casing Co.*, 34 Kan. 340, 8 Pac. 403, holding an appearance by "the O. Company," a partnership, an appearance by its four members; *Meixell v. Kirkpatrick*, 29 Kan. 679, holding filing a demurrer equivalent to appearance; *Freeman v. Waynant*, 25 Kan. 279, holding appearing generally to argue a motion to amend a bill of particulars gave the court jurisdiction of the parties; *Shuster v. Finan*, 19 Kan. 114; *Missouri Pac. Ry. Co. v. Lea*, 47 Kan. 268, 27 Pac. 987—holding parties consenting to transferring a cause to the district court and appearing there waived objections to jurisdiction; *Guy v. Doak*, 47 Kan. 366, 27 Pac. 968, on appearance by motion to remove a receiver as a general appearance, giving validity to the appointment; *Gorham v. Tanquerly*, 58 Kan.

233, 48 Pac. 916, holding objection to jurisdiction of person was waived by motion to discharge attachment for insufficient affidavit; *Wynn v. Frost*, 6 Okl. 89, 50 Pac. 184, holding appearance of parties and presentation of motion for new trial was a general appearance.

Set-off or counterclaim.—Cited in *Christy v. Jones*, 39 Kan. 183, 18 Pac. 56, holding, in an action on book account, defendant cannot set off damage done his crop by stock of plaintiff.

Cited in note in 89 Am. Dec. 483, on scope and office of counterclaim.

17 KAN. 475, CULP v. ATCHISON & N. R. CO.

Negligence in lawful act.—Cited in *Atchison & D. Ry. Co. v. Lyon*, 24 Kan. 745, holding a legal act heedlessly done may become negligence; *Fares v. Rio Grande Western R. Co.*, 28 Utah, 132, 77 Pac. 230, 3 Ann. Cas. 1065, holding failure to ring bell or blow whistle of engine was not negligence, where to have done so might have added to fright of plaintiff's horses; *Texas & P. R. Co. v. Scoville*, 62 Fed. 730, 10 C. C. A. 479, 27 L. R. A. 179, holding wanton blowing of locomotive whistle an act for which defendant railroad was liable, as within scope of servant's employment.

Cited in note in 10 L. R. A. (N. S.) 387, on liability for injury by servant to third person in use of dangerous agency; in 23 L. R. A. (N. S.) 947, on liability for discharge of steam near street or highway frightening horses.

Duty of railroad to persons unlawfully on premises.—Cited in note in 90 Am. Dec. 58, on duty and liability of railroad company towards persons other than lawfully on premises without contract relations.

Liability for servant's negligent act towards stranger.—Cited in note in 27 L. R. A. 168, on civil responsibility for wrongful or negligent act of servant or agent towards one not sustaining contractual relation.

Pleading negligence.—Cited in note in 59 L. R. A. 230, on sufficiency of general allegations of negligence.

17 KAN. 478, PALMER v. MEINERS

Estoppel to assert title.—Cited in *Ohellis v. Coble*, 37 Kan. 558, 15 Pac. 505, on estoppel to assert title to property; *Coffelt v. First Nat. Bank*, 52 Kan. 600, 35 Pac. 289, on necessity of reliance on representations to constitute estoppel; *Hill v. Van Sandt*, 1 Kan. App. 367, 40 Pac. 676, holding that a principal who permitted his agent to act as the owner of the principal's goods was not estopped to assert title as against a creditor of the agent whose debt was incurred prior to the transactions of the agent with the property.

Harmless error.—Cited in *De Ford v. Orvis*, 42 Kan. 302, 21 Pac. 1105, holding admission of immaterial evidence not cause for reversal.

Interest on unliquidated damages.—Cited in note in 28 L. R. A. (N. S.) 42, on interest on unliquidated damages.

Damages in replevin.—Cited in *Haas v. Tough*, 67 Kan. 253, 72 Pac. 856, holding that in replevin for 10 horses, plaintiff's expense in feeding 15 other horses retained by him to make up a car load of 25, with those in controversy, was too remote; *Jackson v. Glaze*, 3 Okl. 143, 41 Pac. 79, holding, in an alternative money judgment in replevin, plaintiff is entitled to interest.

17 KAN. 487, STATE v. WHITE

Confession.—Cited in note in 18 L. R. A. (N. S.) 816, as to when confession voluntary.

17 KAN. 492, COBB v. INSURANCE CO. OF NORTH AMERICA

17 KAN. 503, SULLIVAN v. LEAVENWORTH, L. & G. R. CO.

17 KAN. 508, HARRISON v. SIMPSON

Action by third person on parol contract for his benefit.—Cited in *Mine & Smelter Supply Co. v. Stock Growers' Bank*, 173 Fed. 859, 98 C. C. A. 229; *Center v. McQuesten*, 18 Kan. 476; *Floyd v. Ort*, 20 Kan. 162; *Strong v. Marcy*, 33 Kan. 109, 5 Pac. 386; *Burton v. Larkin*, 36 Kan. 246, 13 Pac. 398, 59 Am. Rep. 541; *Plano Mfg. Co. v. Burrows*, 40 Kan. 361, 19 Pac. 809; *Hardesty v. Cox*, 53 Kan. 618, 36 Pac. 985—holding that an action can be maintained on a verbal promise by defendant to a third party, for a consideration, for plaintiff's benefit, though plaintiff was not privy to the consideration.

17 KAN. 514, HOVER v. COCKINS

Review of judgment on pleadings.—Cited in *Kansas Pac. Ry. Co. v. Taylor*, 17 Kan. 566; *Hadley v. Central Branch Union Pac. R. Co.*, 22 Kan. 359—holding that where a case was tried on the pleadings and agreed statement, and the court found for defendant, and no exception was taken save to the judgment, the presumption was in favor of the trial court's judgment, with nothing to cure any errors in the pleadings, and the allegations must be given no more weight than they are justly entitled to have; *Kansas Pac. Ry. Co. v. Taylor*, 17 Kan. 566, holding that where there is absolute omission to state an essential fact in a bill of particulars, and it is not deducible from those stated, and there is nothing curing the omission, the Supreme Court is bound to reverse a judgment founded thereon.

17 KAN. 518, HOVER v. COCKINS

Motion for new trial—Necessity.—Cited in *Horn v. Newton City Bank*, 32 Kan. 518, 4 Pac. 1022, holding decisions of the court on matters of law as set forth in written findings reviewable without motion for new trial.

Recital in record on appeal.—Cited in *Morse v. Brunswick & Co.*, 34 Kan. 378, 8 Pac. 398, holding that, where the record contains no motion for new trial, the court cannot review error alleged to have occurred on trial; *Central Branch R. Co. v. Phillipi*, 20 Kan. 9 (dissenting opinion by Horton, C. J.), on necessity of record showing motion for new trial; *Tyler v. Sooy*, 19 Kan. 593, holding that the record must contain the motion, and if it does not it is of no avail that the testimony is set forth and it states that the motion for new trial was overruled.

Same—Harmless error in ruling peremptorily.—Cited in *Lewis v. Hall*, 11 Okl. 684, 69 Pac. 890, holding that where a case is tried to the court, and it peremptorily overrules the motion for new trial, the judgment will not be reversed for that alone, but the Supreme Court will determine whether or not the court rendered a correct judgment.

Same—Before justices of the peace.—Cited in *Rice v. Harvey*, 19 Kan. 144, holding that, if an alleged error before a justice of the peace is ground for new trial, error will not lie, if no such motion is made.

17 KAN. 522, SCHOOL DIST. NO. 2 v. CONRAD

Mechanics' liens on public buildings.—Cited in *Sullivan v. School District No. 39*, 39 Kan. 347, 18 Pac. 287; *Board of Com'rs of Jewell County v. Snodgrass & Young Mfg. Co.*, 52 Kan. 253, 34 Pac. 741; *City of Topeka v. Thomas*, 1 Kan. App. 113, 40 Pac. 930—holding a mechanic's lien may be had on a public building; *Badger Lumber Co. v. Marion Water Supply, Electric Light & Power Co.*, 48 Kan. 187, 30 Pac. 117, 30 Am. St. Rep. 306, holding that the lien will attach to a lighting plant furnishing light to the public.

Cited in note in 35 L. R. A. 145, on mechanics' liens on public property.

17 KAN. 523, WILLIAMS v. ELLIOTT

Followed in *Noble v. Dowell*, 22 Kan. 498 (affirmed on authority of *Williams v. Elliott*).

Reference.—Cited in *Smith v. Scully*, 66 Kan. 139, 71 Pac. 249, holding compulsory reference may be ordered of mutual accounts requiring examination; *Galbraith v. McCormick*, 23 Kan. 706, holding the reference may be on the court's own motion.

Cited in note in 79 Am. Dec. 209, on power to refer action.

17 KAN. 527, COLBY v. CROCKER

Homesteads and rights of creditors.—Cited in *Emporia Mut. Loan & Savings Ass'n v. Watson*, 45 Kan. 132, 25 Pac. 586, holding a homestead purchased October 14th and immediately occupied as such was not subject to a debt contracted October 26th; *La Rue v. Gilbert*, 18 Kan. 220, holding a homestead not subject to general creditors with judgment liens; *Sproul v. Atchison Nat. Bank*, 22 Kan. 336, holding to relieve the homestead of incumbrance by incumbering other property is not illegal though the owners are involved in debt; *Frick Co. v. Ketels*, 42 Kan. 527, 22 Pac. 580, 16 Am. St. Rep. 507, holding that one holding a mortgage on all a debtor's property, including his homestead, cannot release the property other than the homestead for the benefit of general creditors, but is properly compelled to proceed to judgment and then foreclose first against property other than homestead; *Nolan v. Nolan*, 155 Cal. 476, 101 Pac. 520, 132 Am. St. Rep. 99, 17 Ann. Cas. 1056, holding that, while equity will ordinarily order property other than homestead to be first sold to satisfy mortgage on all the property, it will not do so where such other property is subject to a prior vendor's lien; *In re Bailey*, 176 Fed. 990, holding general creditors not entitled to marshaling of assets which would result in causing a mortgagee of homestead to first proceed against it; *In re Nye*, 133 Fed. 33, 66 C. C. A. 139, holding waiver of exemption in a mortgage is not available to creditors other than the mortgagee.

17 KAN. 532, STATE SAV. ASS'N OF ST. LOUIS v. HUNT

Inapplicable instructions.—Cited in *Missouri Pac. Ry. Co. v. Pierce*, 33 Kan. 61, 5 Pac. 378; *Hazeltine v. Edgmand*, 35 Kan. 202, 10 Pac. 544, 57 Am. Rep. 157; *Ft. Smith & W. R. Co. v. Collins*, 26 Okl. 82, 108 Pac. 550—holding that a judgment must be reversed for inapplicable instructions, which may have misled the jury to the prejudice of the party complaining.

Indorsement for collateral security.—Cited in *Kellogg v. Douglas County Bank*, 58 Kan. 43, 48 Pac. 587, 62 Am. St. Rep. 596, holding that an indorsee for collateral security of a debt contracted at the time of indorsement is protected to the extent of the debt.

Cited in note in 32 Am. St. Rep. 712, on collateral securities; in 31 L. R. A. (N. S.) 299, on holder of bill or note as collateral as bona fide holder.

17 KAN. 537, BOARD OF EDUCATION v. CAMPBELL

Discretion in allowing amendments.—Cited in *Farmers' & Merchants' Bank of Cawker City v. Bank of Glen Elder*, 46 Kan. 376, 23 Pac. 680, on discretion of court in allowing amendments.

17 KAN. 542, SNYDER, IN RE

False pretenses—Inducing cause.—Cited in *State v. McDonald*, 59 Kan. 241, 52 Pac. 453; *State v. Briggs*, 74 Kan. 377, 86 Pac. 447, 7 L. R. A. (N. S.) 278, 10 Ann. Cas. 904; *State v. Hetrick*, 84 Kan. 157, 113 Pac. 383, 34 L. R. A. (N. S.) 642; *State v. Knowlton*, 11 Wash. 512, 39 Pac. 966; *Haines*

v. Territory, 3 Wyo. 167, 13 Pac. 8—holding it not necessary that the false pretense be the sole cause or inducement.

Cited in note in 25 Am. St. Rep. 379, 380, on obtaining goods or money by false pretenses.

Same—Existing facts and future promises.—Cited in *State v. Gordon*, 56 Kan. 64, 42 Pac. 346; *State v. Briggs*, 74 Kan. 377, 86 Pac. 447, 7 L. R. A. (N. S.) 278, 10 Ann. Cas. 904—holding that a future promise accompanying a false pretense as to an existing fact does not avoid the statute.

Same—What constitute.—Cited in *State v. Crane*, 54 Kan. 251, 38 Pac. 270, holding a mere promise not a false pretense; *State v. Cowdin*, 28 Kan. 269, holding that representations by the maker of notes and mortgage to the holder that the maker was securing a loan from a third person to be used in payment of the notes and mortgage, and that the maker had come to the holder to pay them, and would pay on release of the mortgage and surrender of the notes, constituted false pretenses.

Same—Evidence.—Cited in *State v. Hetrick*, 84 Kan. 157, 113 Pac. 383, 34 L. R. A. (N. S.) 642, holding that the prosecutor may testify that he believed the pretense; *State v. Matthews*, 44 Kan. 596, 25 Pac. 36, 10 L. R. A. 308, holding it necessary that the pretenses were made and with intent to deceive, and were false and did deceive the party to his injury.

Cited in note in 34 L. R. A. (N. S.) 642, on competency of prosecuting witness in trial for obtaining property by false pretenses to testify defendant's statements induced him to part with property.

Habeas corpus.—Cited in *Gleason v. Board of Com'rs of McPherson County*, 30 Kan. 53, 1 Pac. 384; *In re Jewett*, 69 Kan. 830, 77 Pac. 567; *State v. Ray*, 81 Kan. 159, 105 Pac. 46—holding habeas corpus by defendant, held on criminal charge, in nature of an appeal, and a criminal proceeding.

Same—Process or final judgment for restraint.—Cited in *Ex parte Johnson*, 1 Okl. Cr. 414, 98 Pac. 461, holding an order of commitment to hold for trial issued by a magistrate is not a process on a final judgment, within the statute forbidding courts to inquire into the legality of judgment or process whereby one is in custody.

Cited in note in 100 Am. St. Rep. 34, on prisoner's right to discharge on habeas corpus after commitment and before trial.

17 KAN. 558, KELLY v. DETROIT BRIDGE WORKS

Negligence of employer.—Cited in *Atchison, T. & S. F. R. Co. v. Wagner*, 33 Kan. 680, 7 Pac. 204; *Kansas City & P. R. Co. v. Ryan*, 52 Kan. 637, 35 Pac. 292—holding that a single defective or imperfect operation of appliance or instrumentality is not evidence of notice of the defect; *Telle v. Leavenworth Rapid Transit Ry. Co.*, 50 Kan. 455, 31 Pac. 1076, on whether there was sufficient evidence of a master's negligence to entitle an injured servant to go to the jury.

Fellow servants.—Cited in note in 50 L. R. A. 422, as to what servants deemed to be in common employment, apart from statutes, where no questions as to vice principalship arise.

17 KAN. 563, MITCHELL v. SKINNER

Conveyances in trust—Fraud.—Cited in *Weatherbee v. Cockrell*, 44 Kan. 380, 24 Pac. 417, holding that a debtor, paying for land and having it conveyed to his sons, cannot claim it from them or their grantees; *Kershaw v. Willey*, 22 Okl. 677, 98 Pac. 908, holding a debtor can dispose of property to which his creditors had no right to look; *G. O. Hixon & Co. v. George*, 18 Kan. 253, holding abandonment of a husband and wife of property as a homestead, it reverting to the wife as her property, could not avail his creditors, though it were

originally purchased with his funds; *Richardson v. Warner*, 28 Fed. 343, holding a conveyance absolute and to a bona fide purchaser.

Attachment—Dissolution.—Followed in *People's Bank of Rock Island v. Morris*, 71 Kan. 849, 80 Pac. 586; *Merchants' Nat. Bank of Kansas City, Mo., v. Kopplin*, 1 Kan. App. 599, 42 Pac. 263—holding that defendant cannot move to set aside an attachment on the ground of title in a third person.

Cited in note in 123 Am. St. Rep. 1041, on proceedings to dissolve attachments.

When deed takes effect.—Cited in *Walker v. Newlin*, 22 Kan. 106; *Green v. Green*, 34 Kan. 740, 10 Pac. 156, 55 Am. Rep. 256—holding that a deed takes effect only from delivery.

17 KAN. 566, KANSAS PAC. RY. CO. v. TAYLOR

Pleading.—Cited in *St. Louis & S. F. R. Co. v. Hoff*, 76 Kan. 506, 92 Pac. 539, holding that the bill of particulars before a justice of the peace, while it need not be formal, cannot omit facts essential to the cause of action; *Netcott v. Porter*, 19 Kan. 131, holding failure to reply waived by trial as though the facts were put in issue; *Barrackman v. Girard*, 26 Kan. 284, on cure of defective pleading by trial on merits.

Stock law.—Cited in *St. Louis & S. F. Ry. Co. v. Byron*, 24 Kan. 850, holding failure to allege that the stock was killed in the county in which the action was brought fatal error.

Followed in *Hadley v. Central Branch Union Pac. R. Co.*, 22 Kan. 359, holding that the complaint must state that defendant's road was not lawfully fenced; *St. Louis & S. F. Ry. Co. v. Ellis*, 25 Kan. 108, reversing judgment on authority of *Kansas Pac. Ry. Co. v. Taylor*.

Private action for violation of statute.—Cited in note in 9 L. R. A. (N. S.) 354, on private action for violation of statute not expressly conferring it.

17 KAN. 571, KANSAS PAC. RY. CO. v. COUSE

Demurrer to evidence.—Cited in *Chicago, R. I. & P. R. Co. v. Doyle*, 18 Kan. 58; *Sullivan v. Phenix Ins. Co. of Brooklyn*, 34 Kan. 170, 8 Pac. 112; *Kansas City, Ft. S. & G. R. Co. v. Foster*, 39 Kan. 329, 18 Pac. 285; *St. Paul Fire & Marine Ins. Co. v. Kelly*, 43 Kan. 741, 23 Pac. 1046; *Friend v. Miller*, 52 Kan. 139, 34 Pac. 397, 39 Am. St. Rep. 340; *Avery v. Union Pac. R. Co.*, 73 Kan. 563, 85 Pac. 600; *Lee v. Ryder*, 1 Kan. App. 293, 41 Pac. 221; *Bank of Le Roy v. Harding*, 1 Kan. App. 389, 41 Pac. 680; *Atchison, T. & S. F. R. Co. v. Ditmars*, 3 Kan. App. 459, 43 Pac. 833; *Belcher v. Whitlock*, 6 Okl. 691, 56 Pac. 23—holding that sustaining demurrer to evidence is final disposition, and it should be overruled where there is testimony fairly tending to prove essential facts, and sufficient to justify refusal to set the verdict aside; *Schafer v. Weaver & Bill*, 20 Kan. 294, holding submitting a demurrer to the evidence is final only if the court sustains it and refuses to reopen the case; *Pugsley v. Chicago, R. I. & P. R. Co.*, 69 Kan. 599, 77 Pac. 579, holding that, after the sustaining of a demurrer to the evidence, plaintiff cannot dismiss without prejudice; *Frick v. Reynolds*, 6 Okl. 638, 52 Pac. 391, holding that a motion to direct a verdict for plaintiff is similar to a demurrer to evidence by the defendant as to the sufficiency of the evidence entitling a party to go to the jury; *Acker v. Norman*, 72 Kan. 586, 84 Pac. 531, holding that a demurrer to the evidence admits every fact which the evidence tends to prove.

Fraudulent conveyance.—Cited in *Locke v. Hedrick*, 24 Kan. 763, holding that a party purchasing hotel furnishings should have been permitted to explain failure to take possession by testifying that several families begged him not to do so as it would leave them without place to live.

Cited in note in 24 L. R. A. (N. S.) 1150, as to whether presumption of fraud flowing from retention of chattel by vendor may be overcome.

17 KAN. 575, CARR v. WILLIAMS

Statute of frauds.—Cited in *Outwright v. Union Sav. & Inv. Co.*, 33 Utah, 486, 94 Pac. 984, 14 Ann. Cas. 725, holding that the statute relates only to executory agreements; *Bard v. Elston*, 81 Kan. 274, 1 Pac. 565, holding a parol lease for six years contrary to statute of frauds, but was taken out of the statute by five years' performance thereunder.

Cited in note in 19 L. R. A. (N. S.) 890, on applicability of statute of frauds to assignment or surrender of purchaser's interest under land contract.

17 KAN. 584, CLIPPENGER v. INGRAM

Judgment for costs.—Cited in *Big Goose & Beaver Ditch Co. v. Morrow*, 8 Wyo. 537, 59 Pac. 159, 80 Am. St. Rep. 955, holding a judgment with the space for the amount of costs left blank is not void; *Wilcox v. Byington*, 36 Kan. 212, 12 Pac. 826, holding such omission not ground for setting the judgment aside.

17 KAN. 586, CLIPPENGER v. INGRAM

Offer to confess judgment controlling costs.—Cited in *Wichita & W. R. Co. v. Beebe*, 38 Kan. 427, 17 Pac. 154, holding that the offer to allow judgment placed the costs on the plaintiff, though not made in open court, and was first filed and then presented to plaintiff's attorneys, and not called to the court's attention until after verdict; *Kaw Valley Fair Ass'n v. Miller*, 42 Kan. 20, 21 Pac. 794, holding the offer need not be served when it is part of the pleadings.

17 KAN. 589, BRIGGS v. EGGAN, Same case on subsequent appeal, 23 Kan. 710

Findings by court.—Cited in *Atchison, T. & S. F. R. Co. v. Ferry*, 28 Kan. 686, holding the court bound to state its conclusions of law separately from its conclusions of fact on request in a cause tried to the court; *Garner v. State ex rel. Moon*, 28 Kan. 790; *Seward v. Rheiner*, 2 Kan. App. 95, 43 Pac. 423; *Thompson v. Russell*, 1 Okl. 225, 32 Pac. 56—holding the right substantial, and failure to grant a request, in a proper case, reversible error; *Kellogg v. Bisantz & Matthews*, 51 Kan. 418, 32 Pac. 1090, holding reversal would not be ordered for defects in the findings and conclusions, where further findings were not requested; *Shattuck v. Board of Com'rs of Harvey County*, 63 Kan. 849, 66 Pac. 1057, holding that the general finding supplements the special findings, and that, in the absence of evidence and of findings to the contrary, it will be presumed that the evidence supported the general finding and judgment; *Shuler v. Lashhorn*, 67 Kan. 694, 74 Pac. 264; *Simon v. Simon*, 69 Kan. 746, 77 Pac. 571—holding that request must be made for specific findings in order to complain.

17 KAN. 592, STANLEY v. FARMERS' BANK

Appeal from justices of the peace.—Cited in *Wagstaff v. Challiss*, 31 Kan. 212, 1 Pac. 631; *Geter v. Ulrich*, 27 Okl. 725, 113 Pac. 713; *Western Union Telegraph Co. v. Hollis*, 28 Okl. 613, 115 Pac. 774—holding that on appeal from a justice of the peace the rights and issues remain the same; *Missouri River, Ft. S. & G. R. Co. v. Shirley*, 20 Kan. 660, holding that, from the ruling in *Stanley v. Farmers' Bank* that in a justice's court corporate existence need not be put in issue by sworn denial, it does not follow that it devolves on plaintiff to prove defendant's corporate existence, as such existence is admitted by its appearing to the suit; *Robbins v. Sackett*, 23 Kan. 301, holding that refusal to permit defendant, on appeal from a justice of the peace, to file a new answer setting up a counterclaim, would not prevent him from proving any valid counterclaim; *Ziegler v. Osborn*, 23 Kan. 464, holding that filing a new plead-

ing on appeal from a justice cannot put the other party in default; *Eggen v. Briggs*, 23 Kan. 710, holding that failure to file bill of particulars in a justice court admitted nothing, and failure to file affidavit denying execution of instrument sued on admitted nothing except the execution of the instrument, and the parties are in the same position on appeal; *Wagstaff v. Challiss*, 29 Kan. 505, holding that on appeal from a justice defendant should have been permitted to set up any set-off which would have been available below; *Douglass v. Easter*, 32 Kan. 496, 4 Pac. 1034, holding that a defendant in trespass quare clausum may, on appeal to the district court, put the title in dispute, though he had filed no answer before the justice, none being necessary; *Missouri Pac. Ry. Co. v. Len*, 47 Kan. 268, 27 Pac. 987, holding that motion to dismiss an appeal to the district court for want of jurisdiction, in that plaintiff's pleading on appeal increased the demand, comes too late after answer by general denial.

17 KAN. 598, TAYLOR v. THOMAS

New trial.—Followed in *Titus v. Mitchell*, 3 Kan. App. 90, 45 Pac. 99, holding newly discovered evidence, merely impeaching, not ground for new trial.

17 KAN. 605, JACKSON v. STONER

Followed in *Minnis v. Jordan*, 24 Kan. 267, reversed on authority of *Jackson v. Stoner*.

Bill of exceptions—Transcript on appeal.—Cited in *State v. Schoenewald*, 26 Kan. 288; *State v. Nickerson*, 30 Kan. 545, 2 Pac. 654; *Bruce v. Casey-Swasey Co.*, 13 Okl. 554, 75 Pac. 280—holding that a transcript, and not the original bill of exceptions, should be sent up on appeal.

Same—As part of record below.—Cited in *State v. Schoenewald*, 26 Kan. 288, holding a bill of exceptions not filed in time is not part of the record; *Atchison & N. R. Co. v. Wagner*, 19 Kan. 335, holding that a bill of exceptions is a part of the record.

Same—In justice's court.—Cited in *Maggert v. Keele*, 20 Okl. 681, 95 Pac. 466, holding that review may be had in a justice of the peace case by petition in error filed in the district court with the bill of exceptions attached.

17 KAN. 608, MAIN v. PAYNE

Limitations of actions—Fraud.—Cited in *Branner v. Nichols*, 61 Kan. 356, 59 Pac. 633, holding limitations against an action for fraudulent concealment of partnership assets runs from discovery of fraud; *Myers v. Center*, 47 Kan. 324, 27 Pac. 978, holding an action based on fraud is barred within two years, unless the plaintiff alleges and shows the cause to fall within some exception; *Woodman v. Davis*, 32 Kan. 344, 4 Pac. 262, holding limitations against action against an agent wrongly acquiring the principal's property does not run until discovery of the fraud, under third division of section 18 of the statute (Comp. Laws 1881, § 3539); *Kennedy v. Kennedy*, 25 Kan. 151, holding the fraud in a constructive trust consummate on acquisition of title, and no exceptions being shown, limitations ran from that time; *City of Clay Center v. Myers*, 52 Kan. 363, 35 Pac. 25, holding an action to impose a trust on one fraudulently converting public funds must be brought within two years, under section 18, subd. 3, of the statute (Gen. St. 1889, § 4262); *Doyle v. Doyle*, 33 Kan. 721, 7 Pac. 615, holding that an action to cancel a tax deed as acquired by one whose duty it was to keep the taxes paid was founded on fraud, and limitations ran from discovery thereof; *Hackett v. Pratt*, 5 Kan. App. 536, 49 Pac. 100, on limitations against an action to establish a constructive trust.

Same—For recovery of real property.—Followed in *Nelson v. Stull*, 65 Kan. 585, 68 Pac. 617, 70 Pac. 590, holding a suit for fraudulent conveyance not

for recovery of land, within section 16 of the statute of Limitations (Gen. St. 1901, § 4444).

Distinguished in *Rehl v. Lakowski*, 38 Kan. 515, 6 Pac. 886, as not showing that plaintiff was out of possession, and therefore not an action for "recovery of real property"; *Cunningham v. Smith*, 10 Kan. App. 407, 61 Pac. 458, holding that, where plaintiffs were in possession, an action to determine an adverse interest was not one for recovery of real property, within the limitations statute.

New trial for recovery of real property.—Cited in *Kennedy v. Haskell*, 67 Kan. 612, 73 Pac. 913; *Hammer v. Rogers*, 21 Okl. 367, 96 Pac. 611—holding that, though an action for land has joined with it equitable features, it is yet an action for recovery of real property within the statute granting new trial as of right.

17 KAN. 613, *GAPEN v. STEPHENSON*

Sheriff's sales.—Cited in *Payne v. Long-Bell Lumber Co.*, 9 Okl. 683, 60 Pac. 235, holding the assignee of a purchaser, as the real party in interest, may move to confirm a sheriff's sale; *Brury v. Smith*, 8 Kan. App. 52, 53 Pac. 74; *Sparks v. City Nat. Bank of Lawton*, 21 Okl. 827, 97 Pac. 575—holding an order of sale not res judicata, and not to determine homestead rights, or ultimate rights of claimants; *Shaffer v. Knox*, 7 Kan. App. 182, 53 Pac. 785, holding a sale of attached property without appraisal voidable.

Judgment lien—Estates and interests affected.—Cited in note in 98 Am. Dec. 351, on estates and interests affected by judgment lien.

17 KAN. 618, *EBENHACK, IN RE*

Imprisonment for debt.—Cited in *Re Boyd*, 34 Kan. 570, 9 Pac. 240; *In re Lowe*, 47 Kan. 769, 28 Pac. 1089—holding that a defendant in criminal proceedings could be imprisoned for nonpayment of costs; *Freeman v. United States*, 217 U. S. 539, 30 Sup. Ct. 592, 54 L. Ed. 874, 12 Ann. Cas. 755, holding imprisonment for penalty in criminal proceedings constitutional; *In re Petrie*, 1 Kan. App. 184, 40 Pac. 118, holding that an examining magistrate may commit a witness refusing to enter into a recognizance; *In re Lowe*, 48 Kan. 255, 26 Pac. 749; *Colby v. Backus*, 19 Wash. 347, 53 Pac. 367, 67 Am. St. Rep. 732—holding imprisonment of complaining witness for costs constitutional.

Cited in note in 37 Am. St. Rep. 761, on statute violating prohibition against imprisonment for debt; in 34 L. R. A. 659, on constitutionality of imprisonment for debt.

Conclusiveness of judgment—As against prosecuting witness.—Cited in *Farwell v. Laird*, 58 Kan. 402, 49 Pac. 518, holding that the prosecuting witness is not a party, therefore the magistrate's finding that the prosecution was malicious and without probable cause cannot be used in evidence in an action against the prosecuting witness.

Same—Collateral attack.—Cited in note in 39 L. R. A. 456, on decision against constitutional right as a nullity subject to collateral attack.

Costs against prosecuting witness.—Cited in note in 61 L. R. A. 489, 491, on constitutionality of statute authorizing costs to be imposed upon prosecuting witness.

17 KAN. 622, *COUCH v. SHERRILL*

Notice of protest.—Cited in *Malott v. Jewett*, 1 Kan. App. 14, 41 Pac. 674, holding that an indorser must be served with sufficient notice of protest; *Bank of Lindesborg v. Ober & Hageman*, 31 Kan. 599, 3 Pac. 324, holding demand and notice all that were necessary; *Selover v. Snively*, 24 Kan. 672, reversed on authority of *Couch v. Sherrill*.

Cited in note in 96 Am. Dec. 608, on protest as evidence.

17 KAN. 625, SWAYZE v. BRITTON

Title of statute.—Cited in *Evans v. Adams*, 21 Kan. 119; *State v. Bankers' & Merchants' Mut. Ben. Ass'n*, 23 Kan. 499; *Shepherd v. Helmers*, 23 Kan. 504; *State v. Barrett*, 27 Kan. 213; *Missouri, K. & T. Ry. Co. v. Long*, 27 Kan. 684; *Missouri Pac. Ry. Co. v. City of Wyandotte*, 44 Kan. 32, 23 Pac. 950; *State v. Lewin*, 58 Kan. 679, 37 Pac. 168; *Clark v. Board of Com'rs of Wallace County*, 54 Kan. 634, 39 Pac. 225—on expression of subject of an act in the title.

Same—Constitution mandatory.—Cited in *Philpin v. McCarty*, 24 Kan. 393; *Atchison, T. & S. F. R. Co. v. Board of Com'rs of Kearny County*, 58 Kan. 19, 48 Pac. 583; *State v. Sholl*, 58 Kan. 507, 49 Pac. 668—holding the requirement as to title mandatory.

Notice of protest by notary.—Followed in *Bank of Lindsborg v. Ober & Hageman*, 31 Kan. 599, 3 Pac. 324; *C. C. Thompson & Walkup Co. v. Appleby*, 5 Kan. App. 680, 48 Pac. 933—holding that a notary public cannot, as a public official, give notice of dishonor.

17 KAN. 634, CLARK v. LIBBEY, Same case on subsequent appeal, 25 Kan. 496

Conveyances of Indian lands.—Cited in *Baldwin v. Squires*, 20 Kan. 280, on construction of the treaty of July, 1862 (12 Stat. 1237), with the Ottawa Indians.

17 KAN. 639, CAMPBELL v. PARAMORE

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EXTRA ANNOTATED EDITION
REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF KANSAS.

W. C. WEBB.
OFFICIAL REPORTER.

VOL. XVIII.
CONTAINING CASES DECIDED AT THE JANUARY AND JULY
TERMS, 1877.
SECOND EDITION, REVISED, CORRECTED, AND ANNOTATED TO
AND INCLUDING VOLUME XXXIV.

ST. PAUL, MINN.
WEST PUBLISHING CO.
1912.

ENTERED according to act of Congress, in the year 1878, by
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*Succeeded by Hon. BENJ. F. SIMPSON, of Paola, April 8th, 1878.

† Resigned, July 19th, 1877.

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AMENDED RULES OF COURT.

THE "Rules of Practice in the Supreme Court," as revised at January Term 1871, and amended in April 1875, are published in full in 13 Kas. Rep., pp. 5 to 7. Rules 2 and 11 were amended at the January Term 1877. These two Rules, as amended, are as follows:

RULE 2. Counsel shall file a written or printed brief in each case for each Justice, and for the Reporter of the Court. In each case where printed briefs are filed, an additional copy shall be furnished for the Librarian; and hereafter, the printed briefs will be bound and indexed, and placed in the State Library. The briefs must refer specifically to the page of the transcript which counsel desires to have examined.

RULE 11. Counsel for plaintiff in error shall furnish a copy of his brief to counsel for defendant in error in each case, at least fifteen days before the time set for the argument thereof; and the counsel for defendant in error shall furnish a copy of his brief to counsel for plaintiff in error at least five days before the time set for the argument thereof. Proof of service of the briefs must be filed with the Clerk of the Court prior to the argument of the cause; and in case of a failure to comply, the court may continue the case, or affirm, or reverse the judgment.

THIS volume contains 105 cases—in which opinions were written by the Justices as follows: HORTON, C. J., 34; VALENTINE, J., 37; BREWER, J., 34. Mr. Justice BREWER filed a separate opinion in one case, (p. 252;) and a dissenting opinion in one case, (p. 41.)

SUPREME COURT, STATE OF KANSAS.

JANUARY TERM, 1877.

PRESENT:

HON. ALBERT H. HORTON, CHIEF JUSTICE.
HON. DANIEL M. VALENTINE, } ASSOCIATE JUSTICES.
HON. DAVID J. BREWER, }

B. W. LEMERT v. M. BARNES, *as Executor, &c.*

1. OCCUPYING-CLAIMANT ACT; *Practice*. The practice under the occupying-claimant act discussed. [*Stebbins v. Guthrie*, 4-354; *Krause v. Means*, 12-335; *Smith v. Smith*, 15-294; *Maynes v. Veale*, 20 374; *Stephens v. Ballou*, 27-595.]
2. ———— *Purchase-Money Paid by Occupying Claimant; Act of 1874, Construed*. The land in controversy in this case was originally a part of the Osage Indian reserve, but was afterward, under the provisions of article 14 of the Osage Indian treaty of September 29th 1855, allotted to a certain half-breed Osage Indian. On August 3d 1867, the occupying claimant procured his title to said land from said half-breed Indian, and paid him therefor \$350. Said occupying claimant then took possession of said land, and has been in possession ever since. On February 3d 1872, the successful party in this case procured his title to said land from said half-breed Indian. On February 7th 1872, this action was commenced. On March 26th 1874, an act of the legislature, which was passed March 7th 1874, took effect, which act provides among other things as follows "That when in any case any of said [Indian] lands are held by any person who has purchased the same in good faith, and for a valuable consideration, from the Indian or Indians to whom the same were allotted under such treaty, * * * such purchaser shall not in any case be evicted from such lands by any other person or persons who may have subsequently acquired an adverse title to the same, until such purchaser shall have been repaid the full amount of his or her purchase-money, with lawful interest thereon." Afterward judgment was rendered in this case in favor of the second and subsequent purchaser for the land, but the first purchaser was allowed to recover said purchase-money, with interest, amounting to \$460.25. *Held*, That the court below erred in allowing said purchase-money; that said act cannot have the effect to require the

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second purchaser under the circumstances of this case to pay said purchase-money.

Error from Neosho District Court.

ACTION to quiet title to certain lands, brought by Giltenan, the testator of *Barnes*, defendant in error. The case was here in July 1874; (13 Kas. 476.) On being remanded to the district court, it was again tried, at the December Term 1874, the trial resulting in a finding and judgment in favor of *Lemert*, defendant. Certain proceedings were thereupon taken by Giltenan, as an "occupying tenant," for the allowance of the purchase-money paid and the improvements made by him, which proceedings were concluded at the April Term 1875. They are sufficiently stated in the opinion, *infra*. In such proceedings the district court allowed to Giltenan \$460 for his improvements, and \$460.25 for the purchase-money paid by him, and interest on same; and from such allowances *Lemert* appealed, and brought the record here for review. Since the petition in error was filed, Giltenan has deceased, and his executor, *M. Barnes*, has been substituted as defendant in error.

Stillwell & Baylies, for plaintiff in error.

Hutchings & Denison, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This action was originally commenced by Daniel Giltenan against B. W. Lemert, to quiet title to a certain piece of land. Lemert answered, setting up title in himself, and asking for a judgment in his favor for the recovery of said land, and for the possession thereof. The case was afterward tried; judgment was rendered in favor of the defendant; the plaintiff then brought the case to this court, where the judgment of the court below was reversed, and cause remanded for a new trial. (*Giltinan v. Lemert*, 13 Kas. 476.) A new trial was afterward had, and again judgment was rendered in favor of the defendant for the land; but at

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this time the plaintiff made an application for the benefit of the occupying-claimant law, (Gen. Stat. 749, et seq.,) and of section 2 of the act to protect *bona fide* purchasers of Indian lands. (Laws of 1874, p. 129.) The court below granted the application. And of this the defendant below, who is now plaintiff in error, complains, and seeks by this petition to have the same reversed. Whether said application was rightfully or wrongfully granted, is the only question in the case which we need consider. The facts of the case are substantially as follows: The land in controversy was originally a part of the Osage Indian reserve, and a part of that portion of said reserve which was afterward called the Osage ceded lands. By article 14 of the treaty with the Osage Indians, of September 26th 1865, (14 U. S. Stat. at Large, 689,) it is provided as follows:

“The half-breeds of the Osage tribe of Indians, not to exceed twenty-five in number, who have improvements on the north half of the lands sold to the United States, shall have a patent issued to them, in fee simple, for eighty acres each, to include, as far as practicable, their improvements, said half-breeds to be designated by the chiefs and headmen of the tribe; * * * all of said lands to be selected by the parties, subject to the approval of the Secretary of the Interior.”

The land in controversy was a part of “the north half of the lands sold to the United States” under the provisions of this treaty. At the time that this treaty was made, Gesso Chouteau, who was a half-breed Osage Indian, occupied, with his wife and family, the land now in controversy, and had improvements thereon. It was his homestead. Chouteau claimed to be one of the twenty-five half-breed Osage Indians who should receive land under the provisions of said article 14 of said treaty; and immediately after the promulgation of said treaty, he selected the land in controversy as the land which he should so receive. On August 3d, 1867, while Chouteau and his family were still occupying said land as their homestead, he sold said land to Giltenan for \$350, and he alone executed to Giltenan a quitclaim deed for said land. At the same time there was a parol contract made between the parties, in sub-

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stance, but not in these exact words, that Giltenan should get the title to said land from the government in his own name if he could, but if he could not, and if such title should be transferred from the government to Chouteau, then Chouteau was to execute another deed to Giltenan for the land. About August 11th 1867, Giltenan took possession of said land, and has occupied the same as the homestead of himself and family ever since, and has made lasting and valuable improvements thereon. After said quitclaim deed was executed to Giltenan, and on September 16th 1867, Chouteau was designated by the chiefs and headmen of said tribe of Indians as one of the half-breed Osage Indians who should receive lands under said Osage treaty. Afterward, and on June 15th 1869, Chouteau's selection of said land was approved by the Secretary of the Interior, and on June 10th 1870 a patent for said land was issued to Chouteau. On February 3d 1873, Chouteau and wife executed to Lemert a general warranty deed for said land. All these facts were shown to the court, and jury, on said second trial; and the jury then found thereon a verdict in favor of the defendant, Lemert.

The plaintiff, Giltenan, then made an application for relief under the provisions of the occupying-claimant act, and under the act to protect *bona fide* purchasers of Indian lands, as aforesaid. This application was in writing, but just what it contained, and how much it contained, we have not been informed, and cannot tell, for the plaintiff in error has not seen fit to bring such application to this court. We must therefore, in support of the decision of the court below, presume that it was sufficient, and that it contained all that was necessary for it to contain. The court below then rendered judgment in favor of the defendant for the land, but also at the same time granted plaintiff's application for the relief asked for under said acts. The granting of said application was done upon no other evidence than that introduced on the trial, and that contained in the application itself. The plaintiff in error claims that said application was made after said judgment was rendered, and not before. The

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record however would seem to show that it was made both before and after. But as all these acts were done substantially at the same time, we suppose it makes but very little difference which was done first. The plaintiff in error seems also to claim that the application should have been embodied in the pleadings. This cannot be so. The law certainly does not contemplate that any party litigating the question of ownership to land, shall set forth in his pleadings that he expects to claim the benefit of the occupying-claimant act, and thereby confess the hopelessness of his cause. It is only when a party is defeated, when his antagonist has set up and proved an adverse and better title, that he should make his application; and even then no formal or written application is required. Section 603 of the code (Gen. Stat. 750) provides how the occupying claimant shall make his application. It says:

"The court rendering judgment in any case provided for by this act, against the occupying claimant, shall, at the request of either party, cause a journal entry thereof to be made; and the sheriff and clerk of the court, when thereafter required by either party, shall meet and draw from the box a jury of twelve men," etc.

And this jury, upon an actual view of the premises, and upon proper evidence, determines the whole question as to how much the occupying claimant shall receive for the lasting and valuable improvements made by him. As to what evidence is required before granting an application in an occupying claimant's case, it is not necessary to determine in this case. Sufficient evidence for such a purpose was introduced on the trial of this case, and presumptively sufficient evidence was embodied in the plaintiff's said application. But whether the evidence introduced on the trial should be taken into consideration by the court granting the application, is questioned in this case; and while we do not think it is necessary to decide that question in this case, still we would think such evidence might be taken into consideration. Probably all that is necessary in such a case is, that the court shall be able to know from the evidence introduced on the trial, or from evidence

THE STATE OF KANSAS V. JOHN MULKINS.

1. **TRIALS IN CRIMINAL CASES; Separation of Jury; Admonition; Error.** In a criminal prosecution for a felony, where the court permits the jury to separate during an adjournment of the trial, but fails to admonish them as required by section 235 of the criminal code, "that it is their duty not to converse among themselves, nor to suffer others to converse with them on any subject connected with the trial, or to form or express any opinion thereon, until the cause is finally submitted to them," and the defendant is afterward convicted, and then moves the court for a new trial on the ground of such failure, and of prejudice intervening during such irregular separation of the jury, and on the hearing of said motion it was not shown that nothing transpired during such separation to prejudice the rights of the defendant, but on the contrary evidence was introduced tending to show that the rights of the defendant may have been prejudiced by conversation had during said separation, and the court overruled said motion for a new trial and sentenced the defendant to imprisonment in the penitentiary, *held*, that the court erred in not admonishing the jury as required by law, and in overruling said motion for a new trial. [*Perkins v. Ermet*, 2-325; *Lewis v. State*, 4-297; *Linton v. Housh*, 4-536; *State v. Snyder*, 20-308; *State v. Lantz*, 23-730; *State v. Stackhouse*, 24-454; *State v. McKinney*, 31-571; *State v. Hendricks*, 32-559.]
2. ——— **Prejudice Presumed; Burden of Proof.** While the error in failing to admonish the jury may not in and of itself be considered as a substantial error, still, the error in overruling the motion for a new trial, must, under the circumstances of this case, be held to be a substantial error. In a case like this, where the court allows the jury to separate, and fails to admonish them as required by law, it will be presumed, in the absence of anything to the contrary, that the rights of the defendant were prejudiced during said separation because of such failure; and *held*, that the burden of proving that the rights of the defendant were not so prejudiced, rests upon the prosecution. [*Madden v. State*, 1-341.]

Appeal from Bourbon District Court.

MULKINS was charged, by information, with having defiled one Helen Kinning, a female child under ten years of age, while having the care and protection of said Helen. Plea, not guilty. Trial at the September Term 1876. Verdict, guilty, and judgment on the verdict. *Mulkins* appeals to this court. The alleged errors are stated in the opinion.

Harris & Spencer, for appellant.

J. D. Hill, county attorney, for The State.

The opinion of the court was delivered by

VALENTINE, J.: Defendant in this case was prosecuted in the court below under section 233 of the crimes act, (Gen. Stat. 369,) and was convicted and sentenced to imprisonment in the penitentiary for the term of three years and six months. He now appeals to this court. The facts necessary to be considered in the case are substantially as follows: On September 5th 1876, in the afternoon, a jury was impaneled to try the cause. A portion of the evidence for the state was introduced, but there not being time sufficient on that day to complete the trial, the cause was adjourned at about 6 o'clock until the next morning, at 8½ o'clock. During this adjournment the jury were allowed to separate, but they were not admonished as required by section 235 of the criminal code, (Gen. Stat. 857, 858.) Said section 235 reads as follows:

“When jurors are permitted to separate after being impaneled, and at each adjournment, they *must* be admonished by the court, that it is their duty not to converse among themselves, nor suffer others to converse with them on any subject connected with the trial, or to form or express any opinion thereon, until the cause is finally submitted to them.”

On September 6th, and 7th, the parties proceeded with the trial; and on September 7th the defendant was found guilty by said jury. The defendant made a motion for a new trial, alleging among other things that the jury were allowed to separate as above set forth, without being admonished by the court, and that there was misconduct of the jurors, and others, during such separation. On the hearing of this motion, an affidavit of one of the jurors was read in evidence, which affidavit states among other things, that during said separation, and “during the evening of the 5th day of September 1876, and again on the next morning, a person who had heard the testimony of the witness Helen Kinning, said to him (affiant) that he wished he (the person speaking) ‘was on the jury;’ ‘that he’ (the person speaking,) ‘would hang the old rascal;’ ‘that he’ (the defendant) ‘was guilty, and ought to be hung.’” (With regard to reading affidavits of jurors,

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see *Perry v. Bailey*, 12 Kas. 539.) The court below overruled said motion for a new trial, and sentenced the defendant **as** aforesaid.

About the only question to be determined in this case is, whether the said failure of the court below to admonish the jury as required by law, and the subsequent refusal of the court below to grant a new trial to the defendant because of such failure, must, under the circumstances of this case, be considered as substantial error. That the failure to admonish the jury was error, we suppose will not be questioned. But still it is claimed by the prosecution that it was not substantial error. It is claimed that a failure to admonish the jury, as required by statute, is not *per se* prejudicial to the defendant's rights, and therefore that it is not *per se* substantial error. We shall assume that this is correct, and still we cannot wholly ignore the imperative demands of this premonitory statute. The statute says that the court "*must*" admonish the jury; and therefore no construction should be put upon the statute that would allow it to be wholly disregarded, or even to be lightly considered. By failing to admonish the jury, as required by statute, the door is opened wide for intervening prejudice to enter during the irregular separation of the jury. By such a failure one of the safeguards to an impartial trial is broken down, one of the securities to an impartial verdict is overthrown, one of the evidences that impartial justice is done, is obliterated; and all this, without any fault on the part of the defendant. Therefore, where there has been a separation of the jury during an adjournment of the trial, without such admonition, and the defendant afterward moves for a new trial upon the ground of such separation, want of admonition, and intervening prejudice, we think it ought to be presumed, in the absence of everything to the contrary, that prejudice, injurious to the defendant's rights, did intervene during such separation, and did result from such want of admonition; and therefore we think, that in such a case the new trial ought to be granted, and a refusal to grant the same would be substantial error. While the mere failure on the part of the court to

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admonish the jury might not be considered in and of itself as substantial error, yet the refusal of the court to grant a new trial notwithstanding the presumed resulting prejudice would be substantial error. Of course, if it were shown affirmatively by the facts of the case, or by facts brought into the case at the time of the hearing of the motion for a new trial, that nothing transpired during the irregular separation of the jury prejudicial to the defendant's rights, then the court would not err in overruling the motion. This view of the question, of course, throws the burden of proving that no prejudice occurred by reason of the failure of the court to admonish the jury, upon the state. And this would seem to be necessary, in order to give the statute full force and effect. If the burden of proving prejudice *by evidence* should always rest on the defendant, then the statute might in every case be disregarded. For if the defendant should show in any case that his rights had been prejudiced during a separation of the jury, he would be entitled to a new trial, whether the court had given such admonition or not. Probably, prejudice actually occurred in the present case. The defendant was charged with an offense well calculated to arouse the feelings, and even the indignation of the public, if the people really believed that he was guilty. And it seems that something really did arouse the indignation of at least one person. The indignation of many others may have been aroused. The failure therefore of the court to admonish the jury, may have resulted in great injury to the defendant. Of course the failure of the court to admonish the jury was a mere oversight, which the court would have corrected at the time if either party had at the time called its attention to the same. But as the statute makes it the imperative duty of the court, without any suggestion, to give such admonition to the jury, we do not think that the defendant waived any rights by failing to call the attention of the court to the matter at the time of such failure. If the defendant had failed to move for a new trial because of said failure, then perhaps we might presume that the defendant had waived the error, or at least we might presume that the error did not work

A. T. & S. F. Rld. Co. v. Woodcock, *Treasurer.*

any substantial prejudice to his rights, and therefore, and for that reason, he did not choose by moving for a new trial on that ground to put the state to the trouble of showing that nothing prejudicial in fact occurred during the irregular separation of the jury. We do not know that any case like this has ever before been decided. But for cases deciding questions slightly analogous to this, see 13 U. S. Dig., first series, 580, 581, §§ 7274 to 7307.

The judgment of the court below will be reversed, and cause remanded for a new trial. The defendant will be returned to Bourbon county, and delivered over to the jailor thereof, there to abide the further order of the court below.

All the Justices concurring.

A. T. & S. F. RAILROAD Co. v. L. W. WOODCOCK, *as Treasurer, &c.*

1. **LEVY OF TAXES; LIMITATION; Powers of County Board.** Where the county commissioners of Sedgwick county, in levying taxes for the year 1874, levied for current expenses a tax of one per cent., which tax was all that they had any power to levy during that year for that purpose, and then in addition to said tax, and apparently without any authority, they levied another tax of eight mills on the dollar to meet a deficit in the county revenue of the preceding year, *held*, that the levy of said eight-mill tax was and is illegal and void. [*Bank v. Barber*, 24-546.]
2. ——— **Curative Acts; Constitutional Law.** On the 6th of March 1875, the legislature passed an act entitled "An act to legalize a certain levy of taxes," which act provides "that all levies of taxes heretofore made by the board of county commissioners of Sedgwick county, in the year 1874, be and the same are hereby legalized." *Held*, That said act does not make valid said eight-mill tax; that even after the passage of said act, said eight-mill tax is not sustained or upheld by any law which distinctly states the object of the tax.

Error from Sedgwick District Court.

INJUNCTION, brought by the *Railroad Company*, to restrain certain alleged illegal taxes. The district judge granted a

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temporary injunction, 30th January 1875. Afterward, and after the passage and approval of ch. 8, laws of 1875, said temporary injunction was dissolved, on motion of *Woodcock*, county treasurer. Plaintiff appeals from the order dissolving the injunction, and brings the case here on error.

Ross Burns, and *J. G. Waters*, for plaintiff.

H. C. Sluss, for defendant.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by the Atchison, Topeka & Santa Fé Railroad Company to perpetually enjoin the collection of certain taxes. It seems that in 1874 the county commissioners of Sedgwick county, and various school-district boards of said county, levied various taxes on the property within said county, and within said school-districts respectively, several of which said taxes are claimed by the plaintiff in this case to be illegal and void. This action was commenced to restrain the collection of such of said taxes as are claimed to be illegal and void so far as the same are levied upon or affect the property of the plaintiff. A temporary injunction was also prayed for in said action, and the same was granted by the court, after a hearing of the application therefor on the petition of the plaintiff, and on an agreed statement of the facts of the case made by the parties. Afterward, and on March 6th 1875, the following act was passed by the legislature, to-wit:

CHAP. 8.—AN ACT TO LEGALIZE A CERTAIN LEVY OF TAXES.

Be it enacted by the Legislature of the State of Kansas, That all levies of taxes heretofore made by the board of county commissioners of Sedgwick county, Kansas, in the year 1874, be the same are hereby legalized.

SEC. 2. This act shall take effect and be in force from and after its publication in the *Kansas Farmer*.

Approved March 6th, 1875.—(Laws of 1875, page 6.)

Afterward, the defendant answered, setting up the passage of said act, and also made a motion to dissolve said temporary

injunction so far as the same restrained the collection of a certain eight-mill tax levied by the county commissioners for the purpose of meeting a deficit in the county revenue for the year 1873. The only ground upon which said motion was made, was, the passage of said act by the legislature. The court below sustained the motion. The plaintiff excepted, and now brings the case to this court for review.

The only question presented in this court is, whether said eight-mill tax was valid at the time said motion was sustained, and at the time said temporary injunction was dissolved. Involved in this question, however, are these other questions: 1st, Was said eight-mill tax valid when it was levied? 2d, and if not, did it become valid by the subsequent passage of said act? All these questions we think must be answered in the negative. The county commissioners had no power to levy said eight-mill tax. There is no statute which in terms gives them any such power. There was no vote of the people, or the electors, attempting to authorize it. And this power to levy taxes for the current expenses of their county was otherwise exercised and exhausted by levying all the taxes that they had any authority to levy under that power. Under that power they could levy only one per cent. on the value of the taxable property in their county. (Gen. Stat. 294, §181.) And aside from this eight-mill tax they exercised this power to its fullest extent, by levying all the taxes that they had power to levy for current expenses for the years 1871, 1872, 1873, and 1874. Said eight-mill tax was therefore not levied in pursuance of any law, and was therefore void. (Const., art. 11, § 4.)

But was said tax made valid by the subsequent passage of said act by the legislature? We think not. And two reasons may be offered therefor: 1st, The tax was void when levied, not because of any mere irregularity in the tax proceedings, but because the commissioners had no power to levy the same. 2d, the only act or law upon which the supposed validity of said tax is founded, (the curative act of 1875, above quoted,) does not in any manner state the object of the tax. An ir

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- regular or defective execution of any power or authority may generally be so aided or cured by a subsequent statute passed for that purpose, and having a retrospective operation. But a want of power or authority can seldom if ever be so aided or cured. (12 Kas. 305.) Where the taxing officers have power to tax, but exercise that power irregularly or defectively, the legislature may generally make the tax valid by subsequent legislation. But where the taxing officers have no power to levy the particular tax in question, but attempt to do so, the legislature can seldom if ever make such a tax valid. We have already given the act of the legislature under which it is claimed said tax is validated. Let us now quote a section of the constitution relating to the levy of taxes, as follows:

"SEC. 4. No tax shall be levied except in pursuance of a law, which shall distinctly state the object of the same, to which object only such tax shall be applied." (Const., art. 11, §4.)

Now the tax in question in this case was not only not *levied* "in pursuance of a law," but it is not *sustained* by any law which "distinctly states the object of the same." This we think is fatal to the tax. It is possible however that it is not necessary that the curative act should in all cases state the object of the tax. When a tax is levied in pursuance of a law, and that law itself distinctly states the object of the tax levied under it, it would seem that that should be sufficient. If for some defect or irregularity in the tax proceedings it were thought that the tax were illegal and void, or voidable, and therefore a curative act should be passed for the purpose of validating such tax, it would probably not be necessary in such a case that the curative act should also distinctly state the object of the tax. But still, it is probably necessary in all cases that every tax should be sustained by some law which should distinctly state the object of such tax. This would seem to be necessary under said §4 of article 11 of the constitution. Now the tax in the present case is sustained by no law except said curative act, and that act does not state the object of any tax. Said act is, according to the title of

Shamleffer v. Peerless Mill Company.

the act, "An act to legalize a certain levy of taxes;" but according to the body of the act it is an act to legalize "all levies of taxes heretofore made by the board of county commissioners of Sedgwick county, in the year 1874;" and neither the object of the "certain levy of taxes," nor the object of the "all levies of taxes," is anywhere stated in the act. Now it may be, that there is some levy of a tax in Sedgwick county for the year 1874 which is or was defective, to which this act applies, and which this act cures, but it cannot be the levy of the tax now under consideration.

The judgment of the court below must therefore be reversed, and cause remanded for further proceedings in accordance with this opinion.

BREWER, J., concurring.

HORTON, C. J., not sitting in the case.

W. F. SHAMLEFFER V. COUNCIL GROVE PEERLESS MILL COMPANY.

1. WATERCOURSE; *Rights of Riparian Owner*. Every man through whose land a stream of water runs is entitled to the flow of that stream without diminution or alteration. [*Emporia v. Soden*, 25-604.]
2. ——— The Council Grove Peerless Mill Company in 1874, with the assent of an upper riparian owner, dug a channel through the lands of such owner from a point on the Neosho river to its mill, and thereby diverted from its natural channel through the land now belonging to plaintiff in error a portion of said stream, and this without the assent of the then owner of said plaintiff in error's land. *Held*, That thereby the mill company acquired no right to continue said diversion, or to restrain plaintiff in error from removing any obstruction, natural or artificial, in the bed of said river on his lands.
3. ESTOPPEL OF MINOR; *Knowledge of Executor and Guardian, no Estoppel*. Where at the time of digging said channel the lands now belonging to plaintiff in error were the property of a minor, held by said minor under a will, and where no legal proceedings were had to acquire the right to the use of any portion of the stream, and no conveyance or

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permission obtained from the executor of said will and guardian of said minor, the mere knowledge on the part of said executor and guardian that said company was engaged in digging said channel, and failure on his part to object to said work or to take measures to prevent it will work no estoppel upon the minor, or prevent said minor from afterward asserting her right to the flow of the entire stream in its natural channel.

4. *FLOWAGE OF WATER; Right of its Use, not an Easement, but Part of the Land itself.* The right to the use of the flow of water in its natural course is connected with and inherent in the property in the land, and passes by a conveyance of the land. Hence a deed of the land made by the executor and guardian, under orders of the probate court, conveyed to plaintiff in error the right to the flow of the entire stream in its natural channel, as before the digging of said artificial channel.

Error from Morris District Court.

A PERPETUAL injunction was decreed in favor of the *Peerless Mill Company*, at the October Term 1875 of the district court. *Shamleffer* brings the case here on error. The opinion contains a full statement of the facts and proceedings.

Sharp & Johnston, and *John T. Bradley*, for plaintiff in error.

M. B. Nicholson, and *McClure & Humphrey*, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This was an action originally commenced in the district court of Morris county, on the 24th of March 1875, by defendant in error, the Council Grove Peerless Mill Company, filing its petition and application for an injunction against *Shamleffer*, plaintiff in error. As grounds for an injunction, the defendant alleged that it was a mill company duly organized under the corporation laws of Kansas, and that as such company, had been since April 27th 1874, the owner in fee simple of two acres of land in Morris county, a portion of which fronted on the Neosho river, upon which it had erected and was operating a flouring mill, which had cost said company the sum of \$7,000. It was further alleged that

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said company for the purpose of acquiring a water-power for their mill had dug an artificial channel through their own lands and the lands of others from whom they had acquired the right, to a certain point on the Neosho river, and had thereby acquired a sufficient water-power to operate their mill successfully, which they had been doing until the interruption of the same by Shamleffer. It was further alleged that about 400 yards below the head of said artificial channel, previous to and at the time of the erection of said mill, there was a natural obstruction, or dam, in the Neosho river, formed of stone and gravel, which backed the water up and forced it through the head of said artificial channel, thus creating the water-power by which said mill was run and operated; and that the said Shamleffer, without any legal right or just cause, and with intent to stop the running of the mill, had removed, displaced and carried away the stones and gravel composing said natural obstruction or dam, whereby said mill was stopped, and plaintiff damaged in the sum of \$1,000. Upon the filing of this petition, verified by affidavit, a temporary order was made at chambers, restraining Shamleffer from interfering with the rights and mill privileges of said company.

Afterward, on the 14th of April 1875, Shamleffer made an application for an injunction against said company to restrain it from cutting, widening or deepening the artificial channel or race-way referred to in the petition of the company, and to restrain it from diverting any of the water of the Neosho river through said artificial channel, alleging that he was the owner in fee simple of certain lands abutting on the Neosho river at the point where the head of said artificial channel had been cut into said river; that from the head of said channel, down to a point below where said natural obstruction was alleged to be, he was the owner of the lands on both sides of said river; that he had purchased all of said lands for the valuable mill privileges to be derived from their lying and fronting on said river, which is a private stream; and that he had, before the commencement of the action of the Peerless Mill Company, commenced proceedings under the mill-dam

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act to have a mill site condemned, and to erect a dam above the head of said artificial channel for the purpose of running and operating a grist and flouring mill; that said company, by means of said artificial channel, was diverting the waters of the said river from its natural course, preventing it from flowing on and over his lands as it was wont to do, and asking that the said Peerless Mill Company be restrained from interfering with his riparian rights to the use and benefit of the waters of said river. Upon the filing of this sworn petition, a temporary order was made at chambers, restraining the Peerless Mill Company from widening or deepening its artificial channel, or diminishing the water of the Neosho river, or in any way interfering with Shamleffer's rights, until a full hearing of the matter could be had at the next regular term of the district court.

When the case came on regularly for hearing, it was agreed by the parties that both cases should be consolidated into one action, under the title of *W. F. Shamleffer v. The Council Grove Peerless Mill Company*, and that the petition theretofore filed by said company against Shamleffer, should be taken as their answer to Shamleffer's petition, and that issue should be joined without further pleadings. A jury was waived, and a trial was had by the court. All the evidence introduced at the trial is set forth in the record. No special findings of fact were asked by either party. Upon consideration of the premises, the district court found the facts, and gave judgment as follows:

"*First*, The court finds, that the said W. F. Shamleffer is not entitled to the injunction as prayed for in his petition; but the court finds that the said Council Grove Peerless Mill Company should be restrained and enjoined from deepening, widening or in any way changing the present condition of the channel by which the waters of the Neosho river are conducted through the slough to the mill of the said Council Grove Peerless Mill Company.

"*Second*, The court finds further, that prior to the commencement of these suits there did exist at a point about half-a-mile, more or less, below the head of the race of the said

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Council Grove Peerless Mill Company, a natural obstruction, formed of stone, gravel and sand, and that said Shamleffer did at said point, prior to the commencement of said suits, unlawfully dig out and remove the sand, gravel and stone, and thereby lowered said natural obstruction twelve inches, and that the effect of so lowering said obstruction did interfere with the rights of said mill company to the use of the waters of the Neosho river it had acquired by the construction of its mill.

"Third, The court further finds that the said natural obstruction should be replaced in the same condition it was in prior to the removal of said stone, gravel and sand, by the said Shamleffer, as aforesaid.

"It is therefore ordered, adjudged and decreed by the court, that said Council Grove Peerless Mill Company, its agents, employes and servants, be restrained and enjoined from further lowering, widening, deepening, or in any manner changing the present channel leading through the slough, by which the waters of the Neosho river are conducted through said slough to the mill of said Mill Company where it now stands. It is further ordered, adjudged and decreed that the said W. F. Shamleffer, his agents, employes and servants, be enjoined and restrained from further interfering with, or in any way removing any stone, gravel, sand, earth or any other material which forms the obstruction by which the waters of the Neosho river are backed up and turned into the slough, and thereby conducted to the mill of said Council Grove Peerless Mill Company. And it is further ordered and decreed that the said Shamleffer, his agents, employes and servants, be enjoined and restrained from doing any unlawful act whatever that will in any way interfere with the rights of said Council Grove Peerless Mill Company to the use of the waters of the said Neosho river, as acquired by it before the commencement of these suits, and prior to the removal of said stone, gravel and sand as aforesaid. It is further ordered, adjudged and decreed that the natural obstruction, situated as aforesaid about half-a-mile, more or less, below the head of the race of the Council Grove Peerless Mill Company, be restored and replaced by the stone, gravel and sand lying adjacent and convenient thereto on the banks of the Neosho river, and on an island in said river near said obstruction, and that said sand, stone and gravel be so replaced as to raise said obstruction twelve inches from the lowest point of the present height of said obstruction, and that

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said material be so placed and spread in said river as to restore the obstruction as near as practicable to the same condition it was in before the removal of the same by the said Shamleffer, prior to the commencement of these suits. And it is further ordered, decreed and adjudged that Isaac Hammond, the county surveyor of Morris county, is hereby appointed and empowered to superintend and control the replacement and restoration of the stone, gravel and sand in said river, for the purpose of carrying into effect the decree of the court aforesaid, and that he is hereby authorized to employ a sufficient number of men to perform said work, under his orders and directions, and to report in writing to this court his action in the premises, and the amount of his services and expenditures incurred thereby. And it is further ordered, adjudged and decreed that the sheriff of said Morris county shall protect the said Isaac Hammond, county surveyor as aforesaid, in the performance of the duty assigned him by this decree of court, and the sheriff is hereby ordered and required to call on a sufficient force, if necessary, to aid and protect the said Hammond in the execution of this order. And it is further ordered, adjudged and decreed that the said Shamleffer, his agents, employés and servants, and all persons whomsoever, are hereby restrained and enjoined from in any way interfering with, hindering or delaying the said Hammond from carrying into effect the duty assigned him as aforesaid."

To this judgment Shamleffer excepted. A motion was made for a new trial, which was overruled and excepted to. The errors complained of by plaintiff practically resolve themselves into but three propositions, to-wit: *First*, That the court erred in admitting certain testimony in behalf of the defendant, over plaintiff's objection. *Second*, That the findings of fact upon which said judgment is based, are contrary to the evidence. *Third*, That said judgment is contrary to law.

So far as the first error is concerned, little need be said. The only matter referred to in the brief is the admission of the proceedings in the probate court which were the foundation of Shamleffer's title. As the findings and decree recognize and are based upon the fact that Shamleffer had title, we fail to see how he was prejudiced by the admission of this testimony. As no brief has been filed by defendant in error, and

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no defects in the proceedings by which Shamleffer acquired title pointed out, and as the decree is practically based upon the assumption that Shamleffer had title, we have made no critical examination of those proceedings; and we shall assume that they were sufficient to vest title in Shamleffer.

As little need be said upon the second proposition of counsel. The only specific finding of fact which could in any manner prejudice Shamleffer, was the second, and this seems a mixture of fact and law. So far as the mere question of the existence of the natural obstruction is concerned, there was testimony on both sides; and upon such a question of fact, the finding of the court must be held conclusive.

There is therefore really but a single question to be considered, and that is, whether the facts as they appeared in the case sustain the judgment; and in reference to this, these matters are undisputed: Shamleffer acquired his title in December 1874; the tract then acquired extended up and down the Neosho river for quite a distance; above and below the head of the artificial channel, it embraced both sides of the river; at that point it touched the river, the center of the channel being the boundary; by the digging of this artificial channel a portion of the stream was diverted; the portion diverted was taken from the river above the lower half of Shamleffer's land, carried through the channel to the Peerless Mill Company's mill, and then returned to the river below all of Shamleffer's tract. In other words, the lower half of Shamleffer's land was by the action of the Peerless Mill Company deprived of so much of the flow of the water as passed through the artificial channel. No portion of this channel was on the Shamleffer tract, and the assent of the owners of the land through which it was dug was obtained by the company. The channel was dug in the summer of 1874, and prior to Shamleffer's acquiring title. No express consent to the diversion was at any time obtained from the owner of the Shamleffer tract. This tract had belonged to one Seth M. Hays, who died before the Mill Company commenced its work,

1. Rights of riparian owner.

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a. Estoppel;
rights of
minor.

leaving one child, a minor, as sole heir. Shamleffer acquired his title by deed from the executor of Hays and guardian of the minor. No right to the diversion was obtained by any legal proceedings, or any conveyance or permission from the executor or guardian. Beyond this there was testimony tending to show that the company applied to the executor for permission to build a dam, and was refused; that it attempted some negotiations with him for the purchase of all or a part of this tract, but failed; and on the other hand that he knew of the digging of the channel by the company, and made no objection.

Upon these facts these questions arise: Did the Mill Company have the right, by digging the channel, with the consent of the owners of the land through which it was dug, and of the owner of one bank of the river at the point where the channel commenced, but without the consent of the lower riparian owner, to divert a portion of the water from its natural channel, and return it to the river only below the lands of the non-consenting and lower riparian owner? If it had no such right, did the knowledge of the executor and guardian, that it was expending money and labor in digging the channel, and his failure to object, work any estoppel upon the infant owner of the premises deprived thereby of the flow of a portion of the stream? If not, did the conveyance of the land carry with it to Shamleffer the rights to the entire flow of the stream in its natural channel? The first question must be answered in the negative. The Mill Company had no right to divert any portion of the flow of the stream to the detriment of any lower riparian owner. A riparian owner has the right to such benefits as will result from the uninterrupted flow of a stream of water through its natural channel. The maxim of the common law was, *Aqua currit et debet currere ut currere solebat*. As was said by Lord Ellenborough in *Bealy v. Shaw*, 6 East, 206, "every man is entitled to a stream of water flowing through his land, without diminution or alteration." In *Tillotson v. Smith*, 32 New Hamp. 90, Bell, J., said: "Every owner of land situate upon a stream has a right

to the natural flow of the stream; a right to insist that the stream shall continue to run *ut currere solebat*; that it shall flow upon his land in the usual quantity, at its natural place, and at its usual height, and that it shall flow off his land upon the land of his neighbor below in its accustomed place and at its usual level. This right he has as an incident to the property in his land, and he cannot be deprived of it but by grant, actual or presumptive. Whenever, by reason of the interference of the owner above, the water is diverted from his land and made to run elsewhere, or the water of other streams naturally running elsewhere is turned upon his land, or the water of the natural stream is made to flow upon his land at a different place from its natural channel, or at a different level, or in an unnatural manner, * * * the owner of the land may maintain an action for such injury." See also *Ingraham v. Hutchinson*, 2 Conn. 584; *Parker v. Griswold*, 17 Conn. 288; *Evans v. Merriweather*, 3 Scam. (Ill.) 492; *Elliott v. Fitchburg Rld. Co.*, 10 Cush. 193; and generally, Angell on Watercourses, ch. 4, and cases cited in text and notes.

The second question must also be answered in the negative. The title to the property was in the heir, a minor. There is no pretense that she knew anything of the work, or any claim that her conduct worked any estoppel, if indeed the knowledge and silence of an infant can ever be construed into an estoppel. And as to the knowledge and silence of her executor and guardian, that certainly can work no estoppel as against her. The right to this stream of water is incident to and part of the realty. But a guardian can make no sale or conveyance of the realty, or any part thereof, without an order of the probate court. And as the will is not copied into the record, we cannot assume that the executor had any greater powers than those he actually exercised, and those were to sell and convey under orders of the court. If he cannot make a sale, or divest the minor of her interests without an order of the court, he cannot indirectly and by his silence accomplish the same result. The court protects the minor's interests, and her rights in the realty cannot be destroyed without ju-

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dicial sanction. More than that, it does not anywhere appear that there was any concealment, or any facts known to the executor and guardian not known to the company. Every one is presumed to know the law. The company knew that it could not divert any portion of the stream from its natural channel without the consent of the riparian owners prejudiced thereby. It knew that the minor was the owner of a tract from which the digging of the channel would divert a portion of the natural flow of the stream. It knew that the guardian of such minor could not dispose of his ward's interest in that land, or any part of it, without the order of the court. The case therefore lacks many of the essentials to an estoppel. (*Clark v. Coolidge*, 8 Kas. 189.)

The third question must be answered in the affirmative. As incident to part of the realty at the time of this conveyance, was the right to the entire flow of the Neosho river through its natural channel "without diminution or alteration." This, with all other hereditaments, corporeal or incorporeal, passed with a conveyance of the land. "The right to the use of the flow of the water in its natural course, and to the momentum of its fall, on the land of the proprietor, is not what is called an easement, because it is inseparably connected with, and inherent in, the property in the land; it is a parcel of the inheritance, and passes with it." Angell on Watercourses, pp. 96, 97. In *Johnson v. Jordan*, 2 Met. 289, Chief Justice Shaw says of this right: "It is inseparably annexed to the soil, and passes with it, not as an easement, nor an appurtenance, but as a parcel. Use does not create it, and disuse cannot destroy or suspend it." See also *Tillotson v. Smith*, 82 New Hampshire, 90; 3 Kent Com., side page 402. It follows therefore, that the mill company having no rights as against Shamleffer to any portion of the stream of water, cannot be permitted to question his acts in reference thereto.

The judgment will be reversed, and the case remanded for

8-13 Kas.

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further proceedings in accordance with the views herein expressed.

VALENTINE, J., concurring.

HORTON, C. J., not sitting in the case.

KANSAS CENTRAL RAILWAY COMPANY V. JERRY FITZSIMMONS.

1. **LIABILITY FOR INJURIES; *Relation of Master and Servant, not Implied.***
When a railroad is being constructed, and is in the exclusive possession of and operated by a contractor for its construction, and the railroad company at the time the injuries complained of are committed has no control thereof, such company is not liable for the damages resulting from the operation of such railroad. In such case, the maxim *Respondet superior* does not apply. [*R. R. v. Fitzsimmons*, 22-687.]
2. ——— ***Instructions.*** In an action to recover damages for personal injuries to F., a boy about twelve years of age, caused by a turn-table used in the operation of a railroad, which was neither inclosed, guarded, nor locked, and where such railroad is being constructed under a contract to equip and construct the same by a constructing corporation, organized under the laws of Pennsylvania with power to contract to *build, construct, maintain or manage any works*, public or private, and supply and furnish all needful materials, laborers, implements and instruments and fixtures of any and every kind whatsoever, and such railroad when partly finished, and while in the possession of and operated by the corporation contracting to construct the road, is used and controlled by the constructing corporation for carrying passengers and freight, *held*, that an instruction, to the effect, "that if the jury find that at the time of the injuries, the turn-table and the road were in the possession of and operated by the corporation, constructing and equipping the same for the purposes of construction only, the railroad company was not liable therefor, but if the said constructing corporation had possession of the road and was operating it for general purposes, the railroad company was not relieved from liability for the injuries," is erroneous, as liable to mislead the jury to the prejudice of the railroad company.

Error from Leavenworth District Court.

ACTION by *Fitzsimmons*, by his father as his next friend, to recover damages for personal injuries sustained. The plaintiff

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had judgment at the November Term 1874 of the district court for three thousand dollars. The *Railway Company* brings the case here on error. The facts, and the instructions complained of, are set forth in the opinion.

Robert Crozier, for plaintiff in error.

F. P. Fitzwilliam, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: This was an action by Jerry Fitzsimmons, by his next friend, to recover damages for personal injuries. On the 17th of August 1878, Fitzsimmons, then about twelve years of age, was so much injured in his right leg by a turn-table that to save his life the leg had to be amputated below the knee. He sat upon the end of the table, with his legs hanging over. It was being run around by other boys about his own age, and when the rails on the table came in juxtaposition to those of the adjacent track, the limb was caught between them, and so crushed as to make amputation necessary. The table is situated on the Fort Leavenworth military reservation, from one-third to one-half of a mile north of the north line of Leavenworth, the intervening space being an open common, which is crossed by the Chicago & Southwestern Railway, and was the grazing-ground of many cows belonging to citizens of the town, among them the cow of the plaintiff's father, who was a laborer in very limited circumstances. About three o'clock in the afternoon of the day mentioned, (which was Sunday,) Fitzsimmons was sent by his father to look after the cow. Having found the cow, in company with five or six other boys he proceeded to the turn-table, and was injured as above stated. The turn-table was not inclosed, guarded, or looked. The Kansas Central Railway Company was organized for the purpose of constructing a railroad from Leavenworth to the west line of the state, with sundry branches, (in all, about five hundred miles.) The defendant had made a contract with the Washington Improve-

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case.

ment Company, a corporation organized under the laws of Pennsylvania, for the construction and equipment of its whole road, fifty-six miles of which had been completed and equipped at the time of the accident. There was conflict in the testimony as to which of the above companies was in possession of and operating so much of the railroad as was then built. On the part of the railway company, evidence was offered of an agreement between the Washington Improvement Company and the Kansas Central Railway Company for the former company to furnish the means and material and to construct and equip the whole of the Kansas Central railroad, and the charter of said company showing its power to make the contract. The testimony of the president of the Kansas Central Railway Company was to the effect, that but fifty-six miles of the road had been constructed; that the same had not been turned over to the railway company, but at the time of the injury complained of the said Improvement Company was in the possession of and operating said railroad. There was evidence introduced in behalf of the plaintiff in the court below tending to contradict this defense. On the trial the defendant railway company requested the court to instruct the jury as follows:

"If the jury find from the testimony that the Kansas Central railway was, at the time of the injury to the plaintiff, in fact in the possession of, and operated by the Washington Improvement Company, the plaintiff cannot recover in this action.

"If the jury find from the evidence that the Kansas Central Railway Company contracted with the Washington Improvement Company to construct and equip its railroad five hundred miles or more west from the city of Leavenworth, and that said Washington Improvement Company had constructed but fifty-six miles thereof, and had not turned the same over to the Kansas Central Railway Company, but remained in the possession of the same at the time of the injury complained of, the plaintiff cannot recover."

The court refused so to instruct the jury, but did instruct them as follows:

"The fact which is presented for our consideration is the alleged one, that at the time of the injury the turn-table in

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question, not only was first constructed by this Washington Improvement Company, but had been from its construction up to that time, and still beyond that period, under the exclusive management and control of that corporation or company, and the defendant—the Kansas Central Railway Company—had nothing to do with it; and it is claimed by the defendant that if that be so, then the Washington Improvement Company is the one that should be responsible, if anybody, and not the defendant.

“With reference to this question, I instruct you as follows: The contract between the Washington Improvement Company and the defendant, read in evidence, will be regarded by the jury a valid contract, in so far as it authorizes the Improvement Company to construct and equip the railroad of the defendant, and in so far as it gives to the Improvement Company the right to use and manage the road for the purposes of completing the track; and so I say to you, if you find that the turn-table and the railroad, in so far as it had been constructed under the contract read in evidence had not been turned over to the defendant, and had been used by the Improvement Company from the time of its construction up to the time of the injury in question, and this only for the purpose of prosecuting the work contracted to be done by it, then I instruct you the plaintiff cannot recover, and it will be the duty of the jury to find a verdict in favor of the defendant.

“But I say to you, that this contract is not to be regarded as valid for the purpose of conferring on the Improvement Company the right to use the road for general purposes—for the purposes of general traffic—and if you find therefore, that at the time of the injury the turn-table and the road so far as it was constructed were being operated and used for the purpose of general traffic—as railroads are generally used and operated—then I say that the defendant cannot relieve itself from liability by the fact that the immediate running of the trains and the operation of the road was confided to others, who may have supposed that they were employed and paid by the Improvement Company. It cannot shield itself from responsibility in this case behind the contract in question.”

The proper exceptions were taken, and the case is here for review. The better authority is, that when a railroad is being constructed, and is in the exclusive possession of and operated

1. Liability, in case of independent companies.

by the contractor for its construction, and the railroad company at the time of the injuries being committed thereon has no control thereof, such company is not liable for the damages resulting from the injuries committed by the contractor in operating the road. The relation of master and servant does not exist between an employer and an independent contractor. There are exceptions, as usually is the case, to this rule, but the later decisions, as well as reason, support the general principle stated. *Knight v. Fox*, 5 Exch. R. 721; *Rudie v. London & Northwestern Rly. Co.*, 4 Exch. R. 244; *Ellis v. Sheffield Gas Consumers Co.*, 2 El. & Bl. 767; *Kelly v. Mayor of N. Y.*, 11 N. Y. 432; *Lockwood v. New York*, 2 Hilt. 66; *Blackwood v. Wiswall*, 24 Barb. 355; *Carman v. Steubenville & Indiana Rld. Co.*, 4 Ohio St. 399; *Boswell v. Laird*, 8 Cal. 466; *Steel v. S. E. Rly.*, 16 C. B. 550; *Meyer v. Midland Pacific Rld. Co.*, 2 Neb. 319; *Peachey v. Rowland*, 16 Eng. L. & E. Rep. 442.

This general doctrine the court below substantially recognized in its charge to the jury, but made a distinction as to the liability of the railway company in the use for which the contractor operated the road. The liability of the railway company is attempted to be made to depend on the character of the use of the road, not the character or manner of the possession of the same by the contractor. In effect, the court instructed the jury, that if the improvement company had charge of the railroad, and was operating it for the purposes of construction *only*, the railway company was not liable; but if the contracting party had *like* possession and *like* control, and was operating the road for the purpose of general traffic, then the railway company was liable. The instruction thus given was too broad, and not sufficiently limited to be applicable to the case at bar. The real defense to the action was, that the railroad was being constructed by the Washington Improvement Company, was in its possession and under its control, and operated by it; that it had not yet been turned over to the railway company, and that the railway company had nothing to do with its operation or construction, or the

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employment of its hands. If the improvement company held possession of the road, and engaged in general traffic against the objections of the railway company, under the charge, the railway company would be liable. If the contracting company had failed to properly equip the road, or had built defective bridges, and the railway company refused to accept the same, this charge of the court would hold the railway company liable for all damages caused thereby, if in defiance of the railway company's orders and authority the contracting company carried freight and passengers over the road. Under its charter, the railway company had full authority from the state to construct its road; it had the undoubted right to employ individuals or a corporation to build and equip the same. During its construction it was properly in the charge of and under the control of the corporation having the contract for its construction, and thus far, it is conceded, the railway company is not liable for the acts of the contracting party. But because the improvement company engaged for a time in general traffic over the road, the court by its charge says the liability of the railway company is settled.

2. When relation of master and servant does not exist.

The charge does not base this liability upon the improvement company being the lessee of the road, nor upon any contract by which the road is to be operated with the consent or for the benefit of the railway company. Nor can it be claimed from the instructions that the railway company had made any contract in violation of its charter, or to avoid its responsibility. It is conceded that the improvement company had authority under its incorporation to construct and equip the road; and to hold, that while in possession of the road and its appurtenances, the railway company should be responsible for its wrongful acts or omissions, because said improvement company ran trains and carried passengers and freight, would be deciding the law contrary to that given in the first part of the charge, and affirming in its broadest sense the principle that the employer is responsible for all acts and omissions of the contractor, the same as those of a servant. Such is not the law. The principle by which all these cases are governed is

the general one, that a person who receives an injury from another must proceed against the party by whom the injury is inflicted. In the case of master and servant, the master is liable for the negligent acts of the servant, on the ground that he has the power of selecting him; but in order to make one person liable for an act which another person has done, the latter must be the servant of the party sought to be made liable. The maxim of the law is, *respondeat superior*; and in this case, the railway company, on the facts presented by the defense, and on which the defendant in the court below asked that the instructions quoted above be given, does not stand in the relation of *superior* to the improvement company. We are unwilling to follow the decisions cited by the counsel for the defendant in this court, so far as they conflict with these principles. As to the decisions cited by the same counsel, that if a railway company leases its road to another, or places its road in the hands of an irresponsible individual, or a worthless corporation, it cannot thereby avoid its liability, we need only say, that in this case they are not applicable. The instructions are not restricted by any such qualifications. The Kansas Central Railway Company had not leased its road to be operated for general traffic; nor is the charge based upon the theory that the improvement company was operating the road in its own name for the use and benefit of the railway company, merely to relieve the latter from responsibility. The fact that the improvement company had no authority to operate a railroad in Kansas, as claimed by counsel for defendant in error, does not on the facts presented change the law in this case. If the improvement company, in carrying passengers and freight, was violating its own charter, as well as committing acts not authorized by the contract existing between it and the railway corporation, the reasons are still stronger in favor of holding the railway company not liable for such unlawful acts. That such improvement company could not interpose the violation of its own charter to shield it from responsibility, is fully discussed and decided in *Bissell v. Michigan Southern & Northern Rld. Cos.*, 22 N. Y. 258. Considering

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the instructions refused, and the charge given, we think the court erred, and that it may have misled the jury.

We do not wish to be understood, that upon the evidence produced, the jury should have found that the Washington Improvement Company was in fact operating the railroad; nor that the Kansas Central Railway Company is not liable in the case. The question, as to which company was operating the road at the time of the injuries complained of, is a question of fact to be decided upon the evidence, by the jury. But a party to an action has a right to have his case submitted to the jury under proper instructions, and in this case the plaintiff in error has been denied this legal right.

Other questions are presented in the brief of the counsel, but as a new trial is to be had, and as these questions may not arise again, we need not comment thereon.

The judgment must be reversed, and a new trial ordered.

VALENTINE, J., concurring.

BREWER, J., *dissenting*: I am unable to concur with my brethren in the conclusions they have reached in this case, and will state very briefly the reasons of my dissent. And first, as I understand it, there is nothing in the record tending to show that the railway company was endeavoring to get possession of its road, or that the construction company for any reason was refusing to surrender the possession, or that the railway company was refusing to receive possession on account of any failure to complete the construction and equipment of the road to Holton, (then and since the only portion of the road constructed,) or that an abundance of time had not elapsed since the completion of that portion of the road for examination and surrender. The instruction certainly contemplates none of these things. Neither was there any testimony tending to show a lease, or anything of that nature. All I understand the instruction to say is, that a railway corporation receiving a franchise from this state, with the high and peculiar privileges attaching to corporations, incorporated to discharge a public duty, as well as to subserve a private benefit, cannot shift upon

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others the duty and responsibility of a *personal exercise* of the corporate powers granted, except in the cases and under the conditions specified in the statute. It may contract for the construction of its road. It may lease the road, when constructed, to another corporation whose road with its own will make a continuous line. (Laws of 1870, ch. 92, §§2 and 3.) But it cannot avoid responsibility by simply permitting another party, neither contractor nor lessee, to assume charge of the immediate running of the road. I think the judgment should be affirmed.

Judgment reversed.

JAMES THOMPSON V. WM. P. HIGGINBOTHAM.

1. **LEGAL NOTICES; *What is Sufficient Publication.*** Where it appears by the return of the sheriff, and the affidavits of the publisher and the foreman of the newspaper, that notice of sale was published in the several issues of the paper as required by law, such publication will be held sufficient, although the affidavit of a party is filed that he examined eight or ten copies of one of said issues and found that a portion of said notice, including the description of the property, was illegible.
2. **AFFIDAVIT—*To State Facts.*** An affidavit to be used as evidence should state facts positively, and not merely upon belief, [*Pemberton v. Hoosier*, 1-108; *Dewey v. Linscott*, 20-687; *State v. Gleason*, 32-250.]
3. ——— ***Before Whom Made.*** An affidavit may be sworn to before a register of deeds.
4. **CONFIRMATION OF SALE; *Regularity of Proceedings.*** While it may be irregular for a court to make an order confirming a sale upon the filing of a certain affidavit, yet if the affidavit is filed as required, the substantial rights of the defendant are not prejudiced.

Error from Riley District Court.

JUDGMENT was rendered against *Thompson*, in favor of *Higginbotham*, in September 1874. An execution was issued in March 1875, and on the first of May thereafter lands of *Thomp-*

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son were sold under said execution, by the sheriff of Riley county. Counter motions were made, to confirm, and to set aside this sale. Such motions were heard at the June Term 1875. The district court confirmed the sale, and *Thompson* appeals, and brings the case here on error.

C. M. Anthony, for plaintiff in error.

Green & Hessin, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This is a proceeding to review an order of the district court overruling a motion to set aside, and sustaining a motion to confirm, a sale of real estate. These questions are presented by counsel for plaintiff in error in his brief. First: It is insisted there was a failure to make due publication of the notice of sale. The notice was advertised in the *Clay County Dispatch*. An affidavit of the attorney of the defendant was filed, stating that he had examined eight or ten copies of one of the issues of said paper in which this notice was published, and that a large portion of the notice, includ-

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of legal
notices.

the description of the property, was illegible. On the other hand, the return of the sheriff shows that he caused "public notice of the time and place of sale of said lands and tenements to be given, over thirty days before the day of sale thereof, by advertising in the *Clay County Dispatch*," etc. The publisher of said paper attaches his affidavit to the return, stating that the notice "was published for five weeks in said newspaper," giving a copy of the notice, and including in his affidavit the issue of the paper referred to in the prior affidavit. A like affidavit was also afterward filed by the foreman of said paper. Upon these facts we think the court properly overruled this objection. Every one knows that it is no uncommon thing to see a few lines in a newspaper blurred, or otherwise rendered illegible. Sometimes the paper as it goes into the press is not entirely smooth; sometimes the ink fails on a portion of the type; and so there may be in every issue a few copies in which any given

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notice is illegible. But to hold that thereby the publication has wholly failed, would not be tolerable. It would render titles resting on judicial proceedings altogether too insecure and uncertain. And it must be remembered that in order to make a publication in a newspaper valid, it is not essential that any given number of copies of a single issue should be printed. The law does not say that 100, or 500, or 1,000 copies should be struck off, in order to make a valid publication. Doubtless the law contemplates the regular edition of the paper; and if the notices was omitted from all but a single copy or two, the courts might be constrained to interfere. But no such case as that is here presented. All that can be said is, that in a few copies of one issue the notice was partially blurred, and thereby rendered to that extent illegible.

A second proposition is, that defendant had personal property out of which the debt could have been made. The sheriff returned, "No goods." And here again, to over-
2. Affidavits must state facts. throw the return, we have only the affidavit of defendant's attorney. This affidavit stated that at the time of the issue and levy of said execution the sheriff who made the levy and the defendant were partners in a livery stable, "in which they held themselves out as joint-owners of a large amount of personal property, one-half of which, or the interest of the defendant in said property, consisting of horses, buggies and harness, which was subject to execution, was more than sufficient to satisfy said judgment-debt as aforesaid, as affiant believes." It also stated that affiant believed that defendant had at all times since the issue of execution personal property subject to execution sufficient to satisfy said judgment. This objection was also overruled. The affidavit proves nothing. It does not state facts, but only affiant's belief. *City of Atchison v. Bartholow*, 4 Kas. 124. Even if defendant was apparently the owner of a half-interest in this stable, the sheriff, his partner, may and doubtless did know the actual facts. He may have known that defendant was only the apparent, and some one else the real owner, or that it was in-

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cumbered to its full value. At any rate, no mere "belief" of the defendant's attorney can overthrow the official return of the officer. Again, it is objected that the affidavit of the foreman of the newspaper was taken before the register of deeds. This was sufficient. Gen. Stat., p. 598.

Finally, it is contended that at the time of the hearing of the motion it did not appear that the publication was in the issues of the paper immediately preceding the day of sale, and that the court improperly made a conditional order of confirmation. The facts are these: The return of the sheriff showed that he received the execution March 20th, that the sale was on May 1st, that he gave public notice over thirty days before the day of sale by advertising in the *Clay County Dispatch*. The affidavit of the publisher attached to the return stated that the notice was published for five weeks in said newspaper, viz., Nos. 2, 3, 4, 5, and 6, of Vol. 3, 1875, but did not give the dates of issue of these several numbers. The court on examination stated that it did not distinctly appear that these five issues of the paper were the last prior to the day of sale, and made an order confirming the sale on the filing of an affidavit that the advertisement was immediately preceding the sale. Court then adjourned, and four days thereafter the required affidavit was filed. Conceding the irregularity of such a proceeding, we do not see how the defendant was prejudiced thereby. Upon the face of the papers as they now stand, the proceedings in the sale were regular, and confirmation ought to be made. If we were to set aside the order of confirmation, as premature, it would be simply to have it entered at the succeeding term. How then is the defendant injured in his substantial rights? We see therefore nothing to justify a setting aside of the order of confirmation, and it will be sustained.

HORTON, C. J., and VALENTINE, J., *concur*, and hold, that upon the record, the proof of the notice of sale was sufficient at the time of the confirmation, and independently of the affidavit

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filed, under the requirement of the court, subsequent to the hearing of the motion to confirm.

Order of confirmation affirmed.

MARTIN MCCARTHY, as Adm'r, &c., v. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY.

1. JURISDICTION; *Statutory Actions; Code Construed.* Section 422 of the civil code, relating to actions where death is caused by the wrongful act of another, has no extra-territorial force, and does not confer a right of action for an injury inflicted in another state.
2. ——— *Action, where Injury Occurred in Another State.* Where M. is an inhabitant of this state, and is injured in the state of Missouri by the wrongful acts of a railway company operating a railroad in the latter state, and thereupon is brought to this state, and dies here from the effects of such wrongful acts, the personal representative of the intestate, appointed under the laws of this state, cannot maintain an action therefor in this state against such railway company under section 422 of the civil code. [*R. R. v. Cutler*, 16-568.]

Error from Leavenworth District Court.

MICHAEL MCCARTHY, a resident of this state, was injured while repairing the track of defendant's railroad in Platte county, Missouri, and died from the effects of such injury. His administrator brought suit against the *Railroad Company*, under §422 of the civil code, to recover damages, alleging that Michael's death was caused by the wrongful acts of the defendant company. The defendant demurred, and the district court, at the May Term 1875, sustained the demurrer and gave judgment for the defendant, and the plaintiff brings the case here on error for review.

Taylor & Gillpatrick, for plaintiff.

Pendery & Goddard, for defendant.

The opinion of the court was delivered by

HORTON, C. J.: Demurrer to petition. The action was brought by the plaintiff as administrator of the estate of Michael McCarthy, deceased. The petition alleges that the plaintiff is the duly-appointed and qualified administrator of said estate; that the defendant is and was a railroad corporation, organized and existing under and by virtue of the laws of Illinois, and was and is engaged in operating the Chicago & Southwestern Railroad, a road leading from the city of Leavenworth, Kansas, across the Missouri river bridge, thence east through Platte county, Missouri; that the intestate, on June 5th 1873, while in the employ of defendant as a track-repairer on its road, received personal injuries, in the county of Platte, and state of Missouri, through its gross and culpable negligence, of which injuries he died twenty-four hours thereafter; that the intestate at the time of his employment by said defendant, and at the time of his death, was a resident of this state; that the services were to be performed on the road defendant was operating and controlling; that immediately after the injuries complained of were received, the intestate was brought from Platte county, Missouri, to his home in Leavenworth city, in this state, where he died; that the intestate left Margaret McCarthy as his widow, and eight children, (giving the name of each,) and also states that by reason of the premises the plaintiff claims damages in the sum of \$10,000. The defendant demurred, and assigned the following grounds of objection: first, that the court did not have jurisdiction of the subject-matter of the action; second, that the plaintiff did not have legal capacity to sue; third, that the petition did not state facts sufficient to constitute a cause of action in favor of the plaintiff against the defendant. The district court sustained the demurrer; and the plaintiff electing to stand by his petition, final judgment was rendered in favor of defendant. To reverse such judgment, a petition in error has been filed in this court.

The suit is based on section 422 of the civil code, Gen. Stat.

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1868, pp. 708, 709; and the first question presented is, whether this provision of our statute has any extra-territorial operation. In other words, does this statute apply, where the suit is brought in this state for an injury done in another state? This question has been before the courts of various states, upon petitions like the one filed in this case, and almost invariably the courts have held that the statutes of a state have no force beyond the limits of the state of their adoption. Generally, all laws are coëxtensive, and only coëxtensive with the political jurisdiction of the law-making power. This identical subject is fully discussed, and decided against the claim of the plaintiff in error, in the following cases: *Campbell v. Rogers*, 2 Handy, 110; *Vanderwerken v. N. Y. & N. H. Rld. Co.*, 6 Abb. Pr. 239; *Beach v. Bay State Steamboat Company*, 30 Barb. 433; *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *Nashville & Chattanooga Rld. Co. v. Eakin, Adm'r*, 6 Cold. (Tenn.) 582; *Needham v. Grand Trunk Rly. Co.*, 38 Vt. 294; *Selma, Rome & Dalton Rld. Co. v. Lacy*, 43 Ga. 461; *Hover v. Pennsylvania Company, &c.*, 25 Ohio St. 667.

In the states where the above-cited decisions were rendered, statutes similar to the provisions of section 422 are in force. At common law, this action could not be maintained. In the first place, if the death was caused by a felony, any action for a civil remedy for it would be merged in the criminal prosecution, or rather, suspended till the conclusion of the criminal action; and as the punishment for a felony, causing death, was the death of the offender, and the forfeiture of his property, the suspension of the action really resulted in its defeat. *Higgins v. Butcher*, Yelv. 89; *Marsh v. Stone*, 6 B. & C. 551, 557, 564. In the second place, the rule that a personal action dies with the person, which was always regarded as applicable to personal torts, operated to abate any cause of action that might have otherwise belonged to the injured party; and this applied equally to deaths by felony, negligence, or misadventure. No claim then can be maintained, in favor of the action brought, upon any rule of the common law; and it is not necessary, in reaching this con-

1. Jurisdiction;
Sec. 422 of code
construed.
* Where death
is caused
in another
state

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clusion, to hold that the doctrine expressed in *Baker v. Bolton*, 1 Campb. 498, that "in a civil court, the death of a human being cannot be complained of as an injury," has authoritative force in this country in those states where there is no statute to recover damages sustained by a husband, parent, master, etc., through the death of a deceased, when the party suing was entitled to the services of such person.

It is contended by the counsel for the plaintiff, however, that confessing the full force of the limitations upon the operation of the laws of the state, so far as any extra-territorial power is concerned, and assuming that, by the common law the cause of action which accrued to plaintiff's intestate died with him, yet, the action is maintainable, and the demurrer should have been overruled, as the court will presume, in the absence of allegations in the record to the contrary, that the laws of Missouri in respect to actions of this character are like our own. Admitting the premises, the conclusion does not necessarily follow. Every statute of another state, giving a right of action, cannot be enforced in a spirit of comity in this state, even if such statute is set forth in the petition filed in the court; and a very different principle is involved, between presuming the laws of sister states like our own, to sustain title to property within this state in litigation, and holding that the laws of other states are similar to ours in enforcing through our courts either the penal or remedial statutes of such other state. In Massachusetts, where the rule of the common law is in force, it has been decided in a case where the intestate was an inhabitant of the state, but injured in New York, (which state has a statute similar to our own,) and the statute law of New York was set forth in the declaration, that the action could not be maintained. Hoar, J., in discussing the right of action, and the New York statute, says: "How can it be regarded as anything else than a statute penalty, which the personal representative of the deceased is to recover by an action which is limited in amount, although that amount may be much less than the extent of the injury sustained by those whose loss is to be estimated in computing

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it, and which is to be distributed among the parties entitled to receive it, not in proportion to the injuries which they have respectively sustained, but in proportion to the shares to which they would be severally entitled in the distribution of an intestate estate? We do not readily find a satisfactory answer to this question." *Richardson v. N. Y. Central Rld. Co.*, 98 Mass. 85. In Ohio, it has been decided, that where a person, who was a brakeman on the M. S. & N. I. Rld. Co., was killed in Cook county, Illinois, by the negligence of the railroad company, and where the statute of Illinois, which is like ours, was set out in the petition, and the same was very similar to that of Ohio, that an administrator appointed in Ohio could not maintain in that state an action for damages for the benefit of the widow, or next of kin, of the deceased. *Woodard, Adm'r, v. M. S. & N. I. Rld. Co.*, 10 Ohio St. 121.

We think it is to be assumed on the petition, in the absence of more definite allegations, that the plaintiff was appointed administrator in this state. Many difficulties present themselves in holding that an administrator appointed under the laws of Kansas can undertake and discharge a trust of this character conferred by the laws of Missouri. The plaintiff is not amenable to the courts of Missouri; yet, if this action is maintainable, the money is to be recovered here, upon the laws of another state, by a person acting in an administrative capacity under the authority of this state, and the fund is then to be distributed by the laws of the sister state. It is doubtful, whether an administrator's bond would extend to such a case, or whether this action would be a bar to other proceedings in Missouri to recover damages for the injuries resulting in the death of the intestate. In the Ohio case cited, Gholson, J., says: "The jurisdiction of the court under which he (the administrator) acts, does not extend to trusts carried out in pursuance of the laws of other states; for it may well happen, that the next of kin, under the law of Illinois, may not be the same persons, or take in the same proportion, as under the law of Ohio. Certainly, to determine who are the *cestui que trust*, the laws of Illinois must be regarded, and it is there-

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fore the intention of the statute of that state, that the tribunal under which the personal representative, in whom the right of action is vested, and upon whom the trust is imposed, is acting, should administer the trust and distribute the fund among the proper parties."

We think this reasoning sound, and applicable to the case at bar. We cannot presume that the laws of Missouri give an administrator of Kansas power to collect moneys under its laws, to administer trusts imposed by its authority, and to distribute funds among the proper parties to whom the same belongs by the statutes of that state. If the laws of our state are to be presumed in force in Missouri, then there was no necessity to institute an action so circuitous as this one must be, if maintainable here, in this state, as the administrator could have brought the action in the courts of Missouri. *Kansas Pacific Rly. Co. v. Cutter*, 16 Kas. 568. As a fact, *aliunde*, the laws of Kansas and Missouri are very dissimilar, and the plaintiff, even if a Missouri administrator, could not, under the laws of the latter state, maintain any action in that state, as the personal representative of the intestate, on account of the injuries which caused his intestate's death. In that state, the damages in such actions must be sued for and recovered, first, by the husband or wife of the deceased; or second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or third, if such deceased be a minor, and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment, or, if either of them be dead, then by the survivor. Wag. Mo. Stats. 1872, vol. 1, 519, 520.

We do not pass upon the question, whether an administrator appointed under the laws of another state having similar provisions of law to section 422 of our code, might or might not maintain an action of this character in this state for the purpose of recovering a fund to be distributed under the law of the state from whence he derives his appointment. Such a case is not presented in the record.

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It is claimed that, whatever construction this court may give to section 422, that the plaintiff's cause of action is supported by section 420 of the code, (Gen. Stat. 708.) It reads as follows:

"In addition to the causes of action which survive at common law; causes of action for mesne profits, or *for an injury to the person*, or to the real or personal estate, or for any deceit or fraud, shall also survive, and the action may be brought, notwithstanding the death of the person entitled or liable to the same."

The plaintiff has declared on the cause of action given by section 422, and not on that given by section 420. But if sufficient facts were contained in the petition, so that section 420 could be considered, we do not think the position of the plaintiff would be any better to sustain his claim. Section 422 was originally passed on February 8th 1859, entitled "an act authorizing actions to be brought in certain cases;" (Comp. Laws, 1862, p. 80.) Section 420 was section 410 in the code of 1859. But both of these provisions of law took effect on the same day, viz., June 1st 1859. In the revision of 1868, these sections were embodied in the civil code as sections 420 and 422, are a part of the same act, and were adopted at the same time. They must be construed *in pari materia*. The purpose of section 422 is evidently not only to fix the amount of damages, and limit them to the use of the widow and children, or next of kin, but to take away the right of the administrator to sue for the benefit of the estate generally, where death resulted from the injuries. Section 420, as construed with section 422, only causes the actions to survive for injury to the person, when the death does not result from such injury, but does occur from other circumstances. The right of the action under section 422 is exclusive; and an administrator could not maintain an action under sections 420 and 422 for the same injury. When death results from *wrongful acts*, section 422 is intended solely to apply. *Read v. Great Eastern Rld. Co.*, 3 Q. B. 555; *Andrews v. Hartford Rld. Co.*, 34 Conn. 57.

The fact, urged with considerable stress by the counsel of

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plaintiff, that the intestate lived in Kansas at the time of his employment, and died in this state, is immaterial in the decision of the questions presented. The wrongful acts were all committed in Missouri. This court has already held, that while section 422 gives a cause of action in every case coming within its terms, and happening within the state, the residence of the deceased is not material, and the place of his death unimportant in determining the right of the administrator to sue. *Kas. Pacific Rly. Co. v. Cutter*, *supra*.

The judgment of the district court will be affirmed.

All the Justices concurring.

EDWARD BURGESS V. M. C. & N. W. RAILROAD CO.

1. **GENERAL STATUTES; What they Embrace; Former Statutes Repealed.** In the general statutes the legislature intended to present a revision of all the laws of a general nature then in force in this state.
2. ——— *Ch. 119 Construed.* By section 1 of chapter 119 of the general statutes it prescribed what acts should form the general statutes; and by section 2, it in terms repealed "all other acts of a general nature embodied or reenacted, in whole or in part, in any of the statutes heretofore enumerated, or repugnant thereto." In determining the scope of this repealing clause, these rules obtain: First, no matter how many of different subjects or sections are included in a prior act, if any one of them is embodied or reenacted in the general statutes, the entire act is repealed. Second, it is not essential that the exact phraseology, or the exact provision, be retained. The idea is, that if the attention of the legislature was directed to the prior act, and it took certain portions for incorporation into the general statutes, although in so doing it changed somewhat the phraseology, or partially enlarged or restricted the provision, it thereby manifested its intention to drop from the laws all the remaining portions of that act. Third, an act amending an act, is to be taken as simply a portion of the amended act, and not as an independent statute. [*Beane v. Adams*, 21-128; *Case v. Bartholow*, 21-308.]

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3. RAILROAD LIEN LAW OF 1865—*Repealed by Revision*. Chapter 45 of the laws of 1865, which purported to authorize mechanics' liens upon railroads, was repealed by the general statutes, known as the revision of 1868. [*Hobart v. Beers*, 26-333.]

Error from Cherokee District Court.

ACTION by *Burgess* to foreclose a mechanic's lien on the road-bed of the *Memphis, Carthage & Northwestern Railroad Company*. The pleadings, and proceedings, are sufficiently stated in the opinion. A money-judgment was entered by consent; but the district court, at the October Term 1874, refused to decree a lien on the road-bed for the amount due, and *Burgess* brings the case here on error.

Hill & Bowman, and *W. R. Cowley*, for plaintiff.

Hallowell & Anderson, and *H. H. Harding*, for defendant.

The opinion of the court was delivered by

BREWER, J.: Plaintiff sued for work done in constructing defendant's road-bed, and to foreclose a mechanic's lien thereon. A demurrer to the petition was filed by defendant. Before any hearing was had, this agreement was entered into:

"It is hereby agreed, that a judgment may be entered in the above-stated case in favor of the plaintiff for the sum of seventy-three thousand six hundred and sixty-one dollars. And it is also hereby agreed, that the judgment so entered will be entitled to a credit of the amount which has been paid to sub-contractors and laborers of the said plaintiff (*Edward Burgess*) by the defendant on that part of the *Memphis, Carthage & Northwestern* railroad between *Minersville, Missouri*, and *Oswego, Kansas*, when the exact amount therefor has been ascertained, and proper vouchers therefor furnished. This agreement is not to authorize the establishment of the lien prayed for in the petition."

In pursuance of this agreement a money-judgment was entered against the defendant. At a subsequent term, plaintiff appeared, and moved for a decree of foreclosure of the mechanic's lien. This motion was overruled, and this ruling is the alleged error. Two questions are presented. Did the

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laws of Kansas, at the time, warrant a mechanic's lien on a railroad? If they did, was the plaintiff under the pleadings and stipulation entitled to a decree of foreclosure? In reference to the first question, this is the proposition of the counsel for plaintiff:

"The statute of 1865, pp. 105, 106, Laws of Kansas, gives an express lien upon railroads to the parties who construct them, do work upon them, or furnish materials to construct them. If this law of 1865 is not repealed by the revised laws of 1868, then the lien of plaintiff upon the road-bed of said railroad constructed by him, is perfect, and judgment on the lien should have been entered for him at the spring term of 1875, May 21st, when the motion was made by plaintiff for a decree foreclosing the lien upon the road-bed."

Was the law of 1865 repealed? The legislation of 1868, known as the general statutes, was intended as a revision of all the laws of a general nature. The legislature of 1867 provided for the appointment of a commission "to revise and codify the civil and criminal codes of procedure, and all laws of a general nature of this state." It was made the duty of the commissioners "to make a complete compilation of the laws of the state to the present session of the legislature, its acts included, omitting all such acts or parts of acts as have been repealed or amended." Laws of 1867, p. 150, §§ 1 and 5. The commissioners were appointed, did the work, and reported to the legislature of 1868, by which their report was in the main adopted. The last act in the general statutes is entitled "An act concerning the general statutes." The first section provides what shall constitute the general statutes, to-wit, all the acts revised by the commissioners and reported to and enacted by the legislature, all general acts of that legislature, and certain acts of preceding legislatures which are specially named.

1. General Statutes of 1868, what are embraced.

2. Ch. 119 comm. is traced.

Section 2 then reads, that "All other acts of a general nature, embodied or reenacted, in whole or in part, in any of the statutes hereinbefore enumerated, or repugnant thereto, are hereby repealed." Now the act of 1865 above cited is not among those specially named, is an act of a gen-

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eral nature, and is repealed, or remains in force, according as it is or is not "embodied or reenacted in whole or in part" in any of the general statutes. It will be noticed that this repealing clause specifies "acts," and refers to statutes as entireties, and not to the various matters and subjects embraced in statutes. It matters not therefore how many different subjects or sections are included in the same act, or how independent and distinct those subjects or sections may be, if any one of them is embodied or reenacted in any of the general statutes, the whole of the act from which such section or subject is taken is repealed. Thus, if a statute prior to 1868 contained provisions concerning the place of bringing certain actions, and also provisions concerning the time for bringing such actions, and only those provisions concerning the *place* were found in the general statutes, the clause we have quoted would operate as a repeal of the entire statute, although it thus left an entire omission of legislation on the subject of the time for such actions. It is a familiar rule, that a statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, will operate as a repeal of the former statute, although it contain no express words to that effect. *Farr v. Brackett*, 30 Vt. 344; *Giddings v. Cox*, 31 Vt. 607; *Bartlett v. King*, 12 Mass. 587; *H. M. Canal Co. v. Chicago*, 14 Ill. 336; *State of California v. Onkling*, 19 Cal. 501. And it is also true, that when a legislature makes a general revision of the laws, its intentions may be as clearly indicated by what it omits as by what it embodies of laws revised. Here the legislature intended a general revision, and in plain language has declared its will, that the general statutes should contain all the laws of a general nature to remain in force, save and except only those prior general acts whose provisions and sections were wholly ignored in the revision. It is not sufficient therefore to inquire whether the general statutes contain any provisions for mechanic's liens on railroads. An omission of any such provision would not necessarily leave the statute of 1865 thereon in force. We must also inquire whether any portion of the act of 1865, in which is found the provision concerning

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such liens, is embodied or reenacted in the general statutes, for if so, the entire act of 1865 is repealed. Neither is it essential that the exact phraseology, or the exact provision of the prior act, be retained in the general statutes, in order to make this repealing section applicable. The idea is this, that if the attention of the legislature had been directed to a prior statute, and it had taken certain portions of it for incorporation into the general statutes, although in so doing it changed the phraseology, or enlarged or restricted the provisions, it thereby manifested its intention to drop from the laws all the remaining portions of that statute. One thing more: an act amending a section of a prior act is, for the purposes of this repealing clause, to be taken as simply a portion of the amended act, and not as an independent statute. In other words, by the amendment the old section is stricken out, and the amended section inserted, and the whole is to be treated as a single statute. It is perhaps not necessary in this case to resort to this rule, for independent of it, and having regard simply to the amended section alone, the same result will follow. Turning now to the laws of 1865, we find that chapter 44 is an act "for the incorporation and regulation of railroad companies," and contains some twenty-eight sections, with various provisions bearing upon those general subjects. Section 6 provides for the collection of unpaid installments of stock, and contains no reference to mechanics' liens. Chapter 45 is an act to amend chapter 44, was approved the day after the approval of the last-named act, and amends only section 6. After providing for the collection of unpaid installments, it adds in the same section these words:

1. Railroad lien-
law of 1865
repealed.

"And any person who shall perform any labor, or furnish any material for the construction, repairing, or altering of any railroad, shall have a lien for the same, in the same manner as though the same were a building, and such lien shall extend to the whole railroad, together with all the real property connected with the road."

The validity of this portion of the act is challenged by de-

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fendant in error, under section 16, of art. 2 of the state constitution. *Commissioners of Sedgwick County v. Bailey*, 18 Kas. 600. But we do not care to examine that question. It needs but a slight examination to show that many of the provisions of chapter 44 are incorporated into the general statutes, and are to be found in chapter 28 of those statutes. And even as to the single matter of collection of unpaid installments, found in chapter 45, we find in sections 29 and 80 of chapter 28 of the general statutes provisions made in aid of all corporations for the collection of unpaid installments, one of which is the same as one of those named in chapter 45, to-wit, civil action. We think therefore, for the reasons given, not only said chapter 44, but also the amendment to section 6 thereof, found in chapter 45, must be held to be covered by the repealing section of 1868. It should also be stated that the general statutes contain full provisions for mechanics' liens, so that the general subjects of the incorporation and regulation of railroad corporations, and of mechanics' liens, were presented to the attention and consideration of the legislature of 1868, and received such legislation as was deemed necessary.

We see no error in the ruling of the district court, and the judgment will be affirmed.

All the Justices concurring.

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. v. THOMAS DOYLE.

1. TRIAL ON THE MERITS, *After Demurrer Overruled*. Where a party demurs to the evidence of a plaintiff on a trial, which demurrer is overruled by the court, and afterward both parties proceed with the case and produce other evidence, and sufficient evidence is introduced to make out a case for the plaintiff, and on the verdict of a jury judgment is rendered in favor of the plaintiff, the supreme court will not reverse the ruling of the trial court overruling such demurrer. [*Simpson v. Kimberlin*, 12-579; *R. R. v. Kunkel*, 17-146; *Jansen v. Atchison*, 16-358; *R. v. Couse*, 17-571; *R. R. v. Young*, 19-493; *R. R. v. Reeher*, 24-223.]

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2. ——— The court does not err in overruling such demurrer, whenever there is testimony, which although weak and inconclusive, yet fairly tends to prove every essential fact, and is sufficient to justify a court in overruling a motion to set aside a verdict based thereon.
3. *RELEASE, Improperly Obtained, Voidable.* Where a party executed a paper, purporting to be a written release, discharging his right of action against a railroad company for injuries complained of, and at the time of executing the same he was so much under the influence of drugs and opiates taken to alleviate his pains, caused by a broken thigh, that he was mentally incapacitated to contract, *held*, that such a release is voidable, and not a defense to his cause of action. And also *held*, that in such case it was not necessary for him to pay back nor offer to pay back the money received at the time of signing said paper as a condition precedent to his right to sue on his claim for damages. On the trial, the jury had the right to give the company credit for the money paid at the time the release, so-called, was signed. [*Bemis v. Becker*, 1-228; *Bridge Co. v. Murphy*, 13-85; *Wolf v. Foster*, 18-118; *Stout v. Hyatt*, 13-243; *R. R. v. Jones*, 34-455.]
4. *NEGLIGENCE; Pleading, and Proof; Presumption.* In an action by an employé against his employer for injuries caused by the negligence of a fellow-servant, an allegation that the employer knew of the latter's unfitness and recklessness, is sustained by proof showing that such incompetency ought to have been known by the defendant. Where the employé is so grossly and notoriously unfit that not to know of his unfitness is negligence, the law presumes notice to the employer. [*R. R. v. Young*, 19-488; *U. T. Co. v. Thomason*, 25-1; *R. R. v. Haley*, 25-35; *R. R. v. Jones*, 30-601; *R. R. v. Holt*, 29-149; *R. R. v. Moore*, 29-632; *R. R. v. Fox*, 30-586; *R. R. v. Moore*, 31-197; *R. R. v. Wagner*, 33-660.]

Error from Leavenworth District Court.

ACTION by *Doyle*, who alleged that by reason of the negligence of the *Railroad Company* he was thrown from a hand-car "against and upon the ground, and was thereby greatly bruised, lacerated and wounded, and that by said fall his right leg was broken at the thigh, his right hip was dislocated, his right side paralyzed, his right shoulder-blade broken, and that he was by said fall injured internally, severely, and dangerously, and was made sick, sore, lame and diseased, and was caused to suffer great bodily pain and anguish, and that ever since that time he has remained sick, sore, lame and diseased, and is still sick, sore, lame and diseased, and ever since that time has suffered and still suffers intense anguish and bodily

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pain, and has been by said injuries rendered utterly unfit for labor of any kind, and that he has been put to great loss and expense in and about procuring medical attendance in striving to get healed and cured of his said injuries," etc. The facts and proceedings are fully stated in the opinion, *infra*. Trial at the September Term 1875. Verdict and judgment for plaintiff for \$1,000, and the *Railroad Company* brings the case here on error.

Clough & Wheat, and *M. A. Lowe*, for plaintiff in error.

Taylor & Gillpatrick, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: This was an action to recover damages for personal injuries alleged to have been received by defendant in error through the negligence of plaintiff in error in knowingly employing and retaining an incompetent, reckless and unfit servant, and in providing an unsafe and unsuitable hand-car. The petition states in substance that plaintiff in error was a corporation organized under the laws of Illinois, and was, on the day of the injury therein complained of, operating a line of railroad, extending from Leavenworth, Kansas, east through the county of Platte, in the state of Missouri; that defendant in error was employed by one Kirwin to work in connection with an extra gang of track-repairers under said Kirwin, in repairing the track of the railroad in Platte county; that as foreman of this gang of men, Kirwin had full power to hire and discharge the laborers so under his control; that Kirwin was a reckless, careless man, entirely unfit to have charge and control of men, and utterly unfit for his position; and then follows this allegation, viz.:

"And plaintiff alleges that said defendant knew that said Kirwin was a reckless, careless and incompetent man, and that he was utterly unfit for the position he occupied; that said defendant knew these facts at the time of the occurring of the injury hereinafter stated, and had had full knowledge of such facts for a long time prior to the occurring of such injuries, to-wit, for the space of two years, more or less; and that de-

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endant, knowing said Kirwin to be a reckless, careless man, and one utterly unfit to have charge of men upon a railroad, and after full knowledge of his reckless and careless character had been brought home to it, continued said Kirwin in its employment as foreman as aforesaid, and gave him charge of a gang of men on said road; and that said defendant willfully, carelessly and negligently continued and retained said Kirwin in its employ after it had full knowledge of his unfitness for his said position, and of his reckless and careless character; and that said defendant had so retained and continued said Kirwin in its employment at the time of the occurring of the wrongs and injuries hereinafter stated, and after knowledge of his said careless and reckless character for a long space of time, to-wit, one year, more or less."

The petition further states that the railroad company employed Kirwin carelessly and negligently, with full knowledge that he was a careless, reckless man, and one unfit to have charge of men; that Doyle did not know of the unfitness of Kirwin until after he received the injuries complained of; that through the recklessness of said Kirwin in running and conducting a hand-car, upon which Doyle and his fellow-servants were proceeding to their work, in said Platte county, and while in said county, the hand-car was thrown from the track, whereby Doyle received the injuries complained of. It was also charged that the hand-car was defective; but as the jury found for the company on that issue, it will not be necessary to consider it here. The railroad company answered, denying generally the allegations of the petition, and afterward filed a supplemental answer, setting up a sixth defense, in which it pleaded a written release, executed by said Doyle, releasing

THE "release" so pleaded, and which was given in evidence on the trial, is as follows:
 FOR THE CONSIDERATION of the sum of thirty-three dollars received to my full satisfaction of the Chicago, Rock Island & Pacific Railway Company, I hereby release and discharge the said company from all claims and demands which I have, or may be entitled to have, against it, either in my own name or in that of any one else, and especially from all liability to me for loss or damage which has resulted or may result to me from injury suffered by me by reason of being thrown from hand-car between Beverly and Platte City while in performance of duty, and (by no act or carelessness of my own) injured so as to be unable to work for twenty-two days, which occurred on or about the 5th of June 1873. Received payment, July 23d, 1873.

HIS
 THOMAS M. DOYLE.
 MARK.

The above was read to and signed by the said Thomas Doyle in our presence, at Leavenworth, on the 8th day of July 1873.

Chas. N. W., F. O. SHERMAN, Auditor.

Examined, and correct: GEO. F. WALKER.

Approved: HUGH RIDDLE, Gen'l Supt.

E. BAKER.
 W. McCULLOM.

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his right of action for the injuries complained of, if any he had. To the answer of the company, a general denial of all new matter was filed by Doyle, and also a verified reply to the new, or sixth, defense, denying the execution of the instrument for the purposes set forth on its face, alleging that Doyle made his mark to the same, if he did make his mark to it, believing it was simply a receipt for wages; that at the time he was not in his right mind, was suffering intensely from pain, and laboring under the influence of drugs, opiates, etc., taken to alleviate his pain and suffering; was not in a condition to know what he was doing, but supposed it was a pay-roll.

On the trial, after defendant in error had introduced his evidence and rested, the plaintiff in error demurred to the evidence on the ground that no cause of action was proven, which demurrer the court overruled. The jury returned a general verdict for defendant in error, and assessed his damages at one thousand dollars; and answered particular questions of fact submitted to them. The plaintiff in error filed its motion for a new trial, which being overruled it moved the court for judgment on the verdict and special findings. This motion was overruled, and judgment entered on the general verdict for Doyle, to which actions of the court the company duly excepted, and now brings the case here by petition in error.

I. As both parties proceeded with the trial, and introduced further and additional evidence, after the demurrer to the evidence by plaintiff in error had been overruled, we do not think it necessary to discuss the question of alleged error in the action of the court below in overruling such demurrer. *Simpson v. Kimberlin*, 12 Kas. 579. We have recently held that, "as sustaining a demurrer to evidence works a final disposition of the case, the court does not err in overruling such a demurrer, whenever there is testimony which although weak and inconclusive, yet fairly tends to prove every essential fact, and is sufficient to justify a court in overruling a motion to set aside a verdict based thereon." *K. P. Railway Company v. Couse*, 17 Kas. 571. See also *Jansen v. City of Atchison*, 17 Kas. 358.

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II. Plaintiff in error contends that the reply of Doyle to the sixth defense is wholly insufficient to avoid the effect of the release. We think otherwise. If Doyle was in the condition stated in that part of the reply, he was incapacitated to contract with the railroad company. He could give no sufficient assent to the release. Assuming, as the reply states, that he was laboring under intense suffering, and was unable to move or turn himself; that his mind was wandering, and that he was under the control of drugs and medicines taken to subdue and ease his sufferings, and in no condition to know what he was doing, it would not only be inequitable, but against authority, to hold him responsible for a settlement made by him in writing with the company for his personal injuries for the sum of \$33. The decisions are manifold, that contracts entered into when, from intoxication, the party was incompetent to contract, may be avoided. In the case at bar, the reasons are very much stronger for holding, if Doyle signed the release, as he sets forth in his reply, that he should not be bound thereby. In the case of intoxication, the party inexcusably "drinks, forgets the law, and perverts his judgment." In this case, Doyle, with a broken thigh, lying in a hospital on his cot, and so affected that he could only turn with great difficulty, naturally demanded opiates to assuage his suffering; and if he used them either to excess, or without the knowledge of his nurse or physician, his act in so doing is at least excusable, perhaps fully justifiable. If he was not competent to contract, (and of this the jury had the right, under the evidence, to judge,) then the release was not effective. Counsel for plaintiff in error, however, insist that unless Doyle offered to rescind the contract, and pay back the money received, the release is binding, and he could not recover in the case, and claim that the charge of the court, which directed the jury to give the company credit for the money paid for the release, provided Doyle did not intend to execute it, was erroneous. In support of this proposition, they say: "It gave him the privilege of rescinding the contract, without surrendering the consideration received. It gave him permission to play the

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game of 'head I win, tail you lose,' a doctrine that is seldom sanctioned in a court of justice. A court of equity can reform a contract only in case of a mutual mistake. In this case, while it is claimed that Doyle was mistaken, there is no pretense that there was any mistake on the part of the company. It is well settled that a mistake of one of the parties to a contract is not enough to authorize a court to reform it."

The argument is faulty, in that it assumes that Doyle made a contract, and also seems to assume that before bringing his suit he had knowingly ratified the release. If Doyle's theory is correct, there was no release, no contract, no ratification within his knowledge. He signed a writing which was voidable for want of capacity on his part to execute. Not until the suit was tried, was he fully informed of the circumstances under which he made his mark thereto, and hence we hold that under the fact stated in such reply it was not necessary for him to tender the money back. Nor did the court below commit error in instructing the jury, if they found for Doyle, to give the company credit for the \$33 paid him at the time the release, so-called, was signed. If Doyle was incompetent to understand or know the character of the paper signed by him, owing to his being under the influence of opiates to surcease his pains, and such paper was never afterward read or explained to him, it cannot be reasonably said that he affirmed the instrument, which he did not in the first instance assent to, and never afterward saw or knew of, until he met it on the trial.

III. It is alleged that the motion for judgment for the railroad company ought to have been sustained. In addition to the general finding by the jury for Doyle, the following particular questions of fact, among others, were also submitted to them, and answered:

"Q.—Was the John Kirwin mentioned in the petition in this action incompetent or unfit to occupy or hold the position of foreman of such a gang of men as he was foreman of at the time when plaintiff was injured? A.—We believe he was competent, but unfit to hold the position.

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"Q.—Was the John Kirwin mentioned in the petition in this action so careless or reckless as not to be a fit person to occupy the position he held at the time when plaintiff was injured? A.—We believe he was too reckless."

With these special facts so found, together with the general verdict for the plaintiff in the court below, the allegations in the petition, that the railroad company was liable for the negligent injuries inflicted by Kirwin upon Doyle, are fully sustained, unless some special finding of fact is inconsistent with the general verdict. Counsel for plaintiff in error claims that the following question and answer, namely—

"Did any of the officers or agents of defendant know that John Kirwin was not an ordinarily competent and careful person for the performance of the service in which he was engaged at the time of the accident to plaintiff, complained of? If so, what officers and agents; what is the name of each of such officers and agents? A.—There is not evidence to show whether they did or did not know"—

is a finding that the railroad company had no notice of the unfitness and recklessness of Kirwin, and therefore that said finding is inconsistent with the general verdict; and as the former controls the latter, the court should have given judgment accordingly. Counsel insisting upon this construction of the finding last named, concede that there are four cases in which an employer will be liable to an employé for negligent injuries inflicted by a co-employé: first, where the employment was without due inquiry as to the employé's fitness; second, where the employment is with notice of the employé's unfitness; third, where the employé is continued in service with notice of his unfitness; fourth, where the employé is so grossly and notoriously unfit that not to know of his unfitness is negligence: in such a case notice will be presumed. The finding relied upon to defeat the verdict is to the effect that no particular officer or agent of the railroad company knew that Kirwin was not an ordinarily competent and careful person. Does this finding rebut the presumption of the law, that notice will be presumed where the employé is so grossly and notoriously unfit that not to know of his unfitness is negligence?" We

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think not. If it was the intention of the special finding to meet also this charge or allegation, then another and entirely different inquiry should have been given to the jury. If Kirwin was retained by the railway company, after it should have known his unfitness and recklessness, the company actually had in law notice of such unfitness and recklessness, although neither the court nor the jury could name any officer or agent of the company in the possession of such knowledge. Hence, the fact that the jury virtually said that the evidence did not point out any officer or agent of the company who knew Kirwin's unfitness and recklessness, did not in any manner do away with the notice presumed by the law. If the circumstances of the case were such as that, in the judgment of the jury, the railway company did not actually know of the unfitness of Kirwin, and nevertheless ought to have known it, it is the same as if the company had such actual notice. Every presumption is in favor of the general verdict; and the court will presume that every fact was found, which there was evidence tending to prove, that is necessary to support such verdict; and a general finding in favor of Doyle, is a finding in his favor of all the facts necessary to constitute his claim. The question then arises, whether the allegations in the petition authorized the proof of such acts of negligence on the part of Kirwin as would make it negligent in the railway company not to know of his unfitness, and thus be bound in law with notice. In other words, does the charge that the railroad company willfully, carelessly and negligently continued and retained said Kirwin in its employ, after it had full knowledge of his unfitness for his position, and of his careless and reckless character, and such knowledge had been brought home to it, permit Doyle to show that the company ought to have known of such incompetency, and thus have actual knowledge in law? We think it does. The petition charges actual knowledge, and thereunder evidence could have been offered, showing that the unfitness and recklessness of Kirwin were known or ought to have been known by the railroad company. The obligation of the former tenders the same issue as the latter, and opens the

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door to every inquiry in relation to it. The petition would sustain a finding that the railroad company ought to have known the unfitness and recklessness of Kirwin, and in law had notice thereof. A statement of facts proven, which show that the railway company ought to have knowledge of the conduct of an employé, presumes notice, and is evidence of notice.

As to the other matters submitted in favor of sustaining the motion for judgment for plaintiff in error, it is sufficient to say that the general verdict fully covers all of said objections, and that the court committed no error in overruling the same.

In this case the evidence was very conflicting upon every material point, excepting as to the injuries received by Doyle; yet as there was testimony tending to support the verdict which would be sufficient therefor, if it was not contradicted by other testimony, and as the district court has approved the verdict, we cannot reverse the judgment and order a new trial on the ground that the verdict is not sustained by sufficient evidence. Our view of the weight of evidence might differ very widely from that of the trial jury, but we have no right usurp their powers after a trial judge has approved their verdict. *American Bridge Co. v. Murphy*, 13 Kas. 35, and the authorities there cited.

We have not thought it necessary to examine or pass upon the point raised in the brief, as to the allegation of error in the instruction of the court as to the question whether the release was obtained by imposition on the part of the agents of the company. We have already decided that if Doyle signed the same without having capacity so to do, it was no defense to his action; and as the counsel for the plaintiff in error, who argued orally the case to this court, clearly and emphatically disavowed any claim to have the judgment reversed upon any technical question not affecting the ultimate rights of the parties, or not liable to result in a final judgment for the plaintiff in error, we have contented ourselves with reviewing the questions before considered.

The judgment of the court below will be affirmed.

All the Justices concurring.

PALMER AND CURTIS V. JOHN MOORE.

LICENSE TO FLOW LANDS, Given by Person Holding Only an Equitable Right, and Inchoate Title, Although in Possession, not Binding on Holder of Paramount Title. Where C., the owner of real estate injured by the flowing back of water resulting from the height of a mill-dam constructed by R. across a river on his own land, obtains a judgment against R. restraining him from maintaining a dam above the height of thirty inches from the forebay or flume of his mill-race, requiring its abatement to that height, and authorizing execution to carry the judgment into effect, and afterward C. makes a contract to sell the real estate affected by such dam to M. and B. and causes a title-bond to be executed therefor to the purchasers, conditioned to be void and of no effect if its provisions be not complied with, and M. and B. take possession of the real estate, pay one-fourth of the purchase-money and execute their notes for the deferred payments, and while thus in possession give R. the right to raise his mill-dam above said height of thirty inches, which is done; and thereafter M. and B., the purchasers, make default in the payment of their notes given for the installments named in the title-bond, and by consent of all parties to the contract of purchase and notes, the contract is rescinded, the notes and title-bond canceled, and the possession of the premises delivered back to C.: *held*, in an action brought by the grantee of R. against C., and the sheriff in whose hands the execution to reduce the height of the dam had been placed, to restrain them from enforcing the judgment to abate the dam to the height authorized by the judgment of C. against R., that the court below erred in rendering judgment perpetually enjoining C. and the sheriff from abating or reducing the said dam below the height established by R.

Error from Cherokee District Court.

INJUNCTION, brought by *Moore*, against *Curtis*, plaintiff in a former action, and *Palmer*, as sheriff, to restrain them from executing a certain decree made in favor of *Curtis* against *Moore's* grantor. All the necessary facts appear in the opinion. The district court, at the April Term 1875, gave judgment in favor of *Moore*, and *Curtis* and *Palmer* bring the case here on error.

Ritter & McKenney, for plaintiffs in error.

Hutchinson & Cowley, for defendant in error.

Opinion of the Court.

The opinion of the court was delivered by

HORRox, C. J.: At the July Term for 1871 of the district court of Cherokee county, in a suit pending therein, of E. H. Curtis against Norman Reed, judgment was rendered for the plaintiff restraining the defendant from maintaining a dam across Spring river in said county above the height of thirty inches, measuring from a given point. The judgment also required its abatement to that height, and awarded execution to carry the judgment into effect. Subsequently Curtis bargained away his interest in the land injured by the raising of the dam, and his trustee, with his wife, executed a title-bond to Murphy & Bryant, the purchasers of the land, conditioned for the making of a deed to M. & B. upon the payment of \$4,000, in four installments, viz., \$1,000 on October 1st 1871; \$1,000 on March 1st 1872; \$1,250 on March 1st 1873; and \$750 on March 1st 1874. The title-bond contained the provision that if M. & B. failed to comply with the conditions of the bond, the same should be void and of no effect. In pursuance of said contract, the first payment was made by M. & B., and notes executed and delivered for the balance, and thereupon possession of all the property was turned over to M. & B. M. & B. held possession of the property until in February 1873. They then had failed to make the payments due March 1st 1872. In February 1873, by agreement of all the parties to the title-bond and the notes, the title-bond was forfeited, and delivered back to the obligors; the notes of M. & B. were canceled, and the premises and the possession thereof delivered up to E. H. Curtis. During the time M. & B. were in the possession of the real estate, and prior to February 1873, Reed, with their consent, and under an agreement with them, raised his dam above the height named in the judgment of Curtis v. Reed. This was done without the knowledge or consent of Curtis; and at the time the title-bond was canceled and the notes returned, Curtis had no knowledge that the dam had been raised. Reed sold out his interest in the land, and the dam thereon, to the defendant in error. Just prior to the institution of this suit

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in the court below, Curtis attempted to enforce his judgment rendered in his case against Reed, to lower the dam, by causing execution to issue, and placing it in the hands of Palmer as sheriff to execute. Thereupon Moore, the grantee of Reed, instituted an action to enjoin Curtis and sheriff Palmer from enforcing said judgment. The court below sustained the cause of action of Moore, and rendered judgment perpetually enjoining Curtis and Palmer from enforcing the judgment to reduce the dam below the height established by Reed. Plaintiffs in error seek to reverse the last-named judgment.

Murphy & Bryant, at the time of the consent to Reed, to raise his dam, only had an equitable interest in the property in their possession, and could not transfer greater rights than those possessed by themselves. Upon the payment of the purchase-money in full, the equitable title of Murphy & Bryant would have sufficiently ripened as to have authorized them to have demanded the transfer to them or their grantees of the legal title. Prior to the payment of the purchase-money, they held the premises subject to a forfeiture of all their rights and interest therein upon proper proceedings had by their grantor on default of payment of the moneys stated in the title-bond. When the contract for purchase was rescinded by the mutual agreement of all the parties to the title-bond, and the notes given by the purchasers canceled, and the premises delivered back into the possession of Curtis, the equities of Murphy & Bryant were determined. The property then reverted back to Curtis in the condition it was prior to the execution of the contract of sale. Reed had no equities superior to Murphy & Bryant; and as he had actual notice, and was also bound in law to take notice of the rights of Murphy & Bryant in the premises, he cannot claim any benefit arising under them as against the judgment of Curtis, when they have returned the land and all their equities to Curtis. The possession of the premises, under the contract of purchase, by Murphy & Bryant, gave them no power or authority to satisfy the judgment of Curtis v. Reed until they had complied with their contract. This they not only refused to do, but voluntarily gave up their

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contract, and conceded all their rights in the lands were forfeited. Reed's authority from Murphy & Bryant to raise his dam operated as a license founded solely on the equity of the latter in the property in their possession, and when that equity was concluded by their own act, and with their own consent, the license could not be continued against the will of Curtis, to whom the possession of the land and all the equities reverted. Reed's grantee, Moore, only succeeded to the rights of Reed, and could not, under the circumstances, continue the height of the dam in violation of the orders of the court. As the counsel for plaintiff in error suggests, if Murphy & Bryant could have legally authorized Reed to raise his dam to the height he did, while they were in possession of the premises under an equitable title on which but one-fourth of the purchase-money had been paid, and Curtis be estopped by their consent from abating or reducing the height of the dam, Murphy & Bryant had it in their power when in possession of the premises to permit Reed to raise his dam sufficiently high to destroy the mill-site on the land of Curtis, and to flood the same. Such is not the law. Reed acted without the consent or knowledge of Curtis; and Moore took the premises from Reed subject to the judgment of Curtis. Curtis is not precluded from enforcing his judgment obtained in July 1871, by any agreement between Murphy & Bryant and Reed, set up in the record, and the action of the court below in rendering judgment in favor of Moore was erroneous.

Counsel for plaintiff in error ask this court to reverse the judgment, and to order the court below to render judgment in favor of Curtis and Palmer. We cannot construe the record as showing that the court made any findings of fact; and as the case was not tried upon an agreed statement of facts, we can only order a reversal of the judgment.

The judgment of the court below is reversed, and cause remanded for a new trial.

All the Justices concurring.

In the Matter of S. D. PRYOR, an Attorney-at-Law—Proceedings for Contempt, etc.

1. **ATTORNEYS-AT-LAW—Punishable for Contempt.** For sneering, insulting and disrespectful language used by an attorney to a judge, before whom a matter is pending, concerning such matter, and the judge's ruling thereon, the attorney may be punished by a fine, as for a contempt.
2. ——— **Contemptuous Language.** Such language as the following, coming from an attorney to a judge in a matter still pending before him—"The ruling you have made is *directly contrary to every principle of law, and everybody knows it*, I believe;" and, that it is "my desire that *no such decision shall stand unreversed in any court I practice in*"—is insulting, and disrespectful. [*Winter v. Sass*, 19-557; *State v. Mortimer*, 20-100; *State v. Comstock*, 20-655.]
3. ——— It is immaterial whether this language is used in oral address in the hearing of others, or in a written communication to the judge.
4. ——— **Obligations of Attorneys.** An attorney, as an officer of the court, is under special obligations to be considerate and respectful in his conduct and communications to the court, or judge.
5. **Court—Forbearance—Duty.** A judge will wisely overlook any mere hasty unguarded expression of passion, or disappointment, even though disrespectful, or simply notice it by a reproof. But where an attorney insists upon a right to use such disrespectful language, or is in the habit of so using it, or fails when his attention is called to it, to apologize therefor, it may become the clearest duty of the judge to punish him for contempt.
6. **CONTEMPTS; Power to Punish; Questions on Review.** On an appeal from an order punishing for contempt, the mere question of the advisability of the court's action, is not the matter of consideration; it is the question of power, and whether the act or word punished is, in fact, a contempt.

Error from Cowley District Court.

ALL the facts in this case, and all the proceedings of the district court from whose order *Pryor* appeals, are sufficiently stated in the opinion.

J. Wade McDonald, for appellant.

The opinion of the court was delivered by

BREWER, J.: Motions to dissolve certain injunctions were argued before Hon. W. P. CAMPBELL, district judge of the

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13th judicial district. The motions were taken under advisement, and a few days thereafter word was sent by the judge to the counsel for plaintiff advising him of the overruling of the motions. This information was conveyed to the counsel for defendant, one of whom wrote and forwarded the following letter:

WINFIELD, COWLEY COUNTY, KANSAS, June 26, 1876.

HON. W. P. CAMPBELL—*Dear Sir*: Mr. Hackney this evening informed me that he had received a letter from you stating that you had overruled the motions to dissolve those injunctions. I can hardly believe that such is the fact, *for it is directly contrary to every principle of law governing injunctions*, and *everybody* knows it, I believe. Consequently we send herewith orders dissolving said injunctions. But if you have concluded to overrule said motions, as Hackney says, you will please allow our exceptions to each and every of your rulings, and allow us time to make and file our case in supreme court, which we will do as quickly as it can be done; for it is our desire that *no such* decisions or orders shall stand unreversed in any court we practice in. Also, fix terms for staying orders.

Yours respectfully,

PRYOR, KAGER & PRYOR.

The judge on the receipt of this letter construed it as a contempt—issued his warrant for the arrest of the writer, and after a hearing adjudged him guilty of contempt, fined him fifty dollars therefor, and suspended him from practice in the courts of that district until the fine should be paid. And the question presented for our consideration is, whether this ruling and order of the judge shall be set aside, or permitted to stand. It appears from other testimony in the case, as well as from the intimations in the letter, that no orders had actually been signed. Notice of his conclusions had simply been given by the judge, and the attorneys requested to prepare the formal order. The matter was therefore still pending before him.

Upon this we remark in the first place, that the language of this letter is very insulting. To say to a judge that a certain ruling which he has made is contrary to every principle of law, and that everybody knows it, is certainly a most ap-

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vere imputation. The learned counsel for appellant says in his brief:

"There is nothing in Mr. Pryor's letter to Judge Campbell that is insulting, contemptuous, or even the least disrespectful. Mr. Pryor simply tells the judge, in a plain, matter-of-fact way, that he has committed an error of law in his decision, if such decision is as has been represented to him, and in that event requests that his exceptions thereto may be allowed, to the end that he may have an opportunity of presenting the matter to the supreme court for review. There is no reflection upon the motives of the judge in rendering such decision; or imputation upon his integrity; nothing in fact to which, in the light of reason and fairness, any possible intention of contempt can be attached. In the warrant issued for the arrest of Mr. Pryor, the judge states that the letter was written for the purpose of 'insulting, abusing, and intimidating' him. There is nothing insulting in the letter—unless it is an insult to this judge for an attorney to disagree with him upon a question of law; nothing abusive about it, unless it is the unpardonable temerity of the expressions that evidence the dissent on the part of the attorney from the exposition of the law by the judge; nothing about it calculated to 'intimidate,' unless it is the statement that the disputed question will be referred to the supreme court for review."

We cannot concur in this construction of the letter. It is not merely an assertion of a difference of opinion, but a charge that he has decided in a way that he as well as everybody else knew to be wrong. To say to a judge that his ruling is contrary to every principle of law, may be simply a reflection upon his intelligence; but to couple with it an assertion that everybody knows it, is clearly an imputation upon his integrity. How can a judge be honest, and yet decide contrary to that which he as well as all others knows to be the law?

We remark secondly, that an attorney is under special obligations to be considerate and respectful in his conduct and communications to a judge. He is an officer of the court, and it is therefore his duty to uphold its honor and dignity. Certain privileges attach to him by reason of such official position. He may in the trial of cases use language concerning witnesses, and parties, and all matters and things in issue,

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which elsewhere and under other circumstances would be libelous. By virtue of this privilege, we often hear from the lips of counsel in argument, or read in the briefs filed in proceedings in error in this court, the most severe animadversion and criticism upon the conduct and rulings of the courts from which the proceedings are brought. They have the same right of criticising the ruling and conduct of those courts in proceedings pending here, that they have in those courts of criticising the actions and conduct under review there. In other words, the independence of the profession carries with it the right freely to challenge, criticise, and condemn all matters and things under review and in evidence. But with this privilege goes the corresponding obligation of constant courtesy and respect toward the tribunal in which the proceedings are pending. And the fact that the tribunal is an inferior one, and its rulings not final and without appeal, does not diminish in the slightest degree this obligation of courtesy and respect. A justice of the peace before whom the most trifling matter is being litigated, is entitled to receive from every attorney in the case courteous and respectful treatment. He is *pro hac vice* the representative of the law, as fully as the chief justice of the United States in the most important case pending before him. A failure to extend this courteous and respectful treatment, is a failure of duty; and it may be so gross a dereliction as to warrant the exercise of the power to punish for contempt. Now as we have said, the language of the letter is insulting. It would be so regarded outside of judicial proceedings, and in the intercourse of gentlemen. To charge another with knowingly doing an illegal act, would always be regarded as an imputation to be resented. Change the circumstances a little: suppose in a public trial in the court-house, after a ruling had been made, an attorney in the case should say to the court: "That ruling is not the law, and your honor knows it." Who would doubt that the court might rightly treat such language as contempt, and punish it accordingly? Yet practically that is this case. The fact that in the case supposed, others are listening, and

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hear the words, and in this the language reaches the judge alone, does not change the quality of the act. It will be borne in mind that the remarks we have made apply only while the matters which give rise to the words or acts of the attorney are pending and undetermined. Other considerations apply after the matters have finally been determined, the orders signed, or the judgment entered. For no judge, and no court, high or low, is beyond the reach of public and individual criticism. After a case is disposed of, a court or judge has no power to compel the public, or any individual thereof, attorney or otherwise, to consider his rulings correct, his conduct proper, or even his integrity free from stain, or to punish for contempt any mere criticism or animadversion thereon, no matter how severe or unjust. Nor do we wish to be understood as expressing any opinion as to the power to punish others than attorneys and officers of the court, for language or conduct even while the matter is pending and undetermined. Whether the same rules and considerations apply to them or not, we do not care to inquire. Such is not the case before us; and to this case alone do our remarks apply.

We remark again, that a judge will generally *and wisely* pass unnoticed any mere hasty and unguarded expression of passion, or at least pass it with simply a reproof. It is so that, in every case where a judge decides *for* one party, he decides *against* another; and oftentimes both parties are beforehand equally confident and sanguine. The disappointment therefore is great, and it is not in human nature that there should be other than bitter feeling, which often reaches to the judge as the cause of the supposed wrong. A judge therefore ought to be patient, and tolerant of everything which appears but the momentary outbreak of disappointment. A second thought will generally make a party ashamed of such outbreak, and the dignity of the court will suffer none by passing it in silence. On the other hand, a little thing which is properly unnoticed once, may by its repetition require notice and punishment. It is but a little matter to whisper a single time in

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the presence of a court in session, but if repeated, and the monitions of the court disregarded, it may become not merely the privilege, but the clearest duty of the court to punish for contempt. So an attorney sometimes, thinking it a mark of independence, may become wont to use contemptuous, angry, or insulting expressions at every adverse ruling, until it becomes the court's clear duty to check the habit by the severe lesson of a punishment for contempt. The single insulting expression for which the court punishes may therefore seem to those knowing nothing of the prior conduct of the attorney, and looking only at the single remark, a matter which might well be unnoticed; and yet if all the conduct of the attorney was known, the duty of interference and punishment might be clear. We make these suggestions, not as intimating that such has been the prior conduct of the attorney in this case, for we neither know nor have heard anything outside of this single matter which reflects at all upon him. We do it simply to indicate that the wisdom or necessity of the court's action is not always disclosed by the single matter apparent in the record, and that therefore, in a matter like this, involving personal conduct toward the court, a large regard must be paid to its discretion. If the language or conduct of the attorney is insulting or disrespectful, and in the presence, real or constructive, of the court, and during the pendency of certain proceedings, we cannot hold that the court exceeded its power by punishing for contempt. See generally on the subject of contempts, 2 Bishop on Cr. Law, 5th ed, ch. 12, § 242, and following, and cases cited; 4 Blackstone, 283; *Com. v. Dandridge*, 2 Va. Cases, 408.

We remark finally, that while from the very nature of things the power of a court to punish for contempt is a vast power, and one which in the hands of a corrupt or unworthy judge may be used tyrannically and unjustly, yet protection to individuals lies in the publicity of all judicial proceedings, and the appeal which may be made to the legislature for proceedings against any judge who proves himself unworthy of the power intrusted to him.

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The conclusion then to which we have come is, that the order of the district judge must be affirmed. It perhaps should be added that in the long answer made by the appellant to the order to show cause why he should not be punished, he tenders no apology, and expresses no regret for the language used, but insists upon his right to use it. Order affirmed.

All the Justices concurring.

THE STATE OF KANSAS V. MICHAEL ROGERS.

CRIMINAL LAW; Self-Defense. Where one commences an altercation with another, and strikes his adversary with his hand, with no purpose or design to kill or cause great bodily injury to him, and his adversary repels such assault with a deadly weapon, and after the assailed has shot and wounded the assailant, and has retired behind a wall, and the assailant ceases to follow, but has neither retreated nor attempted any abandonment of the conflict, *held*, that the assailant is not justified in defending his own life to the taking of the life of the other, even if the assailed attempts at the time to shoot the assailant. [*State v. Potter*, 13-414, 425; *State v. Bohan*, 19-29, 55; *State v. Scott*, 24-68.]

Appeal from Dickinson District Court.

ROGERS was charged by information with murder for killing one *Leggett*. He was tried at the September Term 1876, of the district court, and convicted, and sentenced to imprisonment in the penitentiary for ten years. He now brings the case here by appeal, alleging error in refusing instructions asked by his counsel. The instructions refused, and the facts, are stated in the opinion.

McClure & Humphrey, for appellant.

Willard Davis, Attorney-General, for The State.

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The opinion of the court was delivered by

HORTON, C. J.: The appellant was charged by information with murder in the first degree in killing John Leggett, and upon trial was found guilty of murder in the second degree, and sentenced to the penitentiary for ten years. From that conviction and sentence he has appealed to this court. The single error assigned is the refusal of the court below to give the following instructions:

“If the jury find from the evidence that the defendant, in an altercation between them, commenced by the defendant, struck the said Leggett with his hand, with no purpose or design to kill or cause great bodily injury to said Leggett, said Leggett had no right to repel such assault with a deadly weapon; and if he did so, and after he had shot and wounded the defendant, and had retreated behind a wall, and the defendant had ceased to follow him, (if the jury so find,) said Leggett again shot or attempted to shoot at defendant, the defendant was justified in defending his own life, even to the taking of the life of said Leggett.”

Two inquiries are suggested in the case presented to us for consideration. First, was there evidence before the jury which rendered it necessary or proper, supposing the instruction requested to contain a correct statement of the law in the abstract, to give it to the jury? and second, is it objectionable as a statement of law? We first recur to the evidence. Louis Bruno testified that on the morning of 5th May 1876, he was in Phillips' saloon in Abilene, Dickinson county; “that Rogers was there, and Leggett was tending the bar; that Rogers asked for a glass of whisky for himself and partner; Leggett said he could not have any; Rogers asked why. Leggett told him he had done everything he could do against the house, besides, he had stolen some checks, silver spoons, and cards. Rogers said he was a damned liar—that he had not taken those things. Leggett told him he could prove it by a man that was sitting in the house, then. Leggett called on me to prove it, and Rogers asked me if I had seen him take the checks or spoons, and I told him I had not. Rogers said to Leggett, ‘You have accused me of taking those things, and I will make you dance

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to my music.' Leggett answered 'that he wanted no trouble with him whatever,' and said, 'for God's sake do let me alone, and it is all right.' " Several witnesses for the prosecution testified substantially that on May 6th, the day after the above controversy between Rogers and Leggett, Rogers came into Carpenter's restaurant, in Abilene, about noon; that Leggett was in the room, sitting in his chair after eating his dinner, as Rogers came in the door; that Rogers walked up to him and accused him of talking about him; that Rogers shook his fist in his face, and said he had better keep his damned mouth shut about him; that Leggett rose up; that a few words passed between them, and then Rogers struck Leggett in the face; that Leggett staggered and ran backward about fifteen feet, into the kitchen; that during the altercation Leggett told Rogers to keep away from him, that he wanted nothing to do with him; that Rogers followed him to the door, and as he got to the door, he put his hand in his pocket and told Leggett to draw his six-shooter and shoot if he wanted to. About that time Rogers drew his pistol. There was a shot fired. As the shot was fired, Rogers winced back a little, and then Rogers presented his pistol to fire; and just before he fired there was a second shot, fired by Leggett. After Rogers fired, Leggett fell, in the kitchen. Leggett told Rogers to keep away from him—he wanted nothing to do with him. Rogers did not retreat back any after he struck Leggett, until he fired; Rogers shook his fist in Leggett's face, and said he (Leggett) had better keep his damned mouth shut. The bullet from Rogers' pistol entered Leggett's left temple on the side of the head, and Leggett died from the effect of such pistol shot about August 28th 1876. Rogers took his pistol out of his pants pocket. The pistol shots were quite close together, not more than a minute from the first to the last shot. The last two pistol shots were almost simultaneous. Some of the witnesses testified that Rogers drew his pistol out of his pocket before the first shot was fired. On the part of the defense, the only witnesses who testified to the altercation in Carpenter's restaurant on the 6th of May were the defendant, and Thomas Smith.

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The testimony of the prisoner was to the effect that he went into Carpenter's to eat dinner. As he walked toward the table he saw Leggett, and he advanced toward where he was sitting; he told him he had been talking very harshly about him, and he wanted Leggett to take it back; that Leggett started to rise out of his chair, and as he rose, his hand was in his pants pocket, drawing his pistol; that he saw Leggett's pistol as he drew it out and made an effort to knock the pistol out of Leggett's hand; the pistol went off, it struck the prisoner near the waist; Rogers' hand struck Leggett on the shoulder; that Leggett retired then back to the kitchen door; as he got to the kitchen door he fired again. Rogers was six or eight feet from him; the second shot struck Rogers in the abdomen; that then he put his hand in his coat pocket and drew his pistol; that Leggett fired the second shot near the dining-room door, while yet in the dining-room, and Rogers was then six or eight feet from him. After the second shot Leggett stepped into the kitchen; he was out of Rogers' sight; when Rogers drew his pistol he held it in front of him. After Leggett retreated behind the door of the kitchen, his left shoulder and right hand came in sight, and his head leaned out so he could see. Rogers then shot, Leggett fell, and his pistol dropped; that he shot Leggett because of the motions he had made, and the attitude he had taken, and to save his own life; that he did not shoot him for shooting the first or the second time; that Leggett retreated twelve or fourteen feet; that he followed to get the pistol. The evidence of Smith, who was invited by Rogers to go to Carpenter's to dinner that day, was similar to that of Rogers as to the commencement of the altercation. He also testified that, from where Leggett sat at the time Rogers spoke to him, to the kitchen door to which Leggett retreated, was about eighteen feet, and that Rogers was following Leggett, when Leggett shot the second time; that Rogers drew his pistol from his coat pocket as he was passing the end of the dining-room table; that between the second shot of Leggett and Rogers' shot, there was so short a time that no one could tell which

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shot first; that he heard Rogers say, on May 5th, he would give Leggett a thumping; also heard him say he would lick him; that Rogers was a heavier and stouter man than Leggett, and witness thought when Rogers came in that the fuss was coming to a focus. This witness called Leggett's pistol a small pop-gun, and one of the Smith & Wesson pattern.

The court in its general charge instructed the jury on the state of the evidence as claimed by the prosecution, that, "It is for the jury to decide from the evidence whether the defendant had reasonable cause to apprehend danger to his life, or some great personal injury, and whether at the time he fired the shot he was in immediate danger of his life or some great bodily harm or injury from the deceased, from which he reasonably supposed he could not escape except by disabling the deceased, or by taking his life. In such a case he would be entitled to acquittal. But when a party claims a justification for killing his adversary, it must not be in a combat of his own seeking; nor when he provokes another to commence an affray for the purpose of having a pretext to take the life of his assailant. And if a man for the purpose of bringing another into a quarrel provokes him so that an affray is commenced, and the person causing the quarrel is over-matched, and to save himself from apparent danger kills his adversary, he would not be justifiable; because the necessity being of his own creating shall not operate in his excuse." At the instance of the defendant the court also instructed the jury that, "If the jury find from the evidence that in an altercation of words between the defendant and the deceased, said Leggett made an assault on the defendant with a deadly weapon or loaded pistol, and shot at and wounded the defendant, and that while the said Leggett was endeavoring to shoot defendant again, he shot said Leggett and caused a wound which produced the death of said Leggett, the defendant acted in self-defense, and was justifiable."

We do not think the instruction refused either necessary, or proper. It might have misled the jury. In our view, the evi-

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dence does not show that Rogers ceased to follow Leggett, in the full significance that these words imply. A cessation on the part of Rogers to advance for a single moment, does not show he had given up the pursuit, or had ceased to follow. In one aspect of the case, Rogers ceased to advance, just as he shot; but before this, his pistol was in his hand in front of him, and the fatal bullet was fired by Rogers almost instantaneously with the second shot of Leggett. The instruction contradicts the theory of the defense, that Leggett first made an assault on the defendant, and concedes that the prisoner commenced the altercation, and struck the deceased first with his hand. All the evidence shows that Leggett retreated; that he retired from fifteen to eighteen feet; that he was literally trying to escape from the presence of Rogers; that Rogers made no attempt to shun the combat; that he advanced to the time that Leggett obtained mere temporary shelter behind the door or partition of the kitchen, but shot the moment Leggett presented his arm and head therefrom. Nowhere in the altercation did Rogers manifest sufficient good faith on his part to remove the apprehension of his adversary. Had he exhibited, after the first blow was struck, half the diligence that Leggett did to avoid further encounter, it is more than probable that Leggett would have been saved from an untimely death, and the prisoner from a long confinement in prison. Rogers testified that he followed up Leggett, but gave the excuse that he wished to disarm his opponent. Of the two, Rogers was the abler and stronger; he had the more physical strength, yet he made no effort to retreat, no attempt to escape from Leggett; and he hesitated only, when he supposed his antagonist was in a position to render his further advance dangerous; that hesitation was for a moment only; when the opportunity offered, the bullet from his ready pistol, fired with his own hand, pierced the temple of Leggett, and the latter fell with a fatal wound.

But if we have mistaken in any way the evidence presented in the record, still we think the instruction refused ought not

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to have been given, as it is objectionable as a statement of law. The instruction assumes that Rogers followed Leggett, after commencing the altercation, and striking him with his hand, and assumes no explanation of his ceasing to pursue. The words, "and the defendant had ceased to follow him," are not broad enough in their import; are not sufficiently expressive of any intention on the part of Rogers to abandon the conflict. He may for the instant have ceased to follow, to gain fresh strength, or some new advantage for the attack. If the instruction is based upon the view that Rogers had repented, and was ceasing his pursuit, preparing to flee, then there is no assumption in the instruction that Rogers had done "work meet for repentance." We do not hold, that when one person, with no felonious intent, but simply for the purpose of inflicting a personal chastisement, strikes another with his hand, he has absolutely forfeited all right to exist, as the able counsel for the appellant suggests must be the result, if this instruction be held not good law. In discussing the question of self-defense Lord Hale says: "Supposing that A. by malice makes a sudden assault upon B., who strikes again, and pursuing hard upon A., A. retreats to the wall, and in saving his own life kills B.; some have held this to be murder, and not *se defendo*, because A. gave the first assault. But Mr. Dalton thinketh it to be *se defendo*, though A. made the first assault, either with or without malice, and then retreated. It seems to me that if A. did retreat to the wall upon a real intent to save his life, and then merely in his own defense killed B., that it is *se defendo*. But if on the other side, A., knowing his advantage of strength, or skill, or weapon, retreated to the wall merely as a design to protect himself under shelter of the law, but really intending to kill B., then it is murder, or manslaughter, as the circumstances of the case require." 1 Hale's P. C., 479, 480. Again: "If A. assaults B. first, and upon the assault B. re-assaults A., and that so fiercely that A. cannot retreat to the wall or other *non ultra* without danger of his life; nay, though A. fall upon the ground upon the assault of B., and then kills B., this shall

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not be interpreted to be *se defendo*, but to be murder, or simple homicide, according to the circumstances of the case; for otherwise we should have all cases of murders or manslaughters by the way of interpretations turned into *se defendo*." 1 Hale P. C. 482.

What acts have been held so far to abridge a man's right of defense, that if he thereupon kill another, he cannot be acquitted of all crime, see *State v. Starr*, 38 Mo. 270; *State v. Hill*, 4 Dev. Bot. 491; *Vaiden v. Commonwealth*, 12 Gratt. 717; *Adams v. The People*, 47 Ill. 376; *Haynes v. The State*, 17 Ga. 465; *Commonwealth v. Drum*, 58 Pa. St. 9; *Stauffer v. State*, 15 Ohio St. 47; *Stuart v. State*, 1 Ohio St. 66. The authorities uniformly hold that the person who first commences a malicious assault, then continues to advance as the assailed retreats, or does not in good faith attempt, so far as he can, to withdraw from the combat, and abandon the conflict, cannot justify taking the life of his adversary, however necessary it may be to save his own, and must be deemed to have brought upon himself the necessity of killing his fellow-man. We see no reason from the authorities cited by counsel, or the argument presented in behalf of the appellant, in any way, to loosen these well-settled principles so salutary to prevent altercations, and to save human life. The mere striking of one person by another with the intention to commit only a personal chastisement, is almost sure to be followed by a dangerous, if not deadly result, where the parties are armed with deadly weapons, as in this case; and while the carrying of the pistol loaded for use cannot be too severely censured, too strongly condemned, it is unfortunately a too prevalent custom to be wholly ignored, or to suppose that an encounter between two persons hostile to each other will only result, after a blow is given by the first, in a combat with fists. The blow from the one is often followed by the pistol-shot from the other. The assailant places himself in peril when he makes the assault; and when he is in fault, and calls down upon himself the vengeance of the assailed, he cannot be justified under the law when he has not

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actually "put into exercise the duty of withdrawing from the place."

Under the instructions refused, a person armed with a deadly weapon, who commences an altercation, commits a personal chastisement on another, advances as the other retreats, and only ceases to follow in order to watch the acts of his adversary, and anticipating the shot of his opponent, kills the assailed by the quickness of his movements, is freed from all blame, and stands justified, because his antagonist in his retreat too fiercely returns the assault, and, having succeeded by flight to reach a door or partition from behind which he seeks to defend himself while he has reasonable grounds of apprehension that he is in imminent danger. Such is not the law. The instruction not given does not place the appellant in a fitting position at the time he gave the mortal wound for the law to say he was remitted to his right of self-defense.

The judgment of the court below must be affirmed.

All the Justices concurring.

ASA BEYER AND JOHN ERNST V. ALEX. H. REED *et al.*

AMENDMENT; CHANGING CAUSE OF ACTION; *When not Allowable.* Where an action is commenced, as is claimed, under the act for contesting county-seat and other elections, (ch. 79, Laws of 1871,) by certain electors of a certain school district against the members of the school board of such district, to contest an election authorizing the issue of certain school-district bonds, and to restrain the issue of such bonds, and afterward the defendants cease to be members of said school board, becoming merely private citizens of said school district, and others who have been appointed to take their place issue said bonds, and afterward still others, who are opposed to said election and to everything done thereunder or in pursuance thereof, are elected and become members of said school board, *held*, that it is error for the court, against the objections of said defendants to allow the plaintiffs to change their cause of action, setting forth new facts and making new parties, and to litigate, *at the costs of the*

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original defendants, the questions whether the county commissioners shall be restrained from levying taxes to pay said bonds, and whether the county clerk shall be restrained from putting such taxes on the tax-roll. [*Bridge Co. v. Wyandotte Co.*, 10-326, 331; *Hays v. Hill*, 17-360, 362.]

Error from Atchison District Court.

In April 1873 a petition was filed by *Alexander H. Reed*, *Peter Muller*, *John Ketch*, *Charles Miller*, *William S. Knight* and *Wm. Betchel*, as plaintiffs, against *Wm. Hammon* as director, *Asa Beyer* as clerk, and *John Ernst* as treasurer of school district No. 31, Atchison county, and *Benjamin B. Gale* as county clerk of said county, as defendants, alleging that plaintiffs were residents in and electors and tax-payers of said school-district; that the school-district election held on the 10th of said April in said district "was wholly illegal and void," setting forth certain acts and omissions to support such allegation; that defendants *Hammon*, *Beyer* and *Ernst*, claiming to be the officers of said school district, elected as such at said illegal election, were threatening to sell certain property belonging to the district, and to issue school-district bonds, and praying for an injunction, etc. Temporary injunction granted. Answer filed on 9th May, denying all alleged illegal acts and proceedings, and alleging the legality of the election of April 10th, and alleging that the question of issuing the proposed bonds had been duly submitted to the electors of said district, and that their issuance had been duly authorized. A motion to dissolve such injunction, was heard, and denied by the district judge, July 24th. On the 9th of August 1873 a supplemental petition, alleging the death of defendant *Hammon*, the director of said school district, the appointment of *Peter Muller* (one of the plaintiffs) to fill the vacancy in the said office of treasurer; that *Beyer* and *Ernst* had "pretended to resign" their respective offices, that the county superintendent had "pretended to accept" such resignations, had "pretended to declare their offices, and also the office of director, vacant," and had "pretended to appoint one D. D. High as treasurer, and one Jacob Gibson as clerk, and one Benj. Boyer as director of said school district," "that said pretended officers, on

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the 25th of July 1873 issued fifteen bonds as the bonds of said school district, of the denomination of \$100 each, and of the aggregate amount of \$1,500," payable to B. P. W., or bearer, etc., alleging that such bonds were illegal and fraudulent, and had been illegally registered, etc., and further averring, that the board of county commissioners proposed to and were about to levy a tax on the property of said school district to pay the interest on said bonds falling due June 1st 1874, which tax would be wholly illegal—and the plaintiffs in said supplemental petition prayed—

"That the said L. M. Briggs, J. V. Bryning and J. H. Fitzpatrick, being and constituting the board of county commissioners of said county of Atchison, be made additional parties to this action, and that an order issue enjoining and restraining them as such board of county commissioners from levying any tax or assessment upon said district, and upon the property of the plaintiffs, for the payment of any interest or for sinking-fund, or for final redemption of said bonds, and enjoining and restraining the said Gale as county clerk from placing any such tax or assessment on the tax-roll for collection, and declaring the former registration thereof illegal and void, and that on the final hearing of the case said injunction be made perpetual."

A temporary injunction as prayed for was granted. A motion was filed by defendants *Beyer* and *Ernst* to strike the supplemental petition from the files, which motion was overruled. March 6th 1875 a supplemental answer was filed by *Beyer* and *Ernst* to the supplemental petition, setting up their respective resignations in July 1873, the appointment of their successors, alleging that such successors duly qualified and acted as clerk and treasurer of said district until other successors were duly chosen at the next annual school district meeting, and alleging that since the 24th of July 1873 they had not nor had either of them "exercised in any manner the duties of clerk or treasurer of said school district." Such supplemental answer alleges that the proceeds of the bonds mentioned in the petition and the supplemental petition were duly expended by their successors in office in purchasing a new site and building a new

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school-house for such district—and it also contains the following:

“These defendants further say, that the annual election in said school district, held on August 13th 1874, was, by the general consent of all the voters and inhabitants in said school district, held in said new school-house so built on said new site in said district with the proceeds as before stated; that the legal voters of said district then generally attended and participated in said election, and at said election of the plaintiffs, W. S. Knight, was elected director, Wm. Lewis was elected treasurer, and J. M. Ketch, son of one of the plaintiffs, was elected clerk, all of whom had originally pretended to be opposed to the building of the said new school-house, and had advised the commencement and prosecution of this action; and with full knowledge that such bonds had been issued, and said new school-house built with the proceeds of the sale thereof, said persons respectively did accept the offices to which they were so elected, and forthwith did qualify and enter upon the discharge of their respective duties as such officers, and as such officers, with the full consent of said school district, and with a full knowledge of all the facts as hereinbefore stated, did proceed to hire a teacher for said school district to teach a public school therein, and therefor to occupy the said new school-house. * * *

“Wherefore, believing that the plaintiffs have designedly and willfully prosecuted this action, with full knowledge as aforesaid, for the purpose of annoyance to these defendants, and the public officials of said Atchison county, and with the expectation and purpose of using and enjoying such new school-house site and school-house erected thereon, as legal voters of and inhabitants in said school-district, as they have so done, and are prosecuting this action for the further purpose of endeavoring to relieve themselves from the payment therefor while enjoying the full benefits of the same, these defendants now respectfully pray the dismissal of this action at the costs of the said named plaintiffs.”

Trial at the March Term 1875. Finding and judgment for plaintiffs. The “judgment” is copied in the opinion, *infra*. Defendants *Beyer* and *Ernst* appeal, and bring the case here on error for review.

W. W. Guthrie, for plaintiffs in error.

D. Martin, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This is a strange case, and the proceedings therein are exceedingly tangled. It is claimed by defendants in error, who were plaintiffs below, that the action was intended to be brought under the act providing for contesting county-seat and other elections, (Laws of 1871, page 190, *et seq.*) Now this may be so; and, for the purpose of this case, we shall assume that it is so; but still, no such action as is provided for in that act was ever prosecuted to final judgment in this case. If, in fact, the plaintiffs below commenced this action under said act, (and whether they did or not, or whether they could do so, we do not now choose to decide,) then they evidently abandoned their original cause of action long before any trial was had in the case, and prosecuted a new supposed cause of action, by filing a new and supplemental petition, setting forth therein a new supposed cause of action, making new parties defendant, asking for other relief than that asked for in the original petition, and asking for such relief as they could not have obtained under said act for contesting elections; and they prosecuted this new supposed cause of action to final judgment, and obtained judgment on such new supposed cause of action, and on it alone. And all this was done over and against the objections and exceptions of plaintiffs in error, defendants below. Said judgment, and the only judgment rendered in the case, reads as follows:

"Thereupon it is considered and adjudged by the court here, that the preliminary injunctions heretofore granted in this action be and the same are hereby made perpetual; and the board of county commissioners are forever enjoined and restrained from levying any tax for the payment of any interest on said bonds, or the principal thereof; and the county clerk is forever enjoined and restrained from placing any such

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tax on the tax-roll of said county. And it appearing that the said William Hammon, director, died during the pendency of this action, and that the board of county commissioners and the county clerk are necessary but only nominal parties, having no pecuniary interest therein, it is therefore considered and adjudged that the plaintiffs have and recover of and from the said defendants, Asa Beyer, as clerk, and John Ernst, as treasurer of said school district No. 81, Atchison county, their costs in this behalf expended. And the defendants here except to each and every such finding and conclusion, and the action and decision of the court herein."

Now this is evidently not a judgment in a contested election case. Under the act for contesting elections the court has no power to restrain county commissioners, or any one else, from levying any tax. Neither has the court any power under said act to restrain the county clerk, or any one else, from placing any tax upon the tax-roll. Nor had the court any power or authority in this case to compel the defendants Beyer and Ernst to pay the costs of litigating the questions whether the county commissioners and the county clerk should be so restrained in this particular case. Besides, Beyer and Ernst were at this time merely private citizens, having no interest in this litigation different from that of any other citizen of said school district. They had held no office for nearly two years prior to the rendering of this judgment, and were not attempting to manage the affairs of said school district in any particular. W. S. Knight, one of the plaintiffs below, was director of said school district; William Lewis was treasurer, and J. M. Ketch, a son of one of the plaintiffs, was clerk; and all of these men were opposed to said election, and to everything that was done thereunder, or in pursuance thereof. There was no excuse therefore for compelling Beyer and Ernst to litigate these questions. Said Beyer and Ernst ceased to be members of said school board before said supplemental petition was filed; and said supplemental petition stated these facts, and other facts wholly outside of the original cause of action, and then asked for the relief for which the plaintiffs below finally obtained said judgment. If, when Beyer and Ernst

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ceased to be members of said school board, and ceased to have any interest in said litigation, the plaintiffs had stopped all further proceedings against them, except proceedings to determine who should pay the costs up to that time, it is possible (but this question we do not decide) that the plaintiffs might have obtained a judgment against Beyer and Ernst for the costs which accrued up to that time. But the plaintiffs did not choose to stop there, and have the question then determined who should pay the costs, but they filed a new and supplemental petition, setting forth new facts which could have no place in a cause of action under said statute, and concerning which facts the defendants Beyer and Ernst could have no possible interest different from that of the other residents of the district; and they chose to litigate the case upon these new facts, notwithstanding the continued protestations and objections of the defendants Beyer and Ernst. And they obtained the judgment they sought upon these new facts. But the judgment cannot be sustained under said act for contesting elections; and indeed, if we take no other facts than those alleged in the various petitions of the plaintiffs, and considering all these facts to be true, it cannot be sustained upon any other statute or law. Other facts are still wanting in order to make a good cause of action in favor of the plaintiffs and against any person. (*Bridge Co. v. Wyandotte County*, 10 Kas. 326; *Hays v. Hill*, 17 Kas. 360.) The judgment is erroneous in whole, and in part. It must therefore be reversed.

BREWER, J., concurring.

HORTON, C. J., not sitting in the case.

MISSOURI VALLEY LIFE INSURANCE COMPANY V. ARTHUR D. STURGES.

LIFE INSURANCE; Beneficiary, and Assignee, must have an Interest in Life of Assured. A person who has no interest in another's life cannot purchase or take by assignment an insurance policy on such life. Such a thing would be clearly against public policy, and is not authorized by law. [*State v. Winner*, 17-298.]

Error from Labette District Court.

ACTION by *Sturges* to recover \$2,000, the amount of a policy of insurance issued by the *Missouri Valley Life Ins. Co.* to one Enoch Haynes, and on the life of Haynes. The material facts are stated in the opinion, *infra*. Trial at the June Term 1874 of the district court. Verdict and judgment for plaintiff, and the *Insurance Company* bring the case here on error.

T. A. Hurd, for plaintiff in error.

A. H. Ayres, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: The only question involved in this case is, whether the defendant in error (plaintiff below) has a right to recover on a certain life-insurance policy. That the policy was valid when issued, and that the insured is dead, are facts admitted by the insurance company; but still the company claim that the plaintiff cannot recover, first, because the policy was forfeited prior to the death of the insured for non-payment of premiums; and second, because the plaintiff has no legal or valid interest in said insurance policy. We shall assume that said policy was not forfeited, (and such would probably be our decision if we were to decide the question,) and shall proceed at once to the consideration of the other question. The facts of the case, so far as it is necessary to state them, are substantially as follows: On March 16th 1870, Enoch Haynes procured from the plaintiff in error an insurance policy on his own life

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for the sum of \$2,000. The premiums were made payable quarterly on the 16th days of March, June, September and December of each year, during the continuance of said policy, and the amount of each premium was \$37.58. On May 8th 1872, Haynes assigned said policy to the plaintiff below, Arthur D. Sturges, who had no interest in the life of Haynes. The insurance company assented to said assignment. The plaintiff Sturges afterward paid the premiums on said policy. On 30th January 1878, Haynes died, and Sturges then commenced this action against the insurance company to recover the amount of said insurance policy. Can he recover? We think not. Sturges never had any interest in the life of Haynes, but on the contrary, his whole interest, after said assignment, was in the death of Haynes. Each year that Haynes lived, Sturges was compelled to pay out \$150.82 without the slightest hope of ever receiving anything in return therefor. He was compelled to pay that amount in order to preserve the life of his insurance policy; but no payment that he could make would ever increase the amount of the benefit which he expected finally to receive. The policy, in case of death, was worth just as much on the day of the assignment as it ever could be afterward. If Haynes had died on the very day on which said assignment was made, the holder of the policy would have been entitled to receive just \$2,000; and no payment of premiums for any length of time afterward could ever increase that amount. Nor was Haynes bound to ever refund anything to Sturges. And nothing that Haynes might ever earn, or own, or receive, could ever possibly go to Sturges. Sturges was not dependent upon Haynes for any support, nor was he his heir, or devisee, or legatee. Nor was there even the slightest tie of kindred or relationship, or even of friendship, binding them together, and making it desirable to Sturges for Haynes to live. Sturges in fact had no interest in Haynes, except that Haynes should die. And as soon as that event should take place, Sturges expected to receive from the insurance company the sum of \$2,000; and of course, all his expenditures on said policy and on Haynes's life would then

cease. Hence it will be perceived that Sturges, after said assignment, had a vast interest in procuring the death of Haynes, but had no interest whatever in preserving his life. Haynes's life cost Sturges \$150.82 each year, without the slightest benefit in return, while Haynes's death would be worth to Sturges \$2,000, without the slightest loss or inconvenience whatever. Now can such a state of things be tolerated by the laws of any civilized country? All insurance is in its nature a kind of wagering speculation. In the present case, the insurance contract was in the nature of a bet, for each year, of \$150.82 against \$2,000, (less the \$150.82 paid as premiums,) that the insured would not die within the year; or more strictly speaking, it was in the nature of a bet, for each three months, of \$37.58 against \$2,000, (less the \$37.58 paid as a premium,) that the insured would not die within the three months. Where such contracts are associated with beneficent and modifying circumstances (as many insurance contracts are supposed to be) making them beneficial to society, they are generally upheld, notwithstanding their wagering characteristics. But where they are not associated with any such beneficent or modifying circumstances, but are left wholly in their own naked deformity, as merely wagering contracts, they fall under the same merited interdiction as other wagering contracts. And of all wagering contracts, those concerning the lives of human beings should receive the strongest, the most emphatic, and the most persistent condemnation. This is just what the present insurance policy was, in the hands of Sturges, a mere wagering contract upon the life of Haynes. And if said assignment from Haynes to Sturges were to be upheld, as valid under the law, it would be virtually saying that the law authorizes mere wagering speculations, mere mercenary traffic, concerning human life, and it would be opening the door wide, and inviting to enter the most shocking of all human crimes. If any person should desire to know what men may do where they are strongly interested in procuring the death of another person for the purpose of obtaining the benefit of a life-insurance policy, he may read the case of *The State of Kansas v. Winner*, 17 Kas. 298, 300.

While it was strongly to the interest of Sturges that Haynes should die, yet there is nothing in the record that shows that Sturges in fact did desire the death of Haynes. But whether he did or not, the principles governing the case are the same.

In the case of *Ruse v. M. B. Life Ins. Co.*, 23 N. Y. 516, it is said that a "policy obtained by a party who has no interest in the subject of insurance, is a mere wager policy;" (page 523;) and, "policies without interest, upon lives, are more pernicious and dangerous than any other class of wager policies, because temptations to tamper with life are more mischievous than incitements to mere pecuniary frauds;" (page 526.) Mr. May says in his work on insurance, that "all the objections that exist against issuing a policy to one upon the life of another, in whose life the former has no insurable interest, exist against his holding such policy by mere purchase and assignment from another. In either case, the holder of such policy is interested in the death, rather than the life of the insured. The policy of the law forbids such speculations based on the continuance of human life. It will not uphold a practice which incites danger to life, and it substantially declares that no one shall have any claim under a policy upon the life of another in whose life he had no insurable interest at the time he acquired the policy, whether the policy be issued to him directly from the insurer, or whether he acquires the policy by purchase and assignment from another. If he may purchase a policy on the life of another, in whose life he has no interest, as a mere speculation, the door is open to the same practice of gambling, and the same temptation is held out to the purchaser of the policy to bring about the event insured against as if the policy had been issued directly. It is, in fact, an attempt to do indirectly what the law will not permit to be done directly." (May on Insurance, § 398.) See also *The State v. Winner*, 17 Kas. 298, 300.

There are a large number of cases holding, that, in order to enable any person to procure an insurance policy on the life of another, such person must have an insurable interest in the life of such other; and it has even been held that such interest must,

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in some sense, be pecuniary, and not founded merely upon relationship. (*Guardian Mutual Life Ins. Co. v. Hogan*, Supreme Court of Illinois, June 30th 1876, 8 Chicago Legal News, 382.) In this case the policy was issued to John Hogan on his own life, for the benefit of his son Patrick Hogan, who had no pecuniary interest in his father's life; and it was therefore held that the son had no insurable interest in his father's life, and therefore that he could not recover on the policy after his father's death. The case of the *Franklin Insurance Company v. Hazzard*, 41 Ind. 116, is identical with the case at bar in all its essential particulars. In that case Cone procured an insurance policy on his own life, and then with the consent of the company assigned said policy to Hazzard, who had no interest in Cone's life. The court held that Hazzard could not recover on the policy after Cone's death. See also *Franklin Insurance Co. v. Leflen*, decided by the supreme court of Indiana in 1876. To the contrary, see *St. John v. Mutual Life Ins. Co.*, 13 N. Y. 81; *Valton v. The National Fund Life Ins. Co.*, 20 N. Y. 32, 38; *Clark v. Allen*, recently decided by the supreme court of Rhode Island.

In the present case we think, that, as Sturges had no insurable interest in the life of Haynes, he therefore could not purchase, or take by assignment, any interest in said insurance policy issued to Haynes; that such a thing would be most clearly against the most obvious rules of public policy, and therefore not to be tolerated by law; and as he could not take any interest in said insurance policy, he therefore cannot recover in this action. The judgment of the court below must be reversed, and cause remanded for further proceedings in accordance with this opinion.

HORTON, C. J., concurring.

BREWER, J., dissenting.

7-18 Kas.

JOSEPH DRAKE *et al.* v. JOHN D. WILLIAMS.

PARTNERSHIP DEBT, Due Member of Firm; Action to Compel Payment. A partnership firm owed W., one of its own members, \$133 on a book account. The interest of W. in said partnership consisted of a one-fifth interest, besides said book account. W. sold his interest in the partnership to D. and R., and they agreed to pay all claims, debts and demands, *against his share*. Afterward W. sued D. and R. on said agreement for the amount of his said claim, and obtained judgment to the *full amount* thereof. *Held*, That such judgment was and is erroneous,

Error from Osage District Court.

ACTION by *Williams* against *Drake* and *Ramskill*, to recover a debt alleged to be due to plaintiff from a partnership consisting of plaintiff, defendants, and others, and which plaintiff claims was assumed by defendants. The pleadings, and the facts, fully appear in the opinion, *infra*. *Williams* had judgment for \$133, at the January Term 1875 of the district court, and defendants bring the case here on error for review.

James Rogers, for plaintiffs in error.

Ellis Lewis, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This case was commenced before a justice of the peace, and was appealed to the district court. In the district court the parties filed new pleadings, which are as follows:

(*Court, and Title.*) "The said plaintiff complains of the said defendants for that heretofore, to-wit, on the first day of January 1871 there existed a partnership composed of Henry Harris, James J. Davis, John M. Rees, Evan Williams and John Williams, and called the 'Kansas Coal Company;' that said partnership continued to exist and do business until about the 31st of August 1873, when it dissolved; that on the 15th of January 1872, the said Kansas Coal Company became and was indebted to said plaintiff for work and labor before that time done for said Kansas Coal Company, at their request; for

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money loaned to said company, at their request; for money laid out and expended by said plaintiff, at their request; for goods, wares and merchandise before that time sold and delivered to said company by plaintiff, at their request; for balance due on account stated by said company to said plaintiff for boarding the hands of the said company, at their request—a more particular bill of which is hereto attached, herein referred to, and made a part hereof, and marked 'A,' in all amounting to two hundred dollars; and the said company never paid said sum, or any part thereof, to plaintiff. Plaintiff further says, that on or about the 4th of September 1873, the said defendants entered into an agreement, for a good consideration, with the plaintiff and James J. Davis, (a copy of which agreement is not herein set forth for the reason that the original is in the hands of defendants, uncontrolled by plaintiff, and plaintiff has no copy, and can procure none,) that said defendants were to pay off all the debts of the said Kansas Coal Company; and plaintiff says that the said Kansas Coal Company was then indebted to said plaintiff as aforesaid, and that by virtue of said agreement with said defendants the defendants are indebted to said plaintiff in the sum of \$200, but refuse to pay. Wherefore plaintiff prays judgment against the defendants for the sum of two hundred dollars, and interest, and costs of suit.

“SHELDON & THOMSON, Attorneys for Plaintiff.”

ANSWER:—(*Court, and Tille.*) “And now comes the said Joseph Drake and James Ramskill defendants, and for answer to the amended petition of said plaintiff John Williams herein say:

“I. For a first defense to the said amended petition, the defendants deny each and every material allegation therein contained.

“II. For a second defense, these defendants, Joseph Drake and James Ramskill, say, that on the 4th of September 1873 they did enter into an agreement in writing with the said J. J. Davis, and said plaintiff under the name of ‘John D. Williams,’ relative to the purchase of their interest in the Kansas Coal Company; and these defendants further say that said contract is not in terms as alleged in said plaintiff’s amended petition; but that by the terms of said contract, they, these defendants, were to pay off all the claims, debts and demands now due or contracted to become due as against the share of the said J. J. Davis and John D. Williams, and

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that the share of the said John D. Williams in said Kansas Coal Company was only a one-fifth interest; and these defendants further say that the said John D. Williams by the terms of said contract assigned to these defendants all his right and interest in and to all money due the said Kansas Coal Company in which he had an interest; and the defendants further say, that by the terms of the said agreement the plaintiff assigned all his interest in and to all notes and book accounts in which the said John D. Williams has an interest; and the defendants further say, that the annexed instrument in writing marked exhibit "A" is the original agreement referred to in plaintiff's amended petition. Wherefore, the defendants say that they are not indebted to said plaintiff as alleged, and pray that they may have their costs herein in this behalf expended.

JOSEPH DRAKE, JAMES RAMSKILL,

"By their attorney, James Rogers."

EXHIBIT "A."—Know all men by these presents, that I, J. J. Davis and John D. Williams, of the county of Osage and the state of Kansas, this 4th of September 1873, sold and transferred unto James Ramskill and Joseph Drake, of the same place, all our right, title and interest in and to a certain lease on the following described real estate, to-wit, the northwest quarter of section 25, township 15, range 14, in said county of Osage, being the premises now occupied and worked by the Kansas Coal Company, in said county and state. Said sale and transfer is in and for consideration of \$1,800, to be paid as follows: on the signing of this contract, three hundred dollars; and on the 4th of March 1874, the further sum of five hundred dollars; and on the 4th of September 1874, the further sum of five hundred dollars, with interest on the last-mentioned sum at seven per cent. per annum from this date; and on the 4th of March 1875, the further sum of five hundred dollars, with interest at the rate of ten per cent. per annum from the date hereof. The said J. J. Davis and John D. Williams also, in consideration of the foregoing stipulation, hereby assign to the said James Ramskill and Joseph Drake all our right, title and interest in and to all the buildings on said premises, and all the mules, horses and fixtures, and tools in and out of said coal mines, and all things whatsoever used in and out in the working of said mines.

"The said James Ramskill and Joseph Drake are by the terms of this sale to pay all the claims, debts and demands now due or contracted to become due as against the share of

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the said J. J. Davis and John D. Williams; and the said Davis and Williams hereby assign to the said James Ramskill and Joseph Drake all their right, title and interest in and to all money due the said Kansas Coal Company in which they the said Williams and Davis have an interest, together with their interest in all notes and book accounts in which they the said Williams and Davis have any interest by the terms of this assignment. The said James Ramskill and Joseph Drake are to have and retain all money now due the said Kansas Coal Company, that is to say, that portion of said money, notes, accounts in which the said Williams and Davis have an interest, and the same is hereby transferred to the said Ramskill and Drake.

September 4th, 1873.

J. J. DAVIS, [L.S.]
JOHN D. WILLIAMS, [L.S.]

REPLY.—(*Court, and Title.*) “And now comes the said plaintiff, and denies each and every allegation of the defendants, except the making of the agreement in the petition and in the answer alleged. And for further reply, the plaintiff says he has duly performed all the conditions of the said agreement on his part to be performed, but that the defendants have wholly failed to perform the conditions of said agreement on their part to be performed.

SHELDON & THOMPSON, *Attys for Plff.*”

After the foregoing pleadings were filed, the defendants below moved for judgment thereon, which motion the court overruled, and the defendants excepted. A jury was then impaneled to try the cause. The plaintiff below then offered to introduce evidence to prove his alleged cause of action, but defendants objected thereto, on the ground that the petition did not state facts sufficient to constitute a cause of action. The court overruled the objection, and permitted the evidence to be introduced, and the defendants again excepted. The plaintiff then proved his cause of action substantially as it was alleged in his petition, except that he proved the contract between himself and the defendants to be precisely as the defendants alleged it was in their answer. The defendants objected and excepted to much of the evidence that was introduced on the trial, and this they did for various reasons. The court gave general instructions to the jury, to each of which the de

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defendants excepted. The jury, upon the evidence and the instructions, found a verdict in favor of the plaintiff and against the defendants for \$133. The defendants then moved the court for a new trial, upon various grounds, which motion the court overruled, and the defendants again excepted. The court rendered judgment in accordance with the verdict of the jury. The defendants now bring the case to this court, assigning various grounds for error, and ask for a reversal of the judgment of the court below.

We think said judgment should be reversed. The plaintiff cannot maintain such an action as he is endeavoring to maintain upon said contract, (mentioned in his petition, set out in full as exhibit "A" to the answer, admitted by the reply, and proved on the trial.) It appears from the pleadings and the evidence in the case that a copartnership existed under the name of the "Kansas Coal Company." The plaintiff was a member of that copartnership, or company. The company owed him \$133. Afterward, and by the terms of said contract, he sold his interest in said company to Drake and Ramskill, the present defendants. His whole interest in the company consisted at that time of a one-fifth interest in the company, and a claim against the company for said \$133. Whether he intended to sell to Drake and Ramskill his whole interest, including said claim for said \$133, is not however quite clear. That portion of the contract which would tend to show that he intended to sell his interest in said claim, along with his other interest in the company, reads as follows: "And the said Davis and Williams hereby assign to the said James Ramskill and Joseph Drake all their right, title and interest in and to all money," etc., "together with their interest in all notes and book accounts in which they the said Williams and Davis have an interest by the terms of this assignment," etc. Now at this time, Williams and Davis each had a fifth interest in said company. Each in addition thereto had a claim against the company for money coming to them respectively. The claim of each was founded on a "book account." and the claim of Williams was for said \$133. Now

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if the plaintiff Williams assigned his said "book account" to Drake and Ramskill, of course he cannot recover in this action, or in any other action. But suppose that he did not so assign the same, (and probably he did not intend to do so, even if the terms of his contract might be so construed,) then can he recover in this action? We think not. His remedy, if he has any, would be a suit of equity against his former partners, the other members of the "Kansas Coal Company," for an accounting. In such suit, Drake and Ramskill, as assignees of his interest, would however be proper parties.

But the plaintiff claims that the defendant agreed in said contract to pay his said claim. Now the only thing in said contract upon which the plaintiff can found any such claim reads as follows: "The said James Ramskill and Joseph Drake are by the terms of this sale to pay all the claims, debts, and demands now due or contracted to become due as against the share of the said J. J. Davis and John D. Williams." Now it will be seen that the defendants did not agree to pay the plaintiff's claim, but they agreed only to pay such claims as might come against the plaintiff's share. There is nothing in the record that tends to show that the defendants ever knew that the plaintiff ever had any such claim until long after said contract was made. But as the defendants agreed to pay all the claims against the plaintiff's share, it will be necessary to consider whether the plaintiff had any claim against his own share. Could he have sued himself? Had he any cause of action against himself? Was he himself liable for what the company owed him? All these questions must certainly be answered in the negative. The plaintiff certainly had no claim against himself. He could have sued the other members of the company for an accounting and settlement, but he could not have sued himself. And even when his claim should at any time be paid out of the common property of the company, the plaintiff could not, in any sense, be considered as paying more than one-fifth of his own claim, for he would have only a one-fifth interest in said property. And he could not in any event have an execution against himself, or against his own

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individual property for the payment of his own claim. He would have no action at law against himself, or against any other person or persons, in which such an execution could be issued. His only remedy would be in equity. And after exhausting his remedy in equity against the property of the firm, and against the individual property of his copartners, his remedy would cease. But the court below ruled differently. Although this is purely an action at law, and although the plaintiff could not in any sense even in equity be considered as responsible for the payment of more than one-fifth of his own claim, yet the court below rendered a judgment at law against the defendants and in favor of the plaintiff for the whole amount of the plaintiff's claim. This was clearly erroneous. If the plaintiff in any sense sold a liability against himself so as to make his vendees liable therefor, the liability could not under any view of the case have been for more than one-fifth of the amount for which said judgment was rendered.

The judgment will be reversed, and cause remanded for further proceedings in accordance with this opinion.

All the Justices concurring.

J. G. SCHMUCKER *et al.* v. GEO. W. SIBERT, *Assignee, &c.*

1. STATUTE OF LIMITATIONS; *Acknowledgment to Stranger*. An acknowledgment of a debt, made not to the creditor, but to a stranger, does not avoid the running of the statute of limitations. [*Sibert v. Wilder*, 18-176.]
2. ——— *Mortgage to Secure Note*. In case of a note and mortgage, the latter being merely an incident to and security for the former, the mortgage is not barred until the note is.
3. ——— As soon as the note is barred, the mortgage is also barred; [*Waterson v. Kirkwood*, 17-9; *Fort Scott v. Schulenberg*, 22-658; *Hubbard v. Ins. Co.*, 25-172, 175:] and a grantee of the mortgagor may interpose this defense to an action to foreclose the mortgage, whether the mortgagor does or not.

4. ——— *Note and Mortgage; Revivor of Note.* Where a note and mortgage are once barred, a subsequent revivor of the note by part payment, promise, or acknowledgment of the payor, will revive the mortgage so far as it affects the interest of the payor in the mortgaged premises. But such revivor of the note will not revive the mortgage as against a grantee of the mortgagor, or any other parties who have acquired interests in the mortgaged premises prior to the revivor of the note. [*Hubbard v. Ins. Co.*, 25-172, 175.]
5. **CONTRACT BY DEED—*Grantee to Assume Incumbrance.*** The acceptance of a deed which in terms provides that the grantee is to assume a certain incumbrance on the granted premises, makes a contract in writing by such grantee to pay that incumbrance, upon which contract the holder of the incumbrance may proceed directly against the grantee, and recover. [*Scott v. Morning*, 23-253.]
6. ——— Such a contract is not a mere waiver of the statute of limitations by promise or acknowledgment, and therefore necessarily to be signed by the party to be charged thereby, but it is an original contract by which the grantee creates a liability that had no existence before.
7. ——— Nor is the contract one merely of indemnity, and to save the grantor harmless; but is a direct agreement and promise to pay the debt, a promise and agreement upon which the statute of limitations does not begin to run until the acceptance of the deed.
8. ——— *Conveyance Subject to Incumbrance.* The same rules obtain where the deed specifies that it is made subject to a certain mortgage; though in the latter case, the promise of the grantee is not to pay the mortgage absolutely, and without any reference to the value of the property conveyed, but only that the premises shall stand charged with the mortgage-debt, and to the extent of its value be appropriated to the payment of such debt.
9. **EVIDENCE; *Contract to Pay Mortgage-Debt; Competency.*** In an action to foreclose a mortgage, in which subsequent grantees of the mortgagor are defendants, a written agreement between the grantor and grantees, outside of the conveyance, by which for value received the latter promise to pay the note and mortgage, or a certain amount thereof, is competent evidence against the latter.
10. **REVIEWING JUDGMENT; *Error in Rejecting Evidence; Practice.*** Where testimony is offered, but upon objection is not admitted, and thereafter judgment is rendered against the party making the objection, in proceedings in error brought by said party to reverse the judgment this court will not consider the case as though such testimony was in, although it may appear that such testimony ought to have been admitted, unless it also appear that if admitted its effect must necessarily have been conclusive and could not have been destroyed by further testimony.

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Error from Douglas District Court.

ACTION by *George W. Sibert*, as assignee of *Wm. H. R. Lykins*, against *Thomas Guest*, *J. G. Schmucker*, *J. N. McConnell*, and *F. W. McConnell*, upon a note and mortgage given by said *Thomas Guest*, September 29th 1865, to *R. A. and E. B. Hayes*, which note and mortgage were assigned in October 1867 to said *Lykins*. The defendants *Schmucker* and *McConnells*, were joined as grantees of *Guest*. The facts respecting the several conveyances and agreements, are fully stated in the opinion, *infra*. The petition claimed \$1,545 as balance due on the note December 19th 1866, and interest thereon from that date, and demanded a personal judgment against all the defendants for such sum and interest, and the foreclosure of the mortgage, and sale of the mortgaged premises. The action was commenced November 25th 1873. Trial at the October Term 1874. A personal judgment was rendered against *Thomas Guest* for \$2,415.09, and a decree was made against all the defendants for the foreclosure of the mortgage. *Schmucker* and *McConnells* appeal, and bring the case here on error for review.

Newison & Alford, and *S. A. Riggs*, for plaintiffs in error.

Thacher & Stevens, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This case shows, that on the 29th of September 1865, defendant *Guest* made his promissory note for \$2,800, payable in one year thereafter, with seven per cent. interest, and at the same time executed a mortgage on lots 117 and 119 Connecticut street, Lawrence, to secure its payment; that December 19th 1866, he paid thereon \$1,500; that the note and mortgage came to the hands of the plaintiff, as the assignee of *W. H. R. Lykins*, who owns the same; that this action was commenced November 25th 1873; that in October 1873, *Thomas Guest*, in answer to proceedings of garnishment brought by Chancellor Livingston, a

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facts.

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creditor of Lykins, stated that on March 25th 1868, he was indebted on the note and mortgage in controversy, for the amount thereof, excepting \$1,500 paid December 19th 1866, and that Lykins owed him \$53; that none of that amount had been paid; that on the 3d of February 1868, the mortgagor, Thomas Guest, conveyed the undivided-half of the mortgaged premises to George Schmucker, and in the conveyance specified that the same was "subject to a mortgage given to R. & E. Hayes for the sum of \$1,300, he the said George Schmucker to assume one-half of said amount." George Schmucker accepted the deed, and afterward conveyed the premises to defendant John G. Schmucker. This latter conveyance was dated July 3d 1869, and contained the following clause, "subject to a mortgage given to one R. & E. Hayes, for the sum of thirteen hundred dollars." On the 12th of February 1870; defendant Guest conveyed to F. W. McConnell and J. N. McConnell the other undivided-half of said premises, which conveyance contained the following clause: "There is a certain mortgage outstanding on lots 117 and 119 aforesaid, given by Thomas Guest to Richard A. Hayes and Ebenezer B. Hayes, dated about the 29th of September 1865, *to be paid by Guest.*" The plaintiff below also offered in evidence what purported to be a written agreement dated March 1st 1870, between Guest of the one part, and Schmucker and McConnell of the other. The paper, it was proven, was signed by Schmucker with the firm-name of "Schmucker & McConnell." It contained what Guest testified was the contract between the parties, and was an agreement that certain stock of the value of \$1,849.42; should be turned over to Schmucker & McConnell, and that they should pay at least that amount upon the mortgage with the interest thereon at seven per cent., and should indemnify Guest. At the end of the paper are the words, "We do hereby acknowledge the receipt of the above-mentioned stock." The whole is signed, "Schmucker & McConnell." Guest's name is not signed to the paper. An inventory of certain goods left with Schmucker & McConnell was also made out and delivered to Guest at the same time with the agree-

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ment. The district court refused to receive the agreement in evidence, sustaining an objection that it was incompetent, and not an agreement in writing signed by the parties. It permitted the parties to testify as to the parol agreement between Guest and Schmucker & McConnell. Guest testified to an agreement as expressed in the writing. Schmucker and McConnell denied such agreement, but admitted receiving the property, and that it was to indemnify them against the mortgage, as well as for other purposes, and testified that the signature of the firm was simply intended to be to the receipt, and as an acknowledgment that they had such property of Guest's in their possession, and that there was no definite and complete agreement as to what they should do with the proceeds of such property. The court below found that there was due from Guest on the note \$2,415.09, and rendered judgment against him for that amount, and entered a decree foreclosing the mortgage and barring all the defendants. It adjudged no personal liability upon Schmucker and McConnell.

Upon these facts it is clear that but for the statute of limitations a recovery against Guest, the mortgagor, of the amount unpaid on the note, and a decree foreclosing the mortgage and barring all the other defendants, would be right. So that the question in the case is, whether and how far that statute protects the plaintiffs in error. Guest, the mortgagor, and against whom the personal judgment was taken, is not here alleging error, and of course we need not consider any error against him except so far as it may affect the present plaintiffs in error. Again, it is also clear, that if nothing had intervened between the last payment on the note and the commencement of this action, the statute would have been a complete bar to any action on the note. More than five years had elapsed after the payment, and before the suit. Still again, it is settled by the decision of this court, that the answer in the garnishee proceedings, though in some sense an acknowledgment of the debt, yet being one made to a mere stranger, and not to the creditor, or to any one acting for or representing

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him, does not avoid the bar of the statute. *Sibert v. Wilder*, 16 Kas. 176. And again, so long as the statute does not bar a recovery on the note, it does not a foreclosure of the mortgage. We are aware of the fact that in some states a distinction is drawn between the note and mortgage, and that a foreclosure of the latter may be barred even when a recovery on the note is not. And this in states such as California, where the note is the principal thing and the mortgage only a security for the note. *Wood v. Goodfellow*, 48 Cal. 185. We are not now considering the case of a revivor of the note by payment, promise, or acknowledgment; but refer simply to those cases in which the note never has been barred. In such cases we hold, that the mortgage lives as long as the note it was given to secure; that as no separate action can be maintained on the mortgage, independent of the debt secured by it, so there is no separate application of the statute to it. This is scarcely questioned where the mortgagor and promisor are the same, and the mortgaged premises remain the property of the mortgagor; but it is claimed that a conveyance of the mortgaged premises changes the operation of the statute, and that the grantee may successfully plead the statute to prevent a foreclosure, when his grantor, the mortgagor and promisor, cannot to prevent a personal judgment on the note. But if a payment on the note before the conveyance keeps the mortgage alive while the premises remain the property of the mortgagor, why should it not continue to have the same effect after the title has passed to his grantee? Note and mortgage are separate and distinct instruments no more after the conveyance than before. The relation of each instrument to the other is the same, after as before. One is principal and the other is security. By the conveyance, other parties become interested in the mortgaged premises; so they do by the death of the mortgagor; but in each case the interest is subject and subordinate to the mortgage. By indorsement or guaranty, other parties may become interested in the note; but this does not affect the relation of the note to the mortgage, or cause the statute to bar the note when it does not the mortgage. This

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question was before us in the recent case of *Waterson v. Kirkwood*, 17 Kas. 9, 13, 14, in which we took occasion to express our dissent to the views of the California court as announced in *Wood v. Goodfellow*, supra. See also *Palmer v. Butler*, 36 Iowa, 576; *Clinton Co. v. Cox*, 37 Iowa, 570; *Heyer v. Pruyn*, 7 Paige's Ch. 465; *Hughes v. Edwards*, 9 Wheat. 490.

Again, when the note is barred, the mortgage is also barred, and a grantee of the mortgagor may interpose this defense to an action to foreclose the mortgage, whether the mortgagor does or not. He may protect the property conveyed to him by a plea of the statute, as to any lien sought to be charged against it. He cannot of course interpose the plea beyond the extent of his interest, and therefore only to prevent a foreclosure. In the case of *Coster v. Brown*, 23 Cal. 142, the court decided that a "purchaser of an estate, subsequent to the mortgage, may intervene and plead the statute;" and further, "when the debt, to secure which a mortgage is given, is barred by the statute of limitations, the mortgage is also barred, and if an action is brought to foreclose it, one who has purchased or acquired a lien on the property subsequent to the mortgage has a right to intervene in the action and plead the statute of limitations." Also, the case of *Grattan v. Wiggins*, 23 Cal. 16, where the rights of a subsequent grantee are more clearly set out, as follows: "In an action to recover judgment for the amount of a debt secured by mortgage on real estate, and also to foreclose the mortgage, the grantees of the mortgagor, purchasers subsequent to the execution of the mortgage, have a right to plead the statute of limitations as to that part of the claim of the plaintiff which asks for a decree foreclosing the mortgage and a sale of the mortgaged premises." Also, see to the same point, *Lord v. Morris*, 18 Cal. 482, 490; *McCarthy v. White*, 21 Cal. 495; *Low v. Allen*, 26 Cal. 141; *Lent v. Shear*, 26 Cal. 361; *Wood v. Goodfellow*, 43 Cal. 185; *Harris v. Mills*, 28 Ill. 44; *Pollock v. Maison*, 41 Ill. 516; *Medley v. Elliott*, 62 Ill. 532.

Once more: When the note is barred, the mortgage is also barred, and no subsequent payment, promise, or acknowledgment can revive the mortgage as to property which the mort-

gagor has prior thereto conveyed to a third party. Whenever the mortgage is barred, the property is free from the lien. It is, as respects the mortgage, as though the latter had never existed. If therefore the mortgagor no longer owns the property, he cannot impose a burden upon it—his power to bind the property has ceased. He is as powerless over it as though he had never owned it. He can revive the note, as he could give a new note, for no rights but his own are involved. He can revive the old mortgage just so far and so far only as he could give a new mortgage, and that is, to bind his own property. *Day v. Baldwin*, 34 Iowa, 380.

Still further we remark, that the acceptance of a deed which in terms provides that the grantee shall pay off a certain incumbrance, is an undertaking by the grantee to pay the incumbrance, and an undertaking which may be appropriated by the holder of the incumbrance, and upon which he may maintain an action. *Corbett v. Waterman*, 11 Iowa, 87; *Bowen v. Kurtz*, 37 Iowa, 240; *Ross v. Kennison*, 38 Iowa, 397; *Lawrence v. Fox*, 20 N. Y. 268; *Thorp v. Keokuk Coal Co.*, 48 Iowa, 253; *Burr, Adm., v. Beers*, 24 Iowa, 178. The rule is thus stated by the assistant vice-chancellor in *Blyer v. Monholland*, 2 Sanford's Ch. Rep. 478: "The obligation is not enforced as being made by Monhollands to the complainant for the payment of Fitzrandolph's debt, but as a promise by him to Fitzrandolph to pay him \$2,500 by paying that sum to the complainant in discharge of his debt, which promise the complainant, as the mortgage creditor of Fitzrandolph, is equitably entitled to lay hold of and enforce." And the law courts have since then held, that a legal action might be maintained by the holder of the security. *Lawrence v. Fox*, 20 N. Y. 268; *Anthony v. Herman*, 14 Kas. 494. Such an undertaking is a contract in writing, and the statute of limitations does not begin to run upon such a contract until the execution of the deed. Nor is it material that this contract is not signed by the grantee. The acceptance of the deed makes it a contract in writing binding upon the grantee, just as the acceptance by a lessee of a lease in

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writing signed by only the lessor makes it a written contract binding upon such lessee; and suit can be instituted upon it, and the same rights maintained, as though it were also signed by the grantee. And it is not to be considered as a mere promise or acknowledgment, as named in the exceptions to the statute of limitations, and therefore to be signed by the party to be charged. Those exceptions apply to debts already existing against the parties sought to be held, and aim to continue in force prior liabilities. But the grantee in such a deed was not liable before its execution. His liability dates from that. That is the first contract he has made, the first obligation he has assumed. At that time therefore, as to him, the statute first commences to run. Nor is he discharged by the fact that the debt as to the original debtor has since his promise become barred by the statute of limitations. For his contract is an original, absolute promise to pay the debt, and not a mere contract of indemnity, and to save the original debtor harmless. The creditor may ignore the original debtor entirely, and proceed directly and solely upon this promise. The grantee is not simply a surety. His promise is not to see that the original debtor pays, or to pay if he don't. But it is a direct, absolute and unconditional promise to pay the debt to the creditor. Even where there has been only a guaranty of payment, it has been decided that the statute did not commence to run as to the guarantor until the date of his guaranty. *Thomas v. Croft*, 2 Rich. (S. C.) 113; *Cruger v. Daniel*, 8 U. S. Digest, Abbott's Rev. 790; or, 1 McMullan (S. C.) Ch. 157. Upon the same principle, and by the same reasoning, it would seem to be clear, that, where the deed specifies that it is made subject to a certain mortgage, an acceptance of a deed is an undertaking that to the extent at least of the value of the granted premises the grantee shall pay the mortgage. Or in other words, it is an agreement by the grantee that the granted premises shall be used so far as may be necessary to discharge and pay the mortgage. And as in the case last suggested, and for the reasons there given, the statute begins to run only from the execution of the deed.

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We think the written agreement signed by Schmucker & McConnell should have been received in evidence. It was a written agreement to pay this note and mortgage, or at least to pay a certain amount thereon. It recited an ample consideration therefor, was executed less than five years before the commencement of the action; and under the decision in *Anthony v. Herman*, supra, we fail to see any valid objection to its admission. The evidence of an oral agreement was of no value, for it placed such agreement more than three years prior to the commencement of the action. Other objections might also be presented to it.

It does not follow that the case is to be considered here as though the written agreement had been received in evidence, for though the court erred in not admitting it, yet *non constat*, that if admitted no valid defense to it could have been offered. The error is righted by remanding the case for a new trial, and not by considering the testimony as really in the case. For instance, suppose a tax deed were offered in evidence, objections made to it as void upon the face, and sustained. This court on review, if it held the deed *prima facie* valid, should not dispose of the case as though the objections had been overruled and the deed admitted, for if admitted the opposing party might have shown that it was void because prior to any sale the taxes had actually been paid. In other words, a party by objecting to the admission of testimony does not waive all defenses he may have to the testimony if admitted. We notice that some of the authorities cited by counsel for defendant in error seem to sustain their claim, but we are not prepared to assent to it.

We think that upon the record as it now stands before us, no decree of foreclosure and sale should have been entered as to the entire property, but only as to the undivided-half conveyed to Schmucker, and for the satisfaction of one-half the debt. The judgment will therefore be reversed, and the case remanded for a new trial, unless the defendant in error shall consent to a modification of the decree in accordance with the views herein expressed, such consent to be filed in the district

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court within thirty days after the receipt of the mandate in this case. Any error, if error there be, in the decree, as to redemption, can be corrected in the subsequent trial and decree, or after the filing of the consent.

VALENTINE, J., concurring.

HORTON, C. J., not sitting in the case.

WM. McNEILL CLOUGH *et al.* v. PATRICK J. McDONALD.

1. **SUMMONS; Return-Day, and Service.** Where a summons (issued to the sheriff of the county in which the action was brought) is made returnable in less than ten days, and the same is duly served one day before the return day thereof, *held*, that neither the summons nor the service is either void, or voidable. [*Lanone v. McKinnon*, 19-411; *Swerdsfeger v. State*, 21-475, 476.]
2. **MECHANIC'S LIEN LAW OF 1872; Sub-Contractor.** A sub-contractor who furnishes labor and material for the erection of a building has, under the mechanic's-lien law of 1872, sixty days from and after the completion of such building within which to file a mechanic's lien to secure his pay; and he is not bound to file his lien in such case within sixty days from and after the time when he furnished such labor and material.] *Jewell v. Morse*, 21-734; *Seaton v. Chamberlain*, 32-239; *Davis v. Bullard*, 32-234; *Crawford v. Blackman*, 30-529.]
3. ——— A sub-contractor who furnishes labor and material for the erection of a building, and who afterward files a mechanic's lien thereon to secure his pay, is not bound, under said law of 1872, by any of the terms and conditions relating to the payment of money, contained in the original contract made between the owner and contractor, except by such of said terms and conditions only as prescribe the amount that is to be paid. [*Hodgson v. Billson*, 12-568; *Wilson v. Sch. Dist.*, 17-111; *Delahay v. Goldie*, 17-263, 265; *Shellabarger v. Thayer*, 15-619; *McDonald v. Seaton*, 27-672; *Crawford v. Blackman*, 30-527, 529.]
4. ——— **Contract-Price; Fund for Sub-Contractors.** Where a contract is made for the erection of a building, the contract-price for the erection thereof constitutes a fund from which the sub-contractors are to be paid for their labor and materials furnished. And if such fund is not sufficient to pay the whole amount of all the claims of the sub-contractors who are entitled to liens under said law of 1872, then such claims must be paid from such fund *pro rata*.

Error from Leavenworth District Court.

ACTION by *McDonald*, a sub-contractor, against Samuel McFarland, as contractor, and *W. McN. Clough*, as owner, to recover the amount due him for work and labor on a house built for *Clough* by McFarland, and to enforce a mechanic's lien for such amount. *Mary*, the wife of said *Clough*, was joined as a co-defendant. The facts, and proceedings, and alleged error, are sufficiently set forth in the opinion, *infra*. The district court gave judgment in favor of *McDonald*, at the May Term 1875, and *Clough* and wife bring the case here on error.

Clough & Wheat, for plaintiffs in error.

Lucien Baker, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: The first question presented in this case is, whether the summons as served on Mary A. Clough is void, or voidable. The only ground upon which it is claimed that it is void, is, that the summons was made returnable in less than ten days after its date. And the only statutes upon which this claim is based, are the following: Section 61 of the civil code provides, that "the summons shall be served and returned by the officer to whom it is delivered * * * within ten days from its date." (Gen. Stat. 641.) And section 105 of the code provides, that "the answer or demurrer, by the defendant, shall be filed within twenty days after the day on which the summons is returnable." (Gen. Stat. 650.) In the present case, the summons was made returnable in six days after its date, and was served by the officer on the day before the return-day thereof. Now a summons of this kind we think is never void. It might be voidable however, if the officer should take the whole time (ten days) given him by law within which to serve it upon the defendant, for in that case the time given to the defendant within which to answer or demur would be shortened. But where the officer serves the summons before

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the return-day thereof, as in this case, we do not think that either the summons or the service is either void, or voidable. In such a case the defendant has lost nothing. He has his full twenty days after the return-day of the summons within which to answer or demur, and that is all that the law gives him in any case. It is the time of the officer, and not that of the defendant, that is shortened, by making the return of the summons less than ten days from its date.

The next question is, whether under the mechanic's-lien law of 1872 a sub-contractor who furnishes labor and material for the erection of a building has sixty days from and after the completion of such building within which to file a mechanic's

lien thereon to secure his pay, or has only sixty days from and after the time when he furnished such labor and material within which to file such

lien. We think he has sixty days from and after the completion of the building within which to file his lien. (*Delahay v. Goldie*, 17 Kas. 263, 265, and cases there cited.) The statute evidently intends, in all cases, that the sub-contractor shall have sixty days within which to file his lien from and after the completion of the whole of the work on any particular thing for the doing of which the original contract was made. Therefore, where the sub-contractor finishes his part of the work before the whole of such work is completed, he has more than sixty days from the completion of his part of the work, and exactly sixty days from the completion of the whole of the work, within which to file his lien.

The next question is, whether a sub-contractor is bound in all respects by all the terms and conditions of the original contract made between the contractor and the owner of the property. The plaintiffs in error claim that he is, but we have already decided that he is not, and we think rightly. (*Shellabarger v. Thayer*, 15 Kas. 619; *Delahay v. Goldie*, 17 Kas. 263.) In these cases it was held that "the lien of the sub-contractor is limited only by the amount contracted to be paid to the contractor." In the first case, by the terms of the original contract \$800 of the contract-price

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for sub-con-
tractor.

was to be paid down, leaving only \$500 of the original contract-price to be paid afterward, and said \$800 was actually paid long before the sub-contractor did anything to or for the building, or contracted to do anything to or for the same; and yet this court held that the sub-contractor, who afterward furnished material for said building, was not bound to know or take any notice of those terms of the original contract which authorized the immediate payment of said \$800, or of the payment itself, or that only \$500 remained to be paid on the original contract-price; but it was held that the sub-contractor could nevertheless take a valid lien on the building for the whole amount of his claim, which was \$900. For the purposes of this case we shall assume (but without deciding the question) that the sub-contractor is bound by all the terms and conditions of the original contract except those relating to the payment in money for the work to be done, and that he is even bound by those relating to payment so far as the amount agreed to be paid is concerned. But this is as far as we think the sub-contractor is bound. He should not under the statutes of 1872 be bound to know the terms of payment further than as to the amount of such payment. The contract is not required to be in writing; nor is it required to be filed in any place, public or private; and a contract that would require the sub-contractor to be bound by the terms of the contract relating to payment, further than as to the amount to be paid, would be in derogation of the statutes themselves. The cases cited by counsel from New York and California are not applicable to cases like this, under our statutes. Indeed, we know of no statute in any state similar in this respect to ours.

That portion of the original contract which the plaintiffs in error claim that the sub-contractor should take notice of and by which the plaintiffs in error claim that the sub-contractor should be bound, reads as follows: "The said McFarland is to contract with such parties as he pleases for materials, as required by the plans and specifications for said building, *but the said Clough is to have the right and privilege of paying for the same,*

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and the amounts so paid shall be a payment of like amount upon the contract-price of said house." Clough was the owner; McFarland was the contractor; and McDonald was the sub-contractor. The contract-price for the house was \$1,900, of which \$1,800 was to be paid in cash and the balance, \$100, was to be paid in rent. Clough paid said \$100 in rent, and paid to various sub-contractors and material men \$1,800 in money. After Clough paid all this, there still remained the sum of \$157.78 due to the sub-contractor McDonald, and there were perhaps some other small amounts due to other sub-contractors. Clough claims that because of the foregoing stipulation in the original contract, and because of the said payments made by Clough to various sub-contractors, the sub-contractor McDonald is not entitled to any mechanic's lien whatever. The court below however held otherwise. The court below held that McDonald was entitled to a mechanic's lien for a portion of the said amount of \$157.78 due him, to be determined in accordance with certain instructions to the jury. The court instructed the jury in substance, that said \$1,800 constituted a fund from which the sub-contractors were to be paid for their labor and materials; that if the same was not sufficient to pay the whole amount of all the claims of the sub-contractors who were entitled to liens, (which in fact it was not,) then that such claims should be paid therefrom *pro rata*. This we think was right. As we have before said, every sub-contractor is, under the law, entitled to sixty days, after the completion of the building, within which to file his lien; and he must file it within that time, or lose it. And the owner of the building cannot be compelled to pay anything to any person prior to that time. (Laws of 1872, page 296, §2.) Hence, at the end of the said sixty days, and before the owner can be compelled to pay anything to any person, he may know precisely to whom he is liable, and the amount due to each. If the contract-price will pay all the claims, he should pay all. But if it will not pay all, as in this case, then he must pay the various claimants in proportion to the amount due to each respect-

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ively. (Laws of 1871, p. 255, §8.) Whether the law is a good one or not, is a question solely for the legislature to determine, and not for the courts. The jury under said instructions of the court and other proper instructions, found that there was due to McDonald the sum of \$157.78, and that he was entitled to a mechanic's lien on the defendant Clough's property for \$138.85 of that amount. The court thereupon rendered a judgment in favor of the plaintiff McDonald and against the defendant McFarland for said sum of \$157.78, and ordered that the said property of the said defendant Clough be sold to satisfy \$138.85 of said judgment. This we think was right.

But suppose that the said stipulation in said original contract should be held to be strictly binding upon the subcontractor McDonald: then would it have the effect to entirely deprive McDonald of his mechanic's lien? Not entirely so, we should think, and perhaps not at all. That stipulation provided only that Clough should have the privilege of paying for materials furnished, and not for labor; while much that he did pay was for labor, and a large portion of McDonald's claim is for labor. We however do not think that said stipulation is binding in any respect upon McDonald.

The judgment of the court below will be affirmed.

BREWER, J., concurring.

HORTON, C. J., not sitting in the case.

J. C. BAIRD V. JOHN W. TRUITT.

INSTRUCTIONS—*Measure of Damages; Amendment of Pleading After Instruction Given.* The principal issue made by the pleadings, and the principal question litigated at the trial, was, What was the selling-price per thousand of certain apple trees, at Quincy, Illinois, in the spring of 1870? Under the pleadings, the defendant was entitled to recover from the plaintiff one-half the difference between the actual selling-price of said trees and the price at which the plaintiff furnished said trees to the defendant. The defendant alleged in his answer that the actual selling-price was \$35 per thousand, and that the plaintiff furnished the trees to him at \$50 per thousand. The evidence of the various witnesses at the trial showed that the selling-price was from \$32.50 per thousand up to \$50 per thousand. The court instructed the jury to find what the selling-price was, in accordance with the evidence. The jury found generally for the defendant, but what they found that said selling-price was, cannot be told from the verdict. The defendant then, with leave of the court, amended his answer so as to allege that the said selling-price of said trees was only \$32.50 per thousand, instead of \$35 as he had formerly alleged, after which the court rendered judgment in accordance with the verdict, and in favor of the defendant and against the plaintiff, for costs. *Held*, That no substantial error was committed by giving said instruction, or by allowing said amendment, or by any other ruling of the court. [*Brown v. App*, McC.-174; *Butcher v. Bank*, 2-70; *Irwin v. Paulatt*, 1-418; *Taylor v. Clendenning*, 4-524; *Davis v. Wilson*, 11-74; *Kuns v. Grund*, 12-547; *Wilson v. Phillips*, 8-211; *Frather v. Sneed*, 12-447; *Hobson v. Ogden*, 16-388; *R. R. v. Kunkel*, 17-145, 168.]

Error from Lyon District Court.

BAIRD brought suit against *Truitt* and wife, on a note for \$500 given by *Truitt* alone, and a mortgage given by both defendants to secure the debt evidenced by the note. *Truitt* answered, admitting the making of the note and mortgage, but set up a counterclaim exceeding the amount of said note and interest, and claiming a balance as due him from *Baird*. *Truitt's* counterclaim was in part for alleged false and fraudulent representations made by *Baird* in a certain partnership transaction, concerning which the facts and the instructions and proceedings complained of, are fully stated in the opinion. Trial at the September Term 1874. Verdict and judgment for defendant, and *Baird* brings the case here for review.

J. J. Buck, for plaintiff.

Ruggles & Sterry, and *J. V. Sanders*, for defendants.

The opinion of the court was delivered by

VALENTINE, J.: This is the second time this case has been brought to this court. (*Truitt v. Baird*, 12 Kas. 420.) This time the case is brought here by the plaintiff below, J. C. Baird; and the principal ground upon which he asks to have the judgment of the court below reversed is the giving of a certain instruction, which reads as follows:

“If you believe from the evidence, that at the time the partnership mentioned in defendant's answer was entered into, that the plaintiff agreed to furnish certain apple trees and grafts as his portion of the capital stock of said partnership, and that he was to furnish said trees and grafts at the price they were selling at in Quincy, Illinois; that plaintiff furnished said trees at a price exceeding their selling-price in Quincy, Illinois; that the defendant not knowing the selling-price in Quincy, and relying on the representation of said plaintiff as to their selling-price accepted them as so much capital stock at such over-price, the defendant will be entitled to recover one-half the difference between the actual selling-price of the trees in Quincy, and the price at which they were put into said partnership.”

The ground upon which it is claimed that the giving of this instruction was erroneous is as follows: The defendant's answer alleged that the selling-price of said apple trees, and of such apple trees, at Quincy, Illinois, in the spring of 1870, was \$85 per thousand. The evidence showed that the plaintiff actually paid for said apple trees at Quincy only \$82.50 per thousand. The instruction, it is claimed, told the jury in effect, that they might find what the selling-price of said trees was in Quincy, in accordance with the evidence, without regard to the pleading. That is, it is claimed that said instruction told the jury that they might find that the selling-price of said apple trees in Quincy was only \$82.50 per thousand, although the defendant had admitted and alleged in his answer

that said selling-price was \$35 per thousand. Now it is not certain that this instruction is open to such criticism; for it was given along with other instructions, and these other instructions stated precisely and exactly what the issues were, and what the defendant actually did state in his answer. What construction the jury put upon said instruction, and what they found was the selling-price of such apple trees in Quincy, we have no means of determining. The evidence would have sustained a finding of any price from \$32.50 per thousand, which the plaintiff actually paid for said trees, up to \$50 per thousand, the price at which the plaintiff actually furnished them to the defendant. The ordinary selling-price of such trees at said place was probably about from \$35 to \$40 per thousand at that time. There were 10,000 of the apple trees, and one-half the difference of the value of the trees at \$32.50 per thousand, and \$35 per thousand would be \$12.50, and the giving of said instruction may possibly have made a difference in the verdict of the jury to this amount.

The jury found a general verdict in favor of the defendant. The defendant then moved the court to allow him to amend his answer so as to allege that the selling-price of said trees at Quincy, Illinois, was only \$32.50 per thousand, instead of \$35 per thousand, as he had formerly alleged, and the court sustained the motion, and the amendment was so made. The plaintiff claims that this was also error. The plaintiff then moved the court for a new trial, which motion was overruled, and this is also assigned for error. The court rendered judgment in favor of the defendant and against the plaintiff for costs, which is also claimed to be erroneous. It will be seen that all the errors claimed are founded upon the supposed error in giving said instruction. Now for the purposes of this case we shall assume that said instruction is open to the criticism placed upon it by the plaintiff, and that under it the jury found that the selling-price of said apple trees at Quincy was only \$32.50 per thousand; and with these assumptions, was there any substantial error committed by the court below? We think not, although we think it was irregular for the

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court to give the instruction before said amendment was made, or before any suggestion or order that it might be made. A court should generally confine its instructions strictly within the issues made by the pleadings. Probably the court so intended in this very case, but inadvertently used language that will bear a different interpretation. The defendant should have made his amendment before the instruction was given. But still, the giving of the instruction first, and the making of the motion afterward, even if irregular does not infringe upon any substantial right of the plaintiff. No existing issue was changed by said amendment. No new issue was presented. But the same issue—which was, what was the selling-price per thousand at Quincy, Illinois, in the spring of 1870, of apple trees such as plaintiff furnished to the defendant for their said contemplated partnership—still remained, as shown by the pleadings, after the amendment. And the question, what was the price of said trees, was one of the principal questions litigated in the case, and it would seem from the record that both parties introduced about all the evidence they could upon this question. The plaintiff certainly could not have been misled in this case. In this state the district court may permit an amendment to be made to any “pleading, process, or proceeding” “before or after judgment;” and where “such amendment does not change substantially the claim or defense,” there is no limitation upon the power of the court to allow such amendment except the requirement that the amendment must be made “in furtherance of justice.” (Gen. Stat. 655, § 139; *National Bank v. Tappan*, 6 Kas. 456; *Prater v. Snead*, 12 Kas. 447.) And “no variance between the allegations in a pleading, and the proof, is to be deemed material, unless it have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled; and thereupon the court may order the pleading to be amended, upon such terms as may be just.” (Civil code, § 133.) And

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"when the variance is not material, as provided in the last section, the court may direct the fact to be found, according to the evidence, and may order an immediate amendment, without costs." (Civil code, § 184. See also, *Mo. Valley Rld. Co. v. Caldwell*, 8 Kas. 244.) We think said amendment was allowed "in furtherance of justice." At least, we cannot say that it was not so allowed. Besides, it has often been held by this court, that the district court is clothed with considerable discretion in granting amendments. We think the amendment was properly allowed under § 189 of the code.

The judgment of the court below will be affirmed.

All the Justices concurring.

SQUIRE ROSA V. MISSOURI, KANSAS & TEXAS RAILWAY CO

1. PLEADING OVER, *After Demurrer Sustained; Waiver*. Where the court below sustains a demurrer to a petition of the plaintiff, on the ground that the petition does not state facts sufficient to constitute a cause of action, and the plaintiff afterward files a new and amended petition, and takes his chances on that petition, *held*, that the plaintiff thereby waives any error of the court that may have been committed in sustaining said demurrer. [*Moore v. Wade*, 8-380.]
2. CONDEMNATION PROCEEDINGS; *Owner of Land only, Entitled to Damages*. In a proceeding instituted by a railway company for the purpose of procuring the right-of-way for its railroad through the various tracts of land along its route, a person who is in possession of one of said tracts, but who has no title thereto, or interest therein, (the land belonging to the United States,) cannot recover damages for injury done merely to the land itself. [*Nelson v. Mather*, 5-153; *Fitzpatrick v. Gebhart*, 7-46; *R. R. v. Walker*, 12-603, 604; *R. R. v. Wilder*, 17-240.]

Error from Neosho District Court.

ROSA was in the possession and occupancy of certain lands taken and appropriated through statutory condemnation proceedings by the *Railway Company*, and he claimed damages for injuries alleged to be sustained by the lands so occupied. The *Railway Company* demurred. All necessary facts appear in the

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Opinion. The district court sustained the demurrer, at the December Term 1872, and *Rosa* brings the case here on error.

L. Stillwell, for plaintiff.

T. C. Sears, for defendant.

The opinion of the court was delivered by

VALENTINE, J.: This action was originally a proceeding instituted by the Missouri, Kansas & Texas Railway Company to obtain the right-of-way for its railroad through the various tracts of land along its route in Neosho county. The plaintiff in error, Squire Rosa, was aggrieved by the assessment of damages made concerning one of said tracts of land, and thereupon he appealed to the district court. In the district court he filed a petition setting forth the facts of his case. To this petition the railway company demurred, on the ground that it did not state facts sufficient to constitute a cause of action, and the court below sustained the demurrer. The plaintiff then filed a new and amended petition, setting forth the facts of his case in greater detail. The defendant again demurred, for the same reason as before, and the court again sustained the demurrer. The plaintiff now brings the case to this court, and assigns for error the said rulings of the district court. Whether the court below erred in sustaining the first demurrer, we think is wholly immaterial; for even if the court did err, the plaintiff by filing a new and amended petition, and taking his chances upon that petition, entirely waived any error that may have been committed by sustaining the demurrer to his first petition. (*Clearwater v. Meredith*, 1 Wallace, 25, 42; *Dean v. Gecman*, 44 Ill. 286; *Judge v. Moore*, 9 Fla. 269; *Young v. Martin*, 8 Wallace, 354; *Mills v. Martin*, 2 Nebraska, 299, 308, 309.) The only substantial question then for us to decide is, whether the court below erred in sustaining the demurrer to the new and amended petition. Or in other words, the question is, whether the new and amended petition states facts sufficient to authorize the plaintiff to recover damages of any kind from the defendant.

1. Pleading over,
after demurrer
sustained,
waives error.

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All the damages alleged to have been committed, are damages to said land. No claim is made for injury to crops, or to buildings, or to improvements, or to anything else except the land itself. And we shall assume that the petition sufficiently states the injury to the land, and shows that such injury was greater than the amount allowed by the condemnation commissioners. We shall also assume that the petition states sufficiently that the railway company has no right or interest in or to said land except such rights or interests as it may obtain by virtue of these condemnation proceedings. Indeed, we shall assume that the petition is sufficient in every respect, provided it sufficiently states or shows that the plaintiff has any such interest in said land as will enable him in an action like this to recover for damages or injuries done to the land itself. Now the petition states and shows, that said land is a part of the Osage ceded lands, acquired by the government of the United States under the Osage Indian treaty of September 29th 1866. (14 U. S. Stat. at Large, 687.) The plaintiff settled upon said land in January 1867, and has continued to occupy the same as his homestead ever since, and has made lasting and valuable improvements thereon. But there is no claim, or the slightest pretense, that the plaintiff has any title to said land. The title still remains in the government of the United States. On March 8d 1870, these condemnation proceedings were commenced by the railway company. On April 12th 1870, the plaintiff Rosa took his appeal from the assessment of the commissioners to the district court. On January 11th 1872, the plaintiff filed his said amended petition. On April 11th 1872, said demurrer thereto was filed. And in December 1872 the demurrer was sustained by the court below, as before stated. It will therefore be seen that the plaintiff's amended petition not only fails to show that the plaintiff is the owner of said land, but it shows affirmatively that he is not the owner, that he has no interest therein, and that the government of the United States is the owner thereof. Upon what ground then the plaintiff would expect to recover for injuries done to the land itself.

2. Condemnation proceedings; owner of land, only, entitled to damages.

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done to the inheritance, is not very clear. The plaintiff has never had any interest in the land. From the time that he settled upon said land until April 10th 1869, he had the same right to purchase said land that others had, and had no greater right; for under the treaty of 1865 said Osage ceded lands were to be sold "on the most advantageous terms for cash," and "no preëmption claim or homestead settlement shall [was to] be recognized." From April 10th 1869, to April 10th 1871, the plaintiff had the privilege of purchasing said land from the government for \$1.25 per acre. (16 U. S. Stat. at Large, 55.) Since April 10th 1871, he has had no greater right or privilege to purchase said land than any other person, and no better terms have been extended to him than to any other person. But whatever has been his right or privilege to purchase said land, he has never exercised such right or privilege by purchasing the same; and therefore we think he cannot recover for injuries done merely to the land.

This action differs essentially from the action of trespass *quare clausum fregit*, and other actions referred to by counsel for plaintiff. In the first place, the defendant in this action must not be considered as a mere wrongdoer, as the defendants in the actions referred to are. The defendant in this case is attempting by a proceeding *under the statute* (Gen. Stat. 212, *et seq.*; and amendments, Laws of 1870, page 155,) to procure the right-of-way for its railroad, and is therefore not treated as a mere wrongdoer, and held bound, as a mere wrongdoer often is, to treat and consider the person in possession of the land as the owner thereof, when the fact is otherwise. Second, the plaintiff in this case has no title whatever. He does not even have that incipient title which a trespasser upon lands not belonging to the government of the United States may have by taking possession of the land and claiming it as his own. (*Wood v. M. K. & T. Rly. Co.*, 11 Kas. 348, *et seq.*) In the cases referred to by counsel, the defendant was not only a mere wrongdoer, but the title to the property had also passed from the government of the United States. Third, the action of trespass *quare clausum fregit* is an action merely for injury to the

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possession. The plaintiff may recover in that action without the slightest claim of title. He may indeed recover against a mere wrongdoer, although his possession is itself a trespass upon the rights of some other person. *Nelson v. Mather*, 5 Kas. 153; *Fitzpatrick v. Gebhart*, 7 Kas. 46; *Pacific Rly. Co. v. Walker*, 12 Kas. 603, 604. Generally, a mere wrongdoer is not allowed to dispute the title of the person whom he has injured, but that is not this case. In this kind of case the defendant is bound to pay for only such damages as the defendant causes, and these damages go only to such persons as sustain the loss, and in exact proportion as such persons do sustain such loss. Such damages are not to be paid for twice—once to the party in possession, and once to the real owner of the land—as damages are sometimes required to be paid by a mere wrongdoer. In this kind of proceeding, damages are paid to the person or persons entitled to receive the same, without any regard to who has possession. Damages done to crops are to be paid to the owner of the crops; damages done to the land, are to be paid to the owner of the land; and damages done to anything else, real or personal, are to be paid to the person who sustains the loss. If the land belongs to one person only, of course all the damages to it are paid to that person. But if the land belongs to two or more persons, then the damages to it are paid to the several owners in proportion to their respective interests therein. And the same rule prevails with respect to everything else on the land, or connected therewith. A person therefore who has sustained no loss by the establishment of the right-of-way, cannot recover any damages in this kind of proceeding. Now the plaintiff by his amended petition, shows that he has not sustained any loss, and that he cannot sustain any loss by the establishment of the right-of-way for the defendant's railroad, and therefore he cannot recover any damages in this case.

The judgment of the court below must be affirmed.

All the Justices concurring.

COMM'RS OF WABAUNSEE CO. V. J. L. MUHLENBACKER.

1. **LOCATING HIGHWAYS; Proceedings Void, Unless Jurisdiction be First Obtained.** Where a board of county commissioners attempts to locate and open a road, as a public highway, and appropriate private property therefor, without complying with the requisite conditions precedent giving jurisdiction, such proceedings are absolutely void; and on petition in error of a person whose land is thus attempted to be taken without his consent, the district court of the proper county can vacate and set aside such final orders of the board, without any exception being taken thereto by the party complaining, where no appearance was made by the party before the county board in any of the proceedings had therein. [*Comm'rs v. Brewer*, 9-318; *Gillett v. Comm'rs*, 18-410; *Benton v. Nason*, 28-862; *Shaffer v. Weech*, 34-603; *State v. Eggleston*, 34-721.]
2. ——— **Qualifications of Petitioners.** Under section one of the act of 1874, page 164, relating to roads and highways, an application by petition to the board of county commissioners, signed by at least twelve householders, is a condition precedent to confer authority upon the board, under such law, to lay out, locate and open a road as a public highway; and while it is not absolutely necessary, in order to make the road valid, that the *petition itself* should show upon its face that all or any of the signers are householders of the county where the road is to be located, yet the record of the proceedings should *affirmatively* show this fact when directly attacked. In such a case a board of county commissioners is acting in a special and limited capacity, and its jurisdiction should affirmatively appear upon the record. [*Willis v. Sproule*, 12-257; *Oliphant v. Comm'rs*, 18-386, 398; *Welford v. Weidlein*, 23-601, 606; *R. R. v. Moorman*, 30-336 340; *Comm'rs v. Carter*, 30-581, 585; also, 24-511, 514.]

Error from Wabaunsee District Court.

IN August 1875 *Muhlenbacker* filed in the district court his petition in error, to reverse the orders made by the *Board of Commissioners of Wabaunsee Co.* in certain road proceedings. The district court, at the September Term 1875, reversed the orders complained of, and the board of commissioners bring the case here on error for review. The facts and proceedings sufficiently appear in the opinion.

J. T. Keaggy, for plaintiff in error.

McChure & Humphrey, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: The questions for consideration are, whether

9-12 Ka.

a district court, upon a petition in error, can vacate the orders of a board of county commissioners in locating and opening a proposed public highway, when the record fails to show jurisdiction on the part of the board making the orders, where no exception was taken thereto by the party complaining, and no appearance was made by such party in any of the proceedings had before the commissioners; and whether, in this case, upon the record, such want of jurisdiction sufficiently appears?

It has several times been held in this court, that any error apparent in the final judgment of a district court may be corrected by suit in error in this court, although no exception was taken by the party complaining, and no motion made to set aside the judgment. Section 540, Gen. Stat. 1868, p. 735,

gives the district court the same authority to reverse, vacate, or modify, the final orders of any tribunal, board or officer exercising judicial functions, and inferior to said district court, as this court has over the proceedings of district courts, excepting that the words, "for errors appearing on the record," are not contained in § 540, and are included in the provisions of the code authorizing this court to review the judgments and orders of the district courts. But the omission of these words, although some of the decisions are based thereon, do not seem to us to affect the rule which we have adopted. The logical result of the reasoning contained in the case of *Koehler v. Ball*, 2 Kas. 160, tends to this conclusion. If the record shows the proceedings had by a board of county commissioners were without authority of law, to simply note an exception to a final order based thereon, would seem to be both unnecessary and valueless. If it be urged that the district court has no authority to set aside a final order of a board of commissioners, void on its face, as it is not in law technically an order nor a judgment, and cannot therefore be enforced, we answer, that, as it is claimed to be a final order, based upon valid proceedings, and rights are attempted to be acquired thereunder, it is better to give the supervisory court authority to vacate and set aside such void entry, than to remit the complaining party to some other

1. Locating highways; jurisdiction must be obtained.

remedy more difficult to himself, and more vexatious to all concerned. The law ought not to favor a circuitry of action. Section 540, *supra*, gives the district court full power to reverse, vacate or modify any final order of a board of county commissioners; and the more irregular and improper the order, the stronger the reason for the exercise of the power conferred.

The facts in this case show, that on July 6th, 1874, one Sebastian Wertzberger, and fourteen others, filed a petition with the county clerk of Wabaunsee county to have a certain road laid out. The petition itself did not show that all, or any, of the signers were householders. On the presentation of the petition the following proceedings were had:

"JULY SESSION, 1874.—Road petition of Sebastian Wertzberger taken up, and the following persons appointed viewers: J. P. Gleich, Wm. Strasses, and Joseph Hensel, to meet at the house of S. Wertzberger, Friday, August 7th, 1874."

At the September session of the board of county commissioners for 1874, the following additional proceedings were had, as appears from the journal:

"Report of viewers on Wertzberger road taken up. Report approved, and road ordered opened, and damages allowed as follows, to-wit: M. M. Muhlenbacker, \$15.00; Peter Muhlenbacker, \$15.00; Margaret Muhlenbacker, \$15.00; J. L. Muhlenbacker, \$7.50."

The road was ordered to be laid out through the premises of the defendant in error, J. L. Muhlenbacker; but the record does not show that Muhlenbacker ever appeared before the board of commissioners, or the viewers. A certain written claim for damages, signed "J. L. Muhlenbacker," was in the possession of the viewers, and was filed in the county clerk's office, but it nowhere appears that the defendant ever signed such claim, or even authorized it to be presented or filed, or that he had any connection therewith.

The district court, upon the hearing of the petition in error of said J. L. Muhlenbacker, "ordered and adjudged that the proceedings and orders of the county board in locating and opening said road as a public highway, be annulled, vacated,

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rendered wholly void and of no effect, and that Muhlenbacker have judgment for costs." The judgment of the court below was correct. The record should have established the fact that there was some finding by the county board that at least twelve of the signers of the petition were householders, or in some way this should have appeared in the case before the board assumed authority to appropriate the property for the road. The fact that the petition was signed by twelve householders of Wabaunsee county, was a jurisdictional one. The legislature has seen fit to require that, before the board of county commissioners of a county can proceed to exercise the authority to locate and open roads, under the law of 1874, ch. 108, a petition signed by twelve householders must be presented. This is a precedent condition. A failure to comply with this precedent condition would make all subsequent proceedings without authority of law. This court has already held, "that it is not absolutely necessary, in order to make the road valid, that the *petition itself* should show upon its face that the signers are householders." *Willis v. Sproule*, 18 Kas. 257. But the record should somewhere show this fact, before the viewers are appointed. It may be shown by affidavit filed with the county clerk; or it may be shown upon the hearing of the petition, by oral evidence. But some entry or record thereof must be made. In this case, the county board do not seem to have considered the question at all; and in the absence of any showing to that effect, we cannot assume that the petition was signed by twelve householders of the county of Wabaunsee. The general rule applicable to such inferior jurisdictions as boards of county commissioners, is, that in their proceedings they are to be held to the strict limits of their authority, as conferred and prescribed by the statute. When jurisdiction is obtained, of course we should be liberal in reviewing all subsequent proceedings.

The judgment will be affirmed.

All the Justices concurring.

F. A. HIGBEE v. ROBERT McMILLAN.

- 1 **WITNESS; Competency of Wife to Testify.** A wife is a competent witness as to the communications made to a third person by her husband in her presence and hearing, in all civil actions in which the husband is not a party to the suit, when his rights will not be concluded by any verdict therein, and when such communications are themselves admissible in evidence. (*Fisher v. Conway*, 21-18; *Douglass v. Hill*, 29-527.)
- 2 **Instruction; Credibility.** The court below instructed the jury that "if you believe from the evidence that any witness has knowingly and willfully testified falsely to any material fact, you should totally disregard all the testimony of any such witness." *Held*, That such instruction is erroneous. (*Shellabarger v. Nafus*, 15-547, 554; *Garvin v. Jenacron*, 20-371, 373; *R. R. v. Reford*, post, 245.)
- 3 **REPLEVIN; DISMISSAL OF ACTION; Sections 184 and 185 of Code, Construed.** In an action to recover the possession of specific personal property, when the property has been delivered to the plaintiff, and thereafter the plaintiff dismisses his action without prejudice to a future action, and no answer or other pleading is filed by the defendant, but the defendant makes application under section 184 of the civil code for the court to proceed to inquire into the right of property and right of possession of the defendant to the property taken, *held*, that such application is to be construed as a claim by the defendant for a return of the property, and that upon such an application judgment may be rendered for the defendant for a return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same.

Error from Lyon District Court.

REPLEVIN, brought by *Higbee*, to recover possession of thirteen yearling mules, which he claimed to own, and which he alleged were wrongfully detained by *McMillan*. Plaintiff dismissed his action without prejudice to a future action, and judgment in favor of *McMillan* was thereupon rendered, at the September Term 1875. *Higbee* brings the case here on error for review. The opinion contains a sufficient statement of the facts and proceedings.

Ruggles & Sterry, and *Geo. E. Terry*, for plaintiff.

E. S. Waterbury, and *E. W. Cunningham*, for defendant.

The opinion of the court was delivered by

HORTON, C. J.: In the fall of 1874, John A. Baker and

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Robert McMillan made a contract in reference to the purchase of a lot of young mules for market. Baker claimed that the contract was in substance, "that he (Baker) should furnish the money to purchase a lot of weanling mules, and that when so purchased McMillan should take possession of them until they should be sold; that he (Baker) should have the right to sell them at any time; that upon their sale the net profits should be equally divided between him and McMillan." On the other hand, McMillan claimed the contract to be, "that Baker was to furnish the money to buy a lot of weanling mules, and that when bought that he (McMillan) was to have possession of them, take care of and feed them until they were three years old, except they should be sold when they were two years old by consent of both parties; that when they were three years old he (McMillan) was to break and fit them for market, and that when they were sold the net profits were to be divided equally between the parties." Under the contract, however it was, thirteen weanling mules were bought in the fall of 1874, and placed in the possession of defendant. Higbee, the plaintiff, claimed that on July 15th 1875 the said Baker executed and delivered to him for a valuable consideration a bill of sale for all of the said mules; and Higbee, on the 21st of July 1875, filed an affidavit and bond in replevin in the office of the clerk of the district court of Lyon county. The clerk thereupon issued an order of replevin to the sheriff of said county, directing him to take the mules from the possession of McMillan, and deliver them to plaintiff. The mules were taken under said order and delivered to plaintiff. On the 24th of said July, the plaintiff filed his petition in said replevin action. The petition was not filed, however, until after the issuance and service of the summons and order of replevin. The defendant, at the September term of said court, made a special appearance, and moved to set aside the summons and service thereof, which motion was granted. Thereupon plaintiff moved to dismiss the action without prejudice, which motion was granted. The defendant then made application to the court to inquire into the right of property and

right of possession, which was done, and by the court the right of property and the right of possession were found to be in defendant. A motion for a new trial was made by the plaintiff, which was granted by the court. The cause then again came on to be heard on the inquiry demanded by defendant as to the right of property, and the right of possession, which questions were tried by a jury and resulted in the judgment herein complained of, which was to the effect, that McMillan should recover from Higbee the property replevied, together with \$180 his damages for its detention, and in default of return thereof, that McMillan should recover from Higbee \$845, the value of the property, and that he should also recover from Higbee his costs.

I. On the trial, Higbee, the plaintiff, to maintain the issues in his behalf, called Mrs. Baker as a witness, who testified that she was "the wife of John A. Baker." She was then asked: "Do you remember a conversation between your husband and the defendant, in your room at McMillan's, in the fall of 1874, concerning the buying of some mules?" To the asking of this question the defendant objected, on the ground that the witness was incompetent to testify to any transaction between defendant and her husband John A. Baker, concerning the mules in controversy, which objection the court sustained. The plaintiff then offered to prove by this witness, "that in the latter part of September or the first of October 1874, she and her husband, John A. Baker, were living at the house of the defendant, and that about that time defendant came into her room, occupied by her and her husband, and wanted her husband to buy two mules of a Mr. Jenkins; that her husband at first refused to buy the mules of Jenkins, and asked defendant why he (defendant) did not buy them; that defendant replied that he was too poor to buy them, that he wanted to sell the mules he had, and wanted her husband to buy them; that her husband finally consented to buy them, if defendant would take care of them just as he wanted him to, to-wit, to keep the mules until her husband should sell them, and take care of them, and that whenever her husband desired to sell

the mules he should be at liberty to do so, and should pay McMillan one-half of the net profits, as compensation for keeping them; that defendant agreed to this, and that thereupon Baker paid the defendant for his five mules, and that then Jenkins was called into the room, and Baker bought his two mules of him." To this offer of proof of this witness, the defendant objected on the ground of the incompetency of the witness, which objection the court sustained. Proper exceptions were taken, and the question is fairly presented, whether the wife of Baker, the vendor, was a competent witness.

Section 319 of the civil code provides, that "No person shall be disqualified as a witness, in any civil action or proceeding, by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of a crime; but such interest or conviction may be shown for the purpose of affecting his credibility." Section 323 of the code provides, that—

"The following persons shall be incompetent to testify; * * * *Third*, husband and wife, for or against each other, except concerning transactions in which one acted as the agent of the other, or when they are joint parties and have a joint interest in the action; but in no case shall either be permitted to testify concerning any communication made by one to the other during the marriage, whether called while that relation subsisted or afterward."

The husband was not a party to the record, nor is it shown that he was notified to appear and defend the title of the property claimed by his vendee. His appearance in the case was that of a witness, and although he was interested in the result of the suit, his rights would not be concluded by any judgment therein. A true construction of subdivision *third* of section 323 of the code, in connection with section 319, does away with the question of interest on the part of the witness, and only applies when the husband or wife is a party in the action, or where the rights of the other, though not a party to the record, would be concluded by any verdict rendered. The exception so contained in said subdivision of section 323, to the general rule adopted in section 319, should be confined to the

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terms stated. It ought not to be extended by construction. The old doctrine of the law was, that the wife could not be witness for her husband, because her interest was precisely identical with his; nor against him, upon grounds of public policy, because the admission of such evidence would lead to dissension and unhappiness, and possibly to perjury. The statutes in most of the states have changed this rule, and as our statute has opened wide the door to all persons to be witnesses, without regard to their interest in the suit, excepting as affecting their credibility, we ought not to keep up the disqualification as to the wife being a witness, on account of the interest of the husband, unless the plain provision of the law forbids any other conclusion. It is the tendency of our legislation to favor the introduction of all evidence, which will in any way explain a subject under investigation, and to lessen the limitations heretofore existing as to the competency of witnesses, and also to enlarge rather than restrict the rights of married women—to place her on an equality with her husband in all things, and to render her condition sufficiently independent that we ought to expect from her a fearless regard for truth in the statement of facts. Nor do our laws purport to maintain matrimonial felicity by sealing the lips of a married person at all times, when the interests of the husband, or wife, of the witness are at issue. Husband and wife are competent witnesses concerning transactions in which one acted as the agent of the other, or when they are joint parties and have a joint interest in the action. Our law also makes husband and wife competent witnesses, if they are willing to testify, for or against each other in all criminal cases, and provides, that in any action for a divorce the parties thereto, or either of them, shall be competent to testify in like manner, and respecting any fact necessary or proper to be proven, as parties to other civil actions. Again, if a contrary conclusion is reached, than here stated, every time a husband or wife is a witness in a case, in which the other is indirectly, incidentally, or remotely interested, all the old questions of evidence in relation to the competency of the witness on account of the interest of

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his or her spouse, would be involved, and thus rules of evidence, now becoming obsolete everywhere, would be still kept alive in this state. The law has abolished interest as a bar to competency of the witness; and considering the other liberal legislative provisions regarding the testimony of married parties, for and against each other, the prohibition contained in said subdivision third of section 323 should only apply where the letter of the law makes the same indispensable. Perhaps it should be added, that the statements between Baker and McMillan were not communications made by the husband to the wife, and the concluding portion of said subdivision third has no application to communications made to third persons in the presence and hearing of each other.

We are aware that the views expressed above are in conflict with the case of *Bird v. Hueston*, 10 Ohio St. 418, but the laws of Ohio at the time of the rendition of that decision were not as liberal as our own, nor as liberal as the laws of Ohio are now, in this respect. In that opinion it is stated, that, "It is the policy of the law, in order to secure conjugal confidence, that in no case shall husband and wife be allowed to give evidence for or against each other." Our laws favor a different policy, and are not as fearful of disturbing "conjugal confidence" in permitting a wife or husband to testify to the truth. We think Mrs. Baker was a competent witness in the case, and that the court below committed error in rejecting her testimony.

II. The court below instructed the jury, "If you believe from the evidence that any witness has knowingly and willfully testified falsely to any material fact, you should totally disregard all the testimony of any such witness." Within the decision of *Shellabarger v. Nafus*, 15 Kas. 547, the instruction was erroneous, and ought not to have been given. It is fitting however for us to say, that said instruction was given prior to the publication of the latter case in the 15 Kansas, and the court below only followed the rule laid down in *Campbell v. The State*, 3 Kas. 488, and the decisions in such other cases of this court as followed that.

III. The judgment in the case included \$180 as damages to the defendant for the detention of the mules by the plaintiff. This was not error. Section 184 of the code permits the defendant, in a case where the property has been delivered to the plaintiff, and the plaintiff fails to prosecute his action to final judgment, to make application to the court to proceed to inquire into the right of property and right of possession of such defendant to the property taken. This application embodies a claim to the property, and a return of the property. The purpose of giving the court the authority to make the inquiries stated would be useless, unless it was intended to supplement the investigation with a judgment or order. As section 185 of the code provides that in all actions to recover the possession of personal property, if the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment may be for the value in case a return cannot be had, and damages for taking and withholding the same, upon said application being made, as provided for in section 184, by the defendant, a like judgment may be entered as set forth in section 185 when defendant claims a return of the property. We make these remarks to settle a question of practice, and one which may arise again upon the trial of this case.

The judgment of the court below must be reversed, and a new trial awarded.

All the Justices concurring.

JAMES Z. GAPEN v. L. T. STEPHENSON

1. **UNDERTAKING IN ATTACHMENT; Amount Required.** The statute, (Laws 1870, p. 172, §5,) requires in attachment proceedings an undertaking "in a sum not exceeding double the amount of the plaintiff's claim." *Held*, that a motion to set aside an attachment for the reason that the sum named in the undertaking was only just the amount of the plaintiff's claim, might properly be overruled, and that if the amount named was really insufficient to protect the defendant, the court might require additional security. (*Johnson v. Weatherwax*, 9-75; *Ferguson v. Smith*, 10-396.)
2. **ATTACHMENT PROCEEDINGS; Motion to Dissolve; Appraisers.** Where the sheriff returns on an order of attachment that both the appraisers summoned by him were duly qualified, proof, even if admissible to contradict the sheriff's return in this respect, that one of the appraisers was not at the time a householder, will not be sufficient to work a dissolution of the attachment.
3. ——— **Homestead Claim; Contract of Sale.** Evidence that a party had contracted to sell a piece of land upon which he was not actually residing, and was from time to time receiving payments upon such contract, is strong evidence against his testimony that he was all the while intending to retain it for his homestead.
4. **ISSUE—TRIAL; When Action is Triable.** It is substantial error to force a defendant over his objection, to go to trial at a term prior to that at which the action first became triable, and error sufficient to compel a reversal of a judgment rendered against him upon such trial. (*Race v. Malony*, 21-31, 35; *Rice v. Simpson*, 26-143, 146; *Rice v. Hodge*, 26-164, 167.)
5. ——— The petition in this case was filed 24th June 1873. On July 24th, a motion was filed to compel plaintiff to make his petition more specific and definite. This motion was confessed, and an amended petition filed on 22d January 1874. On February 9th a motion was filed to make this amended petition more definite and specific. On April 15th this motion was sustained as to some of the claims embraced in the petition, and overruled as to the rest. The plaintiff then with leave struck out the claims defectively stated. Application was then made for twenty days in which to file answer. This application was overruled, and defendant required to answer by April 17th. No conditions were attached to this order. The defendant filed his answer tendering an issue of fact by the 17th, and then asked to have the case continued on account of the absence of witnesses, and because the action was not triable at that term. This application was overruled, and on April 24th, within nine days after the petition was first perfected, and at the same term, the defendant was forced into trial, and a judgment rendered against him. *Held*, that under the statute then in force (Laws 1871

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p. 278, § 5,) this was error, and that this action was not triable at the same term at which issue was joined.

6. ——— *Code and Amendments, Construed.* The laws of 1868, 1870 and 1871, in respect to the term at which actions are triable, considered, and the changes made thereby commented on and explained.

Error from Montgomery District Court.

ACTION by *Stephenson*, to recover for sundry claims of indebtedness amounting in the aggregate to \$7,500. An order of attachment was obtained at the commencement of the action. *Gapen* moved to dissolve and discharge the attachment. The proceedings taken upon this motion, and the proceedings generally until final judgment in favor of *Stephenson*, at the September Term 1874, are fully stated in the opinion. *Gapen* brings the case here on error.

Turner & Ralstin, for plaintiff in error.

York & Humphrey, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This was an action of attachment. Many questions are presented, and many errors alleged. Some of them however are of minor importance, and deserve little notice. A motion was made to dissolve the attachment, which had been levied upon a quarter-section of land belonging to defendant, the plaintiff in error. Among the grounds in the motion are these:

First, that the affidavit for the attachment was not true. The charge was, that the defendant was about to convert his property into money for the purpose of placing it beyond the reach of his creditors. It appears that the only property belonging to defendant was this quarter-section, except perhaps some lots mortgaged for their full value. The defendant in his affidavit denied the charge, but the affidavit of one witness was in evidence showing that *Gapen* offered him the land for what he said was not half the value, but that he was determined to sell it to prevent *Stephenson* from getting it; and

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the affidavit of another, that Gapen said he had tried to sell the place for less than one-third its value, and that he had moved onto it to claim it as a homestead, for the sake of beating Stephenson. Other circumstances were also in evidence tending to show a like purpose, and we cannot say that the court erred in holding the charge true.

A second ground was, that the bond was insufficient in amount. The claim was for \$7,500. The bond in the same amount. The statute requires the bond to be in "not exceeding double the amount of the plaintiff's claim." The statute was complied with. If the amount was really insufficient to properly protect the defendant, the court on motion could have required a larger bond.

Another ground was, that one of the appraisers was not a householder. The sheriff's return shows that both appraisers were duly qualified. Conceding for the purposes of this case, that in this respect the sheriff's return may be contradicted, and the testimony discloses that one of the appraisers was not a householder, (though we do not decide that either of them is the case,) still we think the defect is not such as to cause a dissolution of the attachment. It was not a matter going to the right of the plaintiff to have an attachment—not a matter over which he had any control. The mistake was one of the officer, and not of the plaintiff, and not a mistake as we think prejudicing the substantial interests of the defendant.

Another ground was, that the property attached was a homestead, and therefore exempt. The land was entered June 21st, and the attachment levied June 24th. The defendant was married in March preceding. His affidavit showed that he moved on to the land in April, with the intention of making it a homestead; that the dwelling-house was located on low ground, which was unhealthy, and in consequence of his wife's health he temporarily removed his family therefrom with the intention of moving the house onto higher ground, and then permanently occupying it as a homestead, which intention he carried into effect on the 26th

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and 27th of June. On the other hand, were several affidavits showing that until after the attachment defendant and his wife never slept a single night on the place, and never ate but one meal thereon, which was cooked at plaintiff's house and taken over there so as to furnish the basis of testimony for a contest for the land before the land-office, and also that defendant had prior to his entry made a contract to sell the land to the wife of plaintiff, and had received considerable amounts in payment therefor. Upon this testimony, and that heretofore referred to in this opinion, did the court err in overruling the motion to dissolve the attachment on the ground that it was a homestead? We think not. The testimony satisfies us that defendant had contracted to sell his land, and that the homestead intention was an after-thought. If he was intending to carry out his contract to sell, of course he was not intending to make a homestead. And we are not willing to believe that he was base enough to be from time to time receiving considerations on a contract which all the while he had no thought of performing. More reasonable is it, more just, and more in accordance with the testimony, to believe that he was intending in good faith to carry out his contract until the time of performance, and that then, owing to some disagreement, or some misunderstanding, the nature of which does not fully appear, the intention was formed of retaining the land, and claiming it as a homestead. At any rate, there was abundant testimony to sustain the conclusion of the district court in the matter.

One or two other grounds were presented in the motion to dissolve the attachment, but those noticed were the principal ones; and in none of them do we see anything of substantial error. The ruling of the court therefore in refusing to set aside the attachment must be sustained.

A second series of questions arises on the overruling of two motions for continuance. In these motions, three matters were presented—the absence of witnesses, sickness in the defendant's family, and a claim that the action was not under the

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statute triable at that term. Passing the two matters first named, with the remark that we see no error in the ruling of the court thereon, we are constrained to hold that under the statute the action was not triable at the term at which it was tried, and that therefore the court erred in compelling the defendant, against his objection, to go to trial at that time. The facts in reference to this matter are these: The petition was filed June 24th 1878. On July 24th, a motion was filed to compel plaintiff to make his petition more specific and definite. This motion was confessed by plaintiff, and on January 22d 1874, by leave of the court, an amended petition was filed. On February 9th, defendant filed his motion to compel plaintiff to make this amended petition more specific and definite. On April 15th this motion was sustained as to four matters, whereupon plaintiff by leave of the court struck out from his amended petition these matters. Defendant thereupon asked for twenty days to file answer, which was overruled and he was ordered to file answer by April 17th. The answer was duly filed. No condition was attached to this order granting leave to answer. And that the motion to have the amended petition made more definite was not frivolous, is evident because it was sustained. The answer was a denial, and a counter-claim. On April 20th, three days after the filing of the answer, the *plaintiff* filed a motion for a change of venue on account of local prejudice. On April 22d this motion was overruled. On April 18th, the first motion for a continuance was filed. In this the claim was made that the action was not triable at that term because the issues had only been joined during the term. On the same day the motion was heard, and overruled. On April 24th, the second motion for a continuance was filed, and overruled, and thereafter, on the same day, the case was called peremptorily for trial, a jury impaneled, and the case tried. It appears from the statement therefore that the defendant was, over his objections, forced into a trial at the very term at which the issues were first joined. Now the law in reference to this

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matter has undergone two or three changes. In the general statutes the rule was thus laid down:

“Actions shall be triable at the first term of the court after the issues therein by the times fixed for the pleadings are, or should have been, made up; and when, by the times fixed for pleading, the issues are or should have been made up during the term, such action shall be triable at that term.”—Gen. Stat., p. 689, § 815.

Here no distinction is made between issues of law, and issues of fact; and an action was triable at a term whether the issues of law or fact were made up before or during that term. The language used is, “by the times fixed for pleadings are or *should have been* made up.” The significance of this will be more apparent hereafter. In 1870 the legislature made this change:

“Actions shall be triable at the first term of the court after the issues therein, by the times fixed for pleading, are or should have been made up ten days before the term. When issues of law are made up, either before or during a term of court, but after the period for preparing the trial docket for such term, the clerk shall place such actions on the trial docket of that term.”—Laws 1870, p. 174, § 10.

At the same time was added this provision: “But no witnesses shall be subpoenaed in any case while the cause stands upon an issue of law.” (Laws 1870, p. 173, § 9.) By this a distinction was drawn between issues of law, and issues of fact. The former were triable at a term whether joined before or during the term, but the latter only when they were or ought to have been made up ten days before the term. Here the significance of the words heretofore noticed, “by the times fixed for pleadings are or should have been made up,” becomes more apparent. The “times fixed for pleadings,” are specified in the statute, or prescribed by order of the court. A plaintiff might give his adversary a few extra days in which to file his answer, and still not lose his right to insist upon a trial at the ensuing term, for the language is not limited to the actual making up of the issues, but refers also to the time

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fixed for making them up. In 1871 another change was made:

“Actions shall be triable at the first term of the court after the issues therein by the times fixed for the pleadings are or shall have been made up ten days before the term. When issues of law are made up either before or during a term of court, but after the period for preparing the trial docket of such term, the clerk shall place such actions on the trial docket of that term; and when any demurrer shall be adjudged to be frivolous, the cause shall stand for hearing or trial in like manner as if an issue of fact had been joined in the first instance; but the court may in its discretion fix specially the time when such cause shall stand for trial.”—Laws 1871, p. 278, § 5.

By this, two changes were made. The words “should have been made up,” were changed to “shall have been made up;” and authority given to enforce the trial of an issue of fact joined after the overruling of a demurrer adjudged to be frivolous, at the same term at which the action would have been triable if an issue of fact had been joined in the first instance. The change from “should have been” to “shall have been,” is, as applicable to this case, significant. As the sentence now reads, it seems to refer exclusively to the actual time of making up the issues. This construction may perhaps leave some words in the sentence destitute of much force, but only thus does it seem to us can any significance be given to the change of language. “Are,” and “shall have been,” belong to the indicative and not to the potential mood. They refer to the actual, and not to the possible, or permissible. In the case before us, the petition was not settled until the very term at which the trial was had. Up to that time there was a defect in the petition which the defendant had a right to have cured before being compelled to make any defense. No delay had been sought by frivolous demurrer, or motion. The objections he made to the petition were good, and sustained. The petition was defective. And yet within nine days after the petition was perfected, the defendant was forced to answer, subpoena his witnesses, and go to trial. This was against the spirit as

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well as the letter of the statute. We are led therefore to the conclusion, that there was substantial error in overruling the motion for a continuance, and in compelling the defendant to go to trial at that term; and for this error the judgment must be reversed, and the case remanded for a new trial. We understand that in a late case pending before the learned justice of the U. S. circuit court for this circuit, similar views were expressed in reference to the construction of the statute quoted of 1871.

It is hardly necessary to inquire into the alleged errors occurring on the trial. We may not anticipate what further proceeding will be had in this case, or the questions that will be raised.

All the Justices concurring.

S. E. BEACH, *Treas., &c.*, v. JOHN SHOENMAKER, *Trustee, &c.*

INJUNCTION, RESTRAINING TAXES; What Decree is Void. Where in an action brought by the owner of a tract of land to restrain the county treasurer from making sale of said tract for the taxes of a specified year, the only ground of relief stated in the petition is a *present use* for religious and charitable purposes, the only tax referred to is the *tax of the given year*, the only party defendant is the *county treasurer*, and the only prayer for relief the enjoining of the sale *for taxes of that year*, except the general prayer for such other and further relief as may be just and proper, a decree restraining defendant and his successors in office, not only from any proceedings to collect the tax of the given year, but also forever thereafter from attempting to collect any subsequent tax upon the said tract, is void as to such subsequent taxes, and may be vacated at any time, on motion by the general representatives of the county.

Error from Neosho District Court.

JOHN SHOENMAKER, Trustee for the Society sustaining the Catholic Mission, as plaintiff, prosecuted to final judgment an action against Beach, as treasurer of Neosho county. The character of the judgment or decree entered in such action.

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and the subsequent proceedings regarding the same, will fully appear from the opinion, *infra*. The motion to vacate such decree was overruled at the April Term 1875 of the district court. The *Board of Commissioners*, and *Chas. Coffin*, the successor of *Beach* as treasurer, appeal, and bring the record here for review.

Allen & Allen, for plaintiffs in error.

Hutchings & Denison, for defendant in error.

The opinion of the court was delivered by

BREWSTER, J.: In July 1871 the defendant obtained a perpetual injunction enjoining the plaintiff in error, as treasurer of Neosho county, and his successors in office, from selling certain lands belonging to said defendant in error for the taxes of 1868, or any taxes that might thereafter be assessed by the authority of the state, or any municipal corporation. No exception was taken to this judgment, and no proceedings had to reverse it. More than three years thereafter, the plaintiff in error, his successor in office, and the county commissioners, filed a motion to vacate and set aside such judgment as void either *in toto*, or as to so much as purported to restrain any sales for taxes for the years subsequent to 1868. This motion was overruled, and this ruling is the error alleged.

An examination of the petition discloses the fact, that in it there is no reference to any other taxes than those of 1868, no claim for relief based upon other than a present use of the property for religious, charitable, educational and benevolent purposes, and no prayer for relief beyond the taxes of 1868, except the general prayer "for such other and further relief in the premises as may be just and proper." In other words, while the only matter presented in the pleadings was the taxes of 1868, and the only party defendant the then acting treasurer of the county, the court by its decree attempted to bind the county, and all municipal authorities, forever; and as to all subsequent taxes. We think the decree was, as to everything except the taxes of 1868, void, and that it should have been

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set aside by the court upon the motion filed. The county treasurer is not the general representative of the county. He represents it only so far as the taxes which he is authorized to collect are concerned. He cannot bind it as to future taxes, nor can a decree as against him bind the county as to taxes other than those he is authorized to collect. As well attempt, when a sheriff holding an execution is sought, by injunction brought by the defendant in the execution, to be restrained in making a sale thereunder, and is the only party defendant, to add an injunction restraining the plaintiff in the action from ever thereafter bringing suit against the defendant, or attempting to collect any other judgment against the defendant. Such a decree would be void as to anything except the present execution. The sheriff is not the general representative of the plaintiff in the execution. Neither is the county treasurer the general representative of the county. A decree against him binds only the taxes he is authorized to collect, and cannot bind the county as to all future claims it may have for taxes. The judgment therefore, so far as it attempted to bind the county as to future taxes, was void, and "a void judgment may be vacated at any time on motion of a party, or any person affected thereby." Gen. Stat. p. 744, § 575.

The ruling of the district court will be reversed, and the case remanded for further proceedings in accordance with the views herein expressed.

All the Justices concurring.

WILLIAM KRONBERG v. P. P. ELDER *et. al.*

1. FOREIGN RECEIVER; *Appointment; Jurisdiction.* Where the title of the plaintiff, according to the petition, rests upon his appointment as receiver by a court of another state, and the jurisdiction of the state is specially denied, and no testimony is offered as to its jurisdiction, and no record produced of its proceedings, and the court is one whose jurisdiction is not determined by the constitution of the state, in which it exists, and there is nothing to show whether it was a court of general or limited jurisdiction, or in what manner or by what process it claimed to have acquired jurisdiction, or in what proceedings it made the appointment, *held*, that a finding of the district court against the plaintiff will not be reversed in this court.
2. CIVIL CODE—*Section 121 Construed.* Section 121 of the code of civil procedure, General Statutes, page 652, applies only to the courts and officers of this state.

Error from Franklin District Court.

DEFENDANTS *Elder* and *Walruff* had judgment against *Kronberg* for costs, at the August Term 1874, and *Kronberg* brings the case here on error for review.

Welsh & Meigs, for plaintiff.

Benson & Parkinson, for defendants.

The opinion of the court was delivered by

BREWER, J.: Action on two promissory notes, payable to the order of Maynard, Wells & Co. The allegations of the petition showing title in plaintiff, and right to sue, are—

“That on the 10th of July 1871, this plaintiff was duly appointed receiver of the notes, bills, accounts, property and effects of the firm of Maynard, Wells & Co., by the city court of Brooklyn, state of New York, and that afterward, on the — day of —, he gave the requisite bond and security as such receiver, and filed the same with the clerk of said court, properly approved, and entered upon the duties of said office as such receiver, and is now as such receiver in possession of the property, things in action, and effects of said firm, and of the notes here sued on. And the plaintiff further says, that he has been authorized and directed by said city court of

Brooklyn to sue upon the notes herein set forth and collect the same."

So much of the answer as is material to the questions to be considered is as follows:

"4.—The defendants further answering say, said city court of Brooklyn, under the constitution and laws of New York, had no jurisdiction to appoint the plaintiff receiver of said Maynard, Wells & Co., as alleged, and had no jurisdiction, power or authority to order this action to be brought in manner and form as alleged.

"5.—The defendants deny each and every allegation in said petition contained, not herein expressly admitted."

No testimony was offered as to any matter referred to in the extract from the petition. The case was tried by the court, without a jury, and a general finding made for defendants.

The counsel for defendants name several matters upon either of which they claim that the ruling of the district court must be affirmed. We shall content ourselves with noticing but a single one. There is nothing by which the jurisdiction of the city court of Brooklyn, to make the appointment of plaintiff as receiver, is shown, or from which it can be inferred. No record of the proceedings in that court was offered in evidence. The constitution of the state of New York discloses nothing as to the jurisdiction of that court, and no evidence was offered of its jurisdiction, or of the statutes of that state. That it appointed plaintiff receiver, and directed him to sue, may perhaps be taken as admitted by a failure to deny the same under oath. But that it had jurisdiction to do this, is not thus admitted. We cannot tell from the record whether that court was one of general or special jurisdiction, in what proceedings it assumed to appoint plaintiff a receiver, or by what process it claimed to have acquired jurisdiction. Surely the mere fact that some court somewhere assumed to appoint plaintiff a receiver, without any evidence of the jurisdiction of the court over the subject-matter or the parties, is not sufficient to warrant a judgment in his favor based upon such appointment. It may be said that under section 121 of

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the code, (Gen. Stat. p. 652,) the jurisdiction of the court is to be presumed until the contrary appears. While the language of this section may be broad enough to apply to courts of foreign states, yet the general construction and understanding has been, and properly, too, that it applies only to the courts and officers of this state. *M. M. College v. Newton*, 2 Handy 165; *Hollister v. Hollister*, 10 How. Pr. 539; *Ayers v. Co-vil*, 18 Barb. 260; *McLaughlin v. Nichols*, 13 Abb. 244; contra, *Halstead v. Black*, 17 Abb. 227.

Whether a receiver appointed by a foreign tribunal can in the absence of statutory authority maintain an action in the courts of this state, may perhaps be questionable. See sustaining directly or by implication the right, High on Receivers, § 47; *Rink v. St. John*, 29 Barb. 585; *Graydon v. Church*, 7 Mich. 50; *Hunt v. Columbian Ins. Co.*, 55 Maine, 297; *Taylor v. Columbian Ins. Co.*, 14 Allen, 355; *Hoyt v. Thompson*, 5 N. Y. 320; *Willets v. Wath*, 25 N. Y. 577; contra, Edwards on Receivers, p. 7; *Booth v. Clark*, 17 How. (U. S.) 327; *Ins. Co. v. Bennison*, 52 Mo. 17. In the case from U. S. supreme court, *supra*, Justice Wayne says, "Our industry has been tasked unsuccessfully to find a case in which a receiver has been permitted to sue in a foreign jurisdiction for the property of the debtor."

The judgment will be affirmed.

All the Justices concurring.

GEORGE F. BELL v. WM. J. PARKS.

CONTRACT; GOVERNMENT LANDS; *Sale of Improvements, and Possession; Consideration.* Where it appears that P. was an actual settler on a quarter-section of the Sac-and-Fox lands, and had made improvements thereon; that by treaty between the government and the Sac-and-Fox Indians these lands were subject to preëmption by actual settlers, and that P. and B. made a contract whereby, in consideration of \$1,500 cash and a note for \$500, P. executed a quitclaim deed of all his right, title and in-

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terest in said premises, and delivered the possession of the same with the improvements to B., *held*, that in the absence of any fraud or deception there was no failure of the consideration of the note, although the improvements were not worth over \$700—although the title to the land continued to remain in the government. [*Lapham v. Head*, 21-338; *Merriman v. Blanton*, 25-572.]

Error from Osage District Court.

At the November Term 1875 of the district court, *Parks* recovered judgment against *Bell* and another, on a promissory note dated 26th September, 1872. *Bell* appeals, and brings the case here on error.

Rogers & Sanford, for plaintiff in error.

The opinion of the court was delivered by

BREWER, J.: Action on a promissory note. Defense, failure of consideration, and counterclaim. A demurrer to the answer was sustained, and this is the alleged error. The allegations of the answer were, that Parks was residing on a quarter-section of the Sac-and-Fox lands; that shortly after the note and deed hereinafter referred to, by treaty between the United States and the Sac-and-Fox Indians these lands became subject to preëmption by actual settlers; that Parks quitclaimed all his right, title and interest in said lands to Bell for \$2,000, of which \$1,500 were paid in cash, and for the balance the note in controversy given; that the value of all improvements, including buildings, fences, breaking, growing crops, etc., on the lands, was not to exceed \$700, and that the remainder of said \$2,000 was given for the pretended title of Parks; that the title was and still is in the government of the United States, and that Parks had no other right, title or interest in said lands than such as he had acquired by settling thereon, and that he had no right to sell or dispose of any interest therein over and above the improvements.

Was the demurrer rightfully sustained? We think so. It is not claimed that there was any fraud or deception. Parks made no misrepresentations as to the extent of his title and

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interest. Bell knew exactly what he was buying. Their contract was based upon full knowledge by each. Parks had some interest in the premises, as the statute says he may lawfully contract to sell. He had such an interest in the improvements, and also had actual and lawful possession, and the exclusive right to purchase the land. This interest he sold and conveyed to Bell. Bell agreed to pay \$2,000 therefor; and whether he paid too much or too little is entirely immaterial. As there is no allegation to the contrary, it must be presumed that possession was delivered, and that he received therefore all that he bargained for. The contract was not illegal, nor against public policy. And he must abide by his contract. *Moore v. McIntosh*, 6 Kas. 39, is in point rather than *Vickroy v. Pratt*, 7 Kas. 238, or *Brewster v. Madden*, 15 Kas. 249.

The judgment will be affirmed.

All the Justices concurring.

GEORGE W. COCKERELL V. JOHN C. MOLL.

Costs—Right of Recovery; Statute Construed. Where C. brought an action in trespass before a justice of the peace against M. and recovered a judgment for \$37.50, and thereafter M. brings an action in trespass against C. before a justice of the peace and recovers a judgment for fifteen dollars, and both actions are duly appealed to the district court, and by consent are there consolidated and tried as one action, and a verdict rendered in favor of M. for less than five dollars, *held*, that the judgment would carry the entire costs of the consolidated action, and of the case of M. against C., notwithstanding the fact, that C. had in the action brought by M. and before the trial in the justice's court offered in writing to consent to a judgment in favor of M. in the action for five dollars.

Error from Pottawatomie District Court.

MOLL recovered a judgment against *Cockerell*, at the August Term 1875, for five cents, and for costs amounting to \$220. *Cockerell*, after verdict, and before judgment, moved that all of said costs except \$20.75 be taxed against *Moll*, which motion

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was denied, and *Cockerell* now brings the record here, alleging error in the overruling of such motion.

J. S. Walker, and *Hick & Reed*, for plaintiff in error.

James S. Merritt, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: Geo. W. Cockerell sued John C. Moll before a justice of the peace and recovered judgment for \$37.50. Moll appealed to the district court. Afterward Moll sued Cockerell before a justice of the peace, and recovered judgment for \$15. Cockerell appealed to the district court. Both actions were for trespass. In the justice's court, and before trial, Cockerell, in the case where he was defendant, offered to allow judgment to be taken against him for five dollars. The cases came on for trial in the district court, when upon the application, and by the agreement of both parties, the two cases were consolidated into one, which was proceeded with from that time under the title—"George W. Cockerell vs. John C. Moll, and John C. Moll vs. George W. Cockerell, consolidated." On the trial of the consolidated case, Moll recovered judgment for less than five dollars. The costs accruing after the offer to confess judgment were \$199.25. These costs accrued in the case of Moll v. Cockerell, and in the consolidated case. Ought they to be taxed against Moll? Clearly not. The statute applicable thereto reads:

"If the defendant, any time before trial, offers in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he do not accept such offer before the trial, and fails to recover in the action a sum equal to the offer, he cannot recover costs accrued after the offer, but costs must be adjudged against him." Gen. Stat., p. 799, § 117.

Neither the letter nor the spirit of this statute requires that these costs be taxed against Moll. Before the letter of the statute applies, there must be a final adjudication in the action in which the offer was made, that the plaintiff is not entitled to recover the amount offered. Here there has been no such adjudication. It has never yet been determined how much

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Moll ought to recover on the cause of action disclosed in his bill of particulars, or in the single action which he brought, and in which the offer was made. The only semblance of a determination was in the judgment before the justice, which awarded Moll three times the offer.

Neither does the spirit of the statute permit any such taxation. The idea of the law is, that the wrong doer, the party who causes the litigation, shall pay the expenses thereof. Hence, when a party recovers judgment, the ordinary rule is that he also recovers his costs, because the judgment is a determination that the party against whom it is rendered is the party in fault, and that through his wrong, whether of omission or commission, the litigation was made necessary. But it is clear that sometimes the litigation is due to the rapacity of the plaintiff, and his efforts to extort unjust amounts from the defendant, and it would be harsh and wrong to compel a defendant who was willing to do right to pay the costs of defending himself against these unjust and extortionate demands. Hence the provision of the statute quoted. It aims to compel a plaintiff who is making both just and unjust demands, and refusing to accept that which he ought, to bear the expense of litigating the unjust demand. It is therefore eminently fair and just. But in the case at bar there were two actions pending, in one of which Cockerell had recovered a judgment, and in the other Moll. Each party therefore was claimant in a separate action. Now Cockerell made no offer to settle both actions, and stop further litigation in them by a judgment in favor of Moll, for even a cent. He was willing to settle Moll's claim and action by a judgment for five dollars, reserving the right to prosecute his own claim and action. But he does not show that Moll was not entitled to more than five dollars on his claim, or that he was making any unjust claim in it. Because the verdict in Moll's favor in the consolidated actions was only five cents, *non constat* that Moll's claim in the separate action was not justly fifteen dollars, as determined by the justice. He does not show therefore that Moll was making any unjust or extortionate demand. On the other hand, as he

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brought the first suit before the justice, and as on a trial of the joint actions the verdict is against him, it would seem that he is the party responsible for the entire litigation, and ought justly to bear the whole expense of it.

The judgment will be affirmed.

All the Justices concurring.

JOHN P. JOHNSON v. E. H. CLARK.

1. **LAND BOUGHT BY PARTNERS, and Paid for by Partnership Funds; Title Taken in Name of One Partner; Equitable Title.** Where L. and B. were partners in 1857 in the transaction of a general real-estate business, and in June of that year they purchased real estate in the territory of Kansas for the firm, paid for it with firm money, and entered the same on the books of the firm as assets of the firm, and afterward paid the taxes thereon with firm money, and both parties treated the lands as partnership property, *held*, that although the legal title of the real estate was taken in the name of one of the partners only, the equitable title would be in both partners according to their respective interests. [*Marsh v. Davis*, 33-328.]
2. ——— **Adverse Title; Purchaser Charged with Notice.** Where partnership of the character above described is dissolved by the death of one of the partners, and the legal title of the real estate of the firm in which both partners have equal interests, is, at the death of the partner, in such deceased partner, and upon due proceedings had by administration the undivided-half of the real estate belonging to the intestate is purchased by V. at an administrator's sale, and such grantee also obtains the equitable interest of the surviving partner to the real estate by deed, and thereupon conveys said land by warranty deed to C., who takes immediate occupation of the premises, makes valuable and lasting improvements thereon, pays taxes assessed against the land, and has open, notorious, unequivocal, and exclusive possession of the real estate, under an apparent claim of ownership, *held*, that where the deeds to V. and C. have all been duly recorded, that a purchaser buying of the sole heir-at-law of the deceased partner the said real estate, is charged with notice of whatever claim the possessor asserts up to the date of purchase, whether such claim is legal or equitable; and *held*, that such purchaser, so buying of the heir-at-law of the deceased partner, obtains no title which can be asserted against C. in the possession of the premises. [*Sch. Dist. v. Taylor*, 19-237. 202; *Greer v. Higgins*, 20-421, 427; *Tucker v. Vandermark*, 21-263-268; *Brues v. McBe*, 23-382; *McNeil v. Jordan*, 28-16.]
3. **PROBATE COURT OF TERRITORY; Jurisdiction.** Under section 2 of ch. 2 of

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the laws of 1859, the probate court of any county in the territory of Kansas, in which were situate lands belonging to an intestate, had jurisdiction to grant letters of administration, upon proper application being made, on such estate of the intestate, although the deceased died out of the territory, and had at his death a mansion-house, or place of abode, in another state.

4. ——— *Administration of Estates, Not Invalid by Reason of Informalities.* The application for letters of administration under ch. 2 of the laws of 1859, sections 11 and 12, is sufficient, if in writing, stating the names of the heirs of the deceased, and showing that the applicant was sworn to the truth of the affidavit by the clerk of the court, although the affiant's name is written below the jurat, and although in other respects the application is informal.
5. ——— *Sale not Invalidated by Informalities.* The acceptance and approval of the bond of the person to whom letters of administration were granted on May 5th 1860, by the written indorsement thereon of the probate judge, when such bond was signed by the administrator and one surety only, and the surety at the time was the governor of Missouri, held not to invalidate a sale of real estate made by such administrator after the report of sale has been approved by the probate court and after the administrator has executed, acknowledged and delivered to the purchaser a deed therefor containing the statutory recitals as provided in section 141 of said act of 1859.
6. ——— *Application and Order to Sell Real Estate.* Where an application was made by a creditor on November 5th 1860, to the probate court, praying for an order for the sale of the real estate of an intestate, which was signed and sworn to by such creditor, and contained a statement of the debts of the estate in the aggregate, and set forth that the personal property belonging to the estate was insufficient to pay the expenses of the administration, that the debts could not be paid without selling the interest of the intestate in the real estate described in the petition, and of which application the administrator had verbal notice prior to the presentation of the same, *held*, that such application was sufficient to authorize notice to be given thereof, and to issue an order to sell real estate, on proof of publication of notice made to the court, and upon hearing of the testimony in the matter, and no objection being made thereto.
7. ——— *Error which does not Mislead, does not Invalidate.* The law required notice to be published, that unless objections be shown to the contrary on the first day of the *next term* of the court, after an application was made to sell real estate to pay the debts of an estate, that an order would be made for the sale. The application was made in November 1860. The *next term*, by the law commenced the first Monday of January 1861—January 7th. The notice stated that the objections must be shown on or before the January term of the court to be held on the

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1st day of January 1861. The hearing on the application was had at the regular January term, 1861. The notice was dated November 9th, 1860: *Held*: that the notice could not have misled, and the error did not invalidate the sale.

8. ——— *Recitals, made as Required by Statute, Prima Facie Evidence.* Under section 142, laws 1859, p. 29, an administrator's deed is evidence of the facts therein recited, and all the recitals required to be contained therein by the preceding section, (§ 141,) which are set forth in the deed, are *prima facie* true, without further proof.

Error from Brown District Court.

EXHIBITION, brought by *Johnson*, to recover possession of a quarter-section of land in Brown county. *Johnson* claimed to be the owner of the legal and equitable estate. *Clark* admitted possession, and set up title, both legal and equitable, in himself. All necessary facts, respecting the respective claims and titles of the parties, are stated in the opinion, *infra*. Findings and judgment in favor of defendant, at the August Term 1874 of the district court, and plaintiff *Johnson* brings the case here on error.

C. W. Johnson, and *Clough & Wheat*, for plaintiff.

Ira J. Lacock, and *W. W. Guthrie*, for defendant.

The opinion of the court was delivered by

HORTON, C. J.: On April 29th 1857, John H. Likins, and John W. Boyd, both of them residing in the city of St. Joseph, state of Missouri, entered into a partnership (with the firm-name of Likins & Boyd,) for the purpose of transacting a general real-estate business, such as selling real estate on commission, buying, selling and locating land-warrants, paying taxes, and such other transactions as usually pertain to the real-estate business. There were no written articles of partnership, and at the formation of the partnership there was no agreement that the firm should buy, sell, and speculate in lands on their own account. This partnership continued until the death of Mr. Likins, which occurred at St. Joseph, March 18th 1860, and the partnership books have

Statement of
facts.

been in the possession of Mr. Boyd ever since the death of Likins. In June 1857, the firm purchased several tracts of land, including the tract in controversy, in Brown county, Kansas, known as the Iowa Trust Lands, which were sold at a government trust sale, at Iowa Point, for the benefit of the Iowa Indians. These lands had been settled upon by squatters, each of whom had the right to purchase his quarter-section. The firm of Likins & Boyd had made arrangements before the sale with several of these squatters, or claimants, for a transfer of their lands, or the certificates therefor, at a price then agreed upon. Likins attended the sale at Iowa Point in behalf of the firm, and made the purchase from the claimants, they bidding off their land and then assigning the certificates of purchase in blank. These lands were bought for the firm, and paid for with the money of the firm, and they were entered on the books of the firm, under the heading "stock account," as assets of the firm. Sylvester B. Stines was the claimant of the quarter-section in controversy in this action, and the firm paid him \$452 therefor, and the same was entered in "stock account." This quarter-section of land was conveyed by letters patent of the United States, and in the individual name of John H. Likins, as well also as several other of the tracts purchased in said sale, none of which were patented in the name of Likins & Boyd, nor in the individual name of John W. Boyd; and the legal title of the quarter-section in controversy stood in the name John H. Likins at the time of his death. The patent bears date, October 1st 1858. Mr. Likins afterward bought some lands for the firm, and took deeds in the individual name of John W. Boyd; and Boyd bought some lands for the firm, and took the title in the name of John H. Likins, so that the principal part of the partnership land stood in the name of one or the other of the partners individually, though some stood in the name of Likins & Boyd. The firm treated these lands standing in the name of each partner individually as partnership stock, and the firm paid the taxes on them as such.

The patents for the Iowa trust lands were kept in the office

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of Likins & Boyd, and the defendant Clark produced them at the trial, the plaintiff never having had possession of them. John W. Boyd, the surviving partner, who resided in St. Joseph, Missouri, and was never a resident of Kansas, administered the partnership effects in the state of Missouri. He did not include the Kansas lands in said administration. His first settlement in the probate court of Buchanan county, Missouri, was filed July 3d 1861; the second February 12th 1864, and the third June 7th 1865, the last settlement showing balance due Boyd, administrator, of \$3,162.92. Rich Likins was the administrator of the individual effects of John H. Likins, in Missouri. Letters of administration on the estate of John H. Likins, were granted to John Stewart, of Doniphan county, Kansas, on May 5th 1860, by the probate court of said county. Thereafter certain proceedings were had in the said probate court, which resulted in the sale of all the right, title and interest to all lands which John H. Likins, deceased, had at the time of his death, in Brown, Doniphan, and Atchison counties, in the state of Kansas. The sale of the property in this controversy took place at the court-house door in Hiawatha, the county-seat of Brown county, March 5th 1861. The price paid was \$126. The land was bid off by John W. Boyd, for John M. Vimont, as trustee of Virginia M. Boyd. John M. Vimont was the son-in-law of John W. Boyd, and Virginia M. Boyd was a daughter of John W. Boyd, and at the time of said sale aged about thirteen years. At the April Term 1861, of said probate court, being the next term of the court after such sale, the report of the administrator of the sale of the real estate made March 5th 1861, was confirmed by the court, and on April 1st 1861 a deed from such administrator to John M. Vimont, trustee of Virginia M. Boyd, was executed for the real estate named in this case. The deed was acknowledged April 1st 1861, before E. M. Lee, register of deeds of Doniphan county, and was filed for record in Brown county on the 10th of said April, and duly recorded in book F, at pages 98 to 101 inclusive. On April 2d 1861, John W. Boyd conveyed by deed of warranty, duly acknowledged and delivered, to

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John M. Vimont, as trustee of Virginia M. Boyd, an undivided-half of the four tracts of land in Brown county purchased in the name of said Vimont as trustee, etc., at said administrator's sale, including the tract in suit. This deed was filed for record in Brown county, also, on said April 10th, and was duly recorded. On February 11th 1870, Virginia M. Boyd, being then of full age, acknowledged the receipt of \$1,200, from the defendant Edward H. Clark, for her use and benefit, and executed and delivered to said John M. Vimont, her trustee, a written power and direction, duly acknowledged, to convey the premises in controversy to said Clark. On the same day the said John M. Vimont, as such trustee, executed and delivered to said Clark a deed of warranty for said premises, in compliance with the written power and direction of the *cestui que trust*, and the sum of \$1,200 received to the use and benefit of said Virginia M. Boyd. Said two deeds were filed for record in Brown county, March 8th 1870, and duly recorded in vol. I, at pages 193 to 195, of the register's office. After the execution and delivery of said deeds, said Clark entered into possession of said premises, in the spring of 1870, and has ever since resided upon them. From the spring of 1870, up to the time this action was commenced, Clark had made improvement on the tract of land in suit, costing him about \$1,456, and of the value of about \$3,000, when the plaintiff John P. Johnson obtained his deed for the same. The defendant Clark and his grantors paid all the taxes on the land in suit ever since the death of John H. Likins.

At the death of John H. Likins, on March 18th 1860, his only surviving child, Myra H. Likins, became his sole heir-at-law. She was born in February, 1849. Myra's mother died in 1860, prior to the death of her father. On July 21st 1870, Myra H. Likins was married to James C. Mobley, at Hagers-town, Md., where she has resided since 1860. On February 6th 1872, Myra H. Mobley and husband executed to John P. Johnson, the plaintiff, a quitclaim deed for the property in suit, with a large amount of other real estate, for the consideration of \$1,500. This deed was duly acknowledged in Wash-

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ington county, Md., February 6th 1872, and was delivered to plaintiff John P. Johnson, and filed for record in Brown county on February 24th 1872, and duly recorded. The plaintiff was at the time of the purchase an extensive dealer and speculator in real estate, particularly in Doniphan and Brown counties, and well acquainted with the value of lands, and familiar with the investigation of titles, and before he made the purchase of the lands from Mrs. Mobley and husband, he procured and examined an abstract of the title of the property, and also wrote to Washington and learned that the land was patented to John H. Likins. He made the purchase without viewing the lands, and without knowing what improvements were on them; but the buying of unimproved lands without seeing them was not an unusual transaction with him.

The same day on which the plaintiff recorded his deed in Brown county, February 24th 1872, he commenced his action in the district court of that county against the defendant E. H. Clark for the recovery of the real property in dispute in this cause. The case was referred to David Martin, Esq., to report the facts, and thereon the court gave judgment for the defendant. Proper exceptions were taken, and the cause is in this court for review at the instance of the plaintiff.

We have carefully read the voluminous record in the case, and also considered the arguments of the learned counsel on either side, as well as the many authorities cited; and while we cannot agree with some of the conclusions of law found by the district court, we are satisfied that upon the facts found the judgment of the court below was correct, and should be affirmed. Our examination has led us to the conclusion, that at the time of the death of John H. Likins, John W. Boyd had an equitable interest in the land, the legal title of which was in John H. Likins, of at least one undivided-half of the same, and that such equitable interest was duly conveyed on April 2d 1861 by John W. Boyd, by warranty deed to John M. Vimont, as trustee for Virginia M. Boyd, and on February 11th 1870 duly

1. Lands of part-
ners; equitable
title.

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conveyed by deed from the trustee, joined in by the *cestui que trust*, to the defendant Clark. The real estate having been purchased by partners, with partnership funds, and on joint account, and having been placed upon the books of the firm as partnership property, and so treated as assets of the firm to the dissolution of the partnership by the death of Likins, and Boyd having contributed his full share of the purchase-money, although the title was taken in Likins' name, Boyd had an equal equitable interest therein, and this interest was of such a character as could be enforced in a proper proceeding in the courts. Clark, the defendant, took immediate possession after obtaining the deeds, made improvements, paid taxes, and was the exclusive occupant of the premises. The records of Brown county, at the date of the plaintiff's purchase, showed a deed to defendant Clark from Vimont, who as trustee derived title to the *undivided-half* of the property by the probate proceedings in the matter of the estate of John H. Likins, deceased, and also as such trustee derived title to another *undivided-half* of said premises from John W. Boyd. Of all these deeds, Johnson had full notice. It is well established, that open, notorious, unequivocal and exclusive pos-

2. Adverse title;
notice to purchaser.

session of real estate under an apparent claim of ownership, is notice to the world of whatever claim the possessor asserts, whether such claim is legal or equitable in its nature. Under these circumstances, it was incumbent upon the plaintiff to inquire. Inquiry would inevitably have led him to knowledge of Clark's possession. This was notorious. Having ascertained the fact of Clark's possession, he was bound to pursue his inquiry until he ascertained the nature of the possessor's claim. Having these means of knowledge at his command, and failing to use them, the law treats the plaintiff precisely as though he had used them and learned all that might have been ascertained therefrom. And therefore the plaintiff, upon the facts in the case, is held by the law to have had, at the date of his purchase, full knowledge of Boyd's equitable interest in the land at the death of Likins,

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and to all of which interest Clark succeeded by his purchase from the grantee of Boyd.

The plaintiff seems to have been unfortunate in the means adopted by him to understand the condition of the property before buying. He took the trouble of writing to Washington to learn about the patent, when he could have seen it by calling upon Clark, who produced it on the trial. He obtained abstracts of title, but notwithstanding the conveyances of undivided parts to Vimont, the grantor of Clark, he made no inquiry of either Clark or Boyd, and finally paid the purchase-money without viewing the land, and without knowing what improvements were on them. An interview with Clark, on the premises, would have enabled the plaintiff to have been fully acquainted with Clark's claim, and his rights to the premises, as also the valuable improvements on the place. There is nothing in the record by which Clark is estopped from relying upon his possession, as notice of so much of his title as was derived through the deed of John W. Boyd.

As stated above, an investigation of the proceedings of the probate court shows, that the deed of the administrator of such estate, of April 1st 1860, conveyed title of an undivided-half of the premises sued for to John H. Vimont, as trustee, etc. The proceedings in said court were sufficiently regular to transfer the interest sold. The appraisement was for an undivided-half of the premises; the certificate of the appraisement was referred to in the administrator's report of the sale, was returned with the report of sale to the court, and was copied in full in the deed. On the day after the administrator's deed was executed, the deed of John W. Boyd to the grantee of the administrator's deed, was also delivered, and this conveyed to such grantee another undivided-half of the premises. The administrator's deed conveyed all the right, title and interest of John H. Likins, deceased, to Vimont, as trustee. At the time, this interest was assumed to be one undivided-half. The appraisers acted upon this understanding, and the purchaser so bought. The plaintiff in error presents

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many supposed defects to the proceedings in the probate court, and claims that such proceedings were not sufficient to divest the title conveyed by the administrator from Myra H. Mobley, *nee* Likins. Premising that, as a matter of public policy, the importance of upholding sales made by guardians, and personal representatives, is very great, whenever it can be done under the law, as the proceedings had in the probate court do not appear to be void, the sale of the real estate based thereon will be sustained.

Under section 2, page 10, laws of 1859, the probate court of Doniphan county had jurisdiction to grant administration on the estate of John H. Likins, although his mansion-house, or place of abode, was in St. Joseph, Mo., at the time of his death, as he possessed lands in said county. Said section substantially prescribed that if the intestate died out of the territory, having no mansion-house, place of abode, or lands in the territory, letters could be granted in any county; but if the intestate died under like circumstances, except that he was possessed of lands in the territory, letters could rightfully be granted in the county in which the land, or a part thereof, was situated.

The application for the letters being in writing, and stating the name of the only heir of the deceased, and purporting to have been sworn to before the clerk of the court by the applicant, although blended with the oath of office as administrator, was sufficient to authorize the granting of letters therein. The signing of the probate judge's name above that of the clerk, did not render the affidavit void; nor was the same invalidated by the name of the applicant being written below the jurat. These matters were mere informalities. The fact that the letters were signed, "A. A. Dougherty, Judge, by E. M. Lee, Clerk," did not render them invalid, although sections 21 to 25, laws of 1859, pp. 12, 13, required the *testimonium* clause to be signed only with the signature of the clerk. Neither is the omission to set forth the seal to the letters in the probate record thereof,

3. Probate court
of territory;
jurisdiction.

4. Informalities
do not vitiate
letters of ad-
ministration.

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any such act as to make them void. The letters purport, in the attestation part, to have been sealed; and in the absence of the originals, and the years intervening since the record was made, we cannot presume that the letters were not duly issued.

The court having the jurisdiction, to grant letters of administration on the estate of the deceased, and an application having been filed to invoke its authority, and letters having been duly issued thereon, the court had the right to pass upon the sufficiency of the bond of the administrator, conditioned for a proper performance of his administration; and after such bond was accepted, and the same had been approved as follows:—"I approve of the sufficiency of the penalty and security of the within bond.—A. A. Dougherty, Probate Judge"—by written indorsement thereon by the probate judge, a sale of real estate made by such administrator, under the order of the court, which has been approved by the court, and a deed issued to the purchaser thereon, will not be held void because said bond was only signed by the administrator, and by one surety, and it is afterwards shown by parol evidence, in a collateral proceeding, that such surety, at the time, was a non-resident of the territory of Kansas, and the governor of Missouri. The numerous authorities cited by the counsel of the plaintiff to establish a contrary rule, do not apply on this point, as in the cases so referred to the bonds were required as a condition precedent to the sales of the real estate, and were not bonds given by administrators upon qualifying for office, as provided for in §§ 15 and 16, laws 1859, page 12.

The application made by John W. Boyd, on November 5th 1860, to the probate court, praying for a sale of the real estate of John H. Likins, deceased, gave jurisdiction to the court to make the subsequent orders allowed; and the administrator's sale was not void for any omissions therein. The administrator did not make the application, which Boyd wanted made. The application was made by a creditor, whose demand for \$1,604.05 had been

6. Informalities
do not vitiate
sale.

7. Error, which
does not mis-
lead, does not
invalidate.

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proved up, and assigned to the fifth class of claims against the estate. It was sworn to. Notice thereof was given verbally to the administrator before the application was made, and no objection was taken to it at the hearing. The objection is also made that the notice required by section 181, laws of 1859, page 38, of the hearing of the application to sell real estate, was not given, and that therefore the sale was void. The point made was, that the notice, as published, fixed the *first day* of January 1861 as the day on which the application would be heard. The order of publication was made in November 1860, and the notice dated the 9th of that month. The next term after November, at which the application must be heard, commenced on January 7th 1861, and not on January 1st, of that year. The law then in force required the January term of the court to commence on the 1st Monday of January; and as the notice ordered all persons interested to make their objections to the application for sale of the real estate "on or before the January term to be held on the 1st day of January 1861," and as no orders were made as to said application, under said notice, until the said January term 1861, the mistake as to the time the court was to convene at its January term, after the publication of the notice, could not have misled any one, and did not invalidate the proceedings. *Mowry v. Sanborn*, Court of Appeals of N. Y.; vol. 4, O. L. J. 394.

Various other objections were also made to the proceedings had in the probate court, but as in our view such defects were mere irregularities, in no way affecting the jurisdiction of the court, we think it unnecessary to mention them in detail, as we have in this opinion passed upon the most important exceptions submitted. Section 141, laws of 1859, page 29, provided, "that if the report of the administrator of the proceedings of a sale of real estate made by him be approved by the probate court, such sale shall be valid, and the administrator shall execute and deliver to the purchaser a deed reciting the order of sale; and the court by which it was made, the certificate of appraisement, the advertisement, the time and place of sale; the report of the proceedings, and

s. Recitals, when evidence.

the consideration, and conveying to the purchaser all the right, title and interest which the deceased had in the same." In this case the sale was approved by the court, and the recitals of the administrator's deed on file at the date of the purchase by Johnson fully met the requirements of the statute. Section 142 made the deed evidence of the facts therein recited; and the matters so set forth in accordance with section 141, in the deed, are *prima facie* true without further proof.

The judgment must be affirmed.

All the Justices concurring.

LEAVENWORTH, LAWRENCE & GALVESTON ELD. CO. V. COMM'RS
OF DOUGLAS COUNTY.

1. **MOTION—Part of the Record.** A motion to require a pleading to be made more definite and certain, is a part of the record, and need not be incorporated in a bill of exceptions.
2. **PETITION; Fraud; Facts must be Stated.** The rule is, that when fraud is charged and made the basis of recovery, a mere general allegation of fraud is insufficient. The facts showing the fraud must be stated. [*Young v. Whittenhall*, 15-579.]
3. **ACTS OF PUBLIC OFFICERS—Obligatory, and Discretionary—Motive, and Intent.** It is generally true, that when an act is obligatory upon a public officer it is immaterial with what motives he does the act, although thereby an obligation is cast upon the public; and the public is bound, although money was paid to the officer to induce him to act; and no cause of action is stated on behalf of the public, and against the party in whose behalf the act is done, by an allegation that the act was done in pursuance of a fraudulent and corrupt combination and conspiracy between such party and the officer. And it is also generally true, that when the doing of an act of like effect upon the public is not obligatory, but intrusted to the discretion of the officer, the public is not bound if the act was induced by the corruption of the officer, and may recover of the party so inducing the act.
4. ——— **Allegations of Fraud; Specific Statements of Facts Required.** Where the allegation in a petition in such an action is only in general

terms, that there was a fraudulent and corrupt combination and conspiracy between such party and the officer, and that the act was done in pursuance of such combination and conspiracy, the party has a right, upon motion, to have the petition made definite and specific by a statement of the facts showing the terms, nature and extent of the conspiracy, and is not compelled to go to trial upon the mere general allegation that there was a combination and conspiracy.

5. **MUNICIPAL-AID BONDS, *Valid*.** Whatever may be individual opinions, it is at the present the settled policy of this state to tolerate the issue by municipalities of bonds in aid of railroads, and the settled law that bonds so issued, if issued in pursuance of express authority and in accordance with the prescribed forms, are valid. [*Comm'rs v. Miller*, 7-479, 517; *State, ex rel., v. Comm'rs Nemaha Co.*, 7-542; *Morris v. Comm'rs*, 7-576; post, 184.]
6. ——— ***Express Authority Required to Issue.*** While the power to issue railroad-aid bonds is not one of the ordinary powers of a county, requires express authority, and must be exercised in conformity to prescribed forms, it is not penal in its nature, and the validity of its exercise does not demand all the strictness of the ancient rules of the criminal law. [*Lewis v. Comm'rs*, 12-186.]
7. ——— ***Waiver of Conditions; Payment of Interest; Ratification.*** While it is true, that authority to the commissioners of a county to issue railroad-aid bonds upon compliance with certain specified conditions carries with it no authority to waive any of the conditions, yet, when there is a failure on the part of the railroad company to comply with one of the conditions in some minor respect, and notwithstanding the failure the commissioners acting in good faith issue the bonds of the county, and the failure is in a matter which is of public knowledge, a failure by the county to make any objection, or take any proceedings, and payment for a series of years of the interest on the bonds, will work a ratification of the action of the commissioners and prevent the county from thereafter recovering of the railroad company the bonds, or their value.
8. **PLEADING; *General Allegations; Motion to make Definite and Certain.*** On 6th February 1867, the qualified electors of Douglas county duly authorized the commissioners to subscribe to the stock of the Leavenworth, Lawrence & Galveston Railroad Company, and issue the bonds of the county in payment thereof. Several conditions were prescribed in the authority thus granted, among them, one that the company should complete and equip twenty-four miles of railroad track before the 1st of January 1868. All the conditions were complied with except that the twenty-four miles were not completed by January 1st 1868, nor for some time thereafter, though the exact time is not disclosed. In July 1869, the county commissioners issued the bonds, and received the stock. In January 1870, the term of office of the then county commissioners expired. The coupons on these bonds falling due in January 1870, and January 1871, were duly paid. No action or proceedings was had by the

Statement, and Opinion.

county in any form to question the validity of the action of the commissioners in issuing the bonds, until August 1871, when this action was brought against the railroad company to recover the value of the bonds. *Held*, That if the commissioners acted in good faith, honestly, and in obedience to their unbiased judgment as to the best interests of the county, the action cannot be maintained; and if it be claimed that they fraudulently and corruptly combined and conspired with the railroad company to defraud the county, and the issue of the bonds was in pursuance of such combination and conspiracy, the petition should state the facts showing the terms, nature and extent of the combination and conspiracy, and not simply allege in general terms that there was such a combination and conspiracy; and that as the latter were the only allegations, a motion to make the petition more definite and certain ought to have been sustained. [*Ins. Co. v. Duffy*, 2-847; *Meagher v. Morgan* 3-872; *Smith v. Burnes*, 8-197; *R. R. v. Fox*, 31-599; *McKee v. Eaton*, 26-231.]

2. *FINDINGS, IN WRITING, Should be Made, and Recorded.* In every case tried by the court there should be a finding in writing, upon which to predicate and rest the judgment, and omission of such finding is error. But doubted, whether such error is fatal to the judgment, or sufficient to compel a reversal. [*Briggs v. Eggen*, 17-589; *R. R. v. Ferry*, 28-686; *Schermerhorn v. Mahaffie*, 34-108; *Clay v. Hildebrand*, 34-708.]

Error from Douglas District Court.

ACTION by the *Board of Commissioners of Douglas County*, to recover from the *Railroad Company*, the par value of certain bonds issued by said county to said company in payment of subscription to the stock of the company, to recover back certain interest-money paid on said bonds, and to compel the surrender for cancellation of certain bonds not negotiated. Trial at the May Term 1875. Judgment in favor of the plaintiff for \$489,589.43, and costs. The *Railroad Company* brings the case here on error. The opinion, *infra*, contains a full statement of the facts and proceedings. (No briefs have come to the hands of the reporter.)

S. O. Thacher, and *Wallace Pratt*, for plaintiff in error.

S. A. Riggs, *W. W. Nevison*, and *Nelson Cobb*, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This was an action to recover a money judgment for the value of certain bonds and coupons claimed to

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have been wrongfully issued to the plaintiff in error, defendant below. The case was tried by the court without a jury, and judgment rendered in favor of the defendant in error, for \$489,589.48, to reverse which this proceeding in error is brought. The testimony was not preserved, so that no question of fact is presented for our consideration. No bill of exceptions, or case-made, was signed, so that the case stands before us with only those matters which of themselves go upon the record. Several errors are alleged—first, in denying a motion to make the petition certain and specific; second, error in rendering a judgment without any finding, general or special, upon which to predicate it; third, the petition stated no cause of action; fourth, the statute of limitations barred all right to relief; fifth, the amount of the judgment was excessive. The petition was in these words:

(*Court, and Title.*) The petition of the plaintiff for cause of action shows to the court: First, that the defendant is a corporation created by the laws of this state; second, that pursuant to a resolution passed by the "Board of County Commissioners of the County of Douglas," on the 15th of January 1867, ordering a special election therefor, the said board of county commissioners submitted to the voters of said county of Douglas, the question of issuing bonds to said defendant, in words and figures as follows, to-wit:

"SPECIAL ELECTION!—To the Qualified Electors of Douglas County.—You are hereby notified that a special election will be held at the several voting precincts in said county, on Wednesday, February 6th, 1867, to vote on the following questions, to-wit:

"1st.—Shall the county of Douglas subscribe Three Hundred Thousand Dollars in full-paid stock to the capital stock of the Leavenworth, Lawrence & Galveston Railroad Company, and issue the bonds of the county therefor, in bonds payable thirty years after date, bearing interest at the rate of seven per cent. per annum from date of delivery, to be issued to said company when twenty-four miles of said railroad track shall be completed and in full operation from Lawrence, Douglas county, via Baldwin City: provided, that no greater amount of bonds shall be issued than the amount of stock issued by said railroad company to the county of Douglas.

"2d.—The condition of the above is with the express understanding and agreement that the said company shall relinquish all claim to the bonds for subscription of stock heretofore voted to said company, to-wit, the 12th of September 1865.

"Ballots to be printed or written: Shall the county of Douglas subscribe the sum of three hundred thousand dollars to the capital stock of the Leavenworth, Lawrence & Galveston Railroad Company, and issue the bonds of the county therefor upon the following conditions, to-wit, said bonds payable thirty years after date, bearing interest at the rate of seven per cent.

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per annum from delivery, to be issued to said railroad company upon completion and full operation of twenty-four miles of railroad track from Lawrence, Douglas county, via Baldwin City; provided, that no greater amount of bonds shall be issued than the amount of stock issued by said company to the county of Douglas; and further provided, that said company shall complete and equip twenty-four miles of said railroad track before the 1st of January 1868; and also further provided, that the condition of the above is with the express understanding and agreement that the said company shall relinquish all claim for the bonds heretofore voted to the company, to-wit, on the 12th day of September 1865. 'Yes,' or 'No.' Polls will be opened at nine o'clock A. M. and close at seven P. M.

"By order of the Board of Commissioners of Douglas county."

Third, that afterward, to-wit, on the 6th of February 1867, a vote was taken in said county pursuant to said submission, at which election a majority of the persons voting voted in the affirmative, but that up to the 1st of January 1868, and for some time thereafter, twenty-four miles of said railroad track was not completed or equipped, or in full operation, as in said ballots provided.

Fourth, that afterward, to-wit, on or about the 12th of May 1869, the defendant fraudulently and corruptly induced Geo. Cutter, Geo. W. E. Griffith, and Aaron E. Platts, who then constituted the "Board of County Commissioners of the County of Douglas," and conspired with them, and said commissioners corruptly conspired with the defendant in fraud, of the rights of said county of Douglas, under color and pretended authority of said submission and vote, to issue to the defendant bonds of said county to the amount of three hundred thousand dollars, without the issuing to or the acquisition by said county of any stock of defendant, and without any consideration other than the nominal consideration of one dollar; and for that purpose the said George Cutter, George W. E. Griffith and Aaron E. Platts, and the said defendant, by Wm. Sturges its president, and H. J. Canniff its secretary, executed and mutually delivered an instrument in writing, of which the following is a copy, to-wit:

"This agreement, made and entered into this twelfth day of May 1869, by and between the Leavenworth, Lawrence & Galveston Railroad Company, as party of the first part, and the Board of County Commissioners of Douglas county, state of Kansas, as party of the second part, witnesseth: that for and in consideration of the sum of one dollar, and the further consideration of the surrender to the party of the first part of three thousand shares of stock in the Leavenworth, Lawrence & Galveston Railroad Company heretofore subscribed by the party of the second part on the completion of said railroad twenty-five miles south of the city of Ottawa, in Franklin county in said state, the said party of the first part hereby agrees and binds itself that the city of Lawrence, in said county of Douglas, shall be its present terminal point, and shall forever remain a point on its main line; and second, that the party of the first part further obligates itself that

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it shall and will occupy suitable depot-grounds already provided or to be provided by said city of Lawrence, and erect suitable buildings thereon for the transaction of the business of said railroad company.

"And the party of the first part further obligates itself that the rates of transportation for freight and passengers to and from the city of Lawrence, over said road, shall be as low per mile as the rates of transportation to or from the city of Leavenworth, or to or from any other city or station within the state of Kansas, on the line of said road.

"And in consideration of the above covenants and agreements to be kept and performed by the said party of the first part, the said party of the second part hereby promises and agrees that as soon as the iron sufficient to build twenty-five miles of railroad shall be delivered in the city of Ottawa, Franklin county, Kansas, the said party of the second part shall and will deliver to the party of the first part, or its duly-authorized agent, the three hundred one-thousand-dollar bonds, with the coupons attached, now in possession of the Treasurer of Douglas county aforesaid, in accordance with the conditions of a bond of even date herewith, entered into by Shelton Sturges, Buckingham Sturges, Frank Sturges and Albert Sturges, to the said party of the second part. And the said party of the second part further agrees, that they will surrender the three thousand shares of railroad stock heretofore subscribed by the party of the second part in the said railroad company, in accordance with the provisions hereinbefore mentioned.

"In witness whereof, we have hereunto subscribed our names, and affixed our official seals, on the day and year first above mentioned.

"Attest: H. J. CANNIFF, *Secretary.*

[SEAL.]

"WM. STURGES, *Pres.* [SEAL.]

GEO. CUTTER,
G. W. E. GRIFFITH,
AARON E. PLATT,

County Commissioners of Douglas Co., Kansas."

That at the same time, and for the same purpose, and as a part of the same transaction, the said defendant made and delivered to said commissioners certificates of stock in said company for the amount of \$800,000, and the said commissioners, for the purpose aforesaid, thereupon immediately signed, released and re-delivered said certificates of stock to the defendant, and the defendant then and there for the same purpose received such release and transfer, well knowing that the same was unlawful, and was a fraud upon the rights of said county; that no subscription for stock of the defendant was ever made by the board of county commissioners of said county, as the plaintiff is informed and believes, and plaintiff alleges that if any subscription *was* ever made it was made pursuant to said fraudulent and corrupt conspiracy, and was void.

Fifth, that afterward, on or about the 9th of July 1869, in furtherance of the aforesaid fraudulent and corrupt purpose, the said commissioners, George Cutter, George W. E. Griffith and Aaron E. Platts, executed and delivered to the defendant three hundred bonds of the said county of Douglas, of the

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amount of one thousand dollars each, dated January 1st 1868, and payable thirty years after date, with interest at seven per cent. per annum, payable annually, and with coupons thereto attached, for said interest, the coupons for the first year's interest falling due on the first day of January 1869, and the others falling due on the first day of January of each year thereafter until the principal would become due, the coupons falling due each year being for the amount of the previous year's interest on the principal of said bonds; that the said bonds and coupons were made and delivered by the said George Cutter, George W. E. Griffith and Aaron E. Platts, and received by the defendant without an adequate or valid consideration, or any consideration other than the nominal consideration of one dollar as aforesaid; and that said bonds bore date, and by their terms drew interest from a date long anterior to the issuing thereof and long anterior to the time any subscription was made to the stock (if any ever was made), and said bonds were ante-dated by said commissioners, and received by said defendant so ante-dated, knowingly, with the fraudulent intent that the said principal and interest should become due and be collectible earlier than they would be if the bonds were dated at the time they were made out, or at the time such subscription was made or to be made.

Sixth, that the coupons on said bonds, calling for the interest thereon for the years 1868, 1869, and 1870, respectively, were, at the time they purported to become due, presented by the defendant to the treasurer of said county of Douglas, and the said interest paid by said treasurer to said defendant, amounting in the aggregate to sixty-three thousand dollars.

Seventh, that said bonds and coupons are in form negotiable, and the same or a portion thereof have been negotiated by said defendant, and transferred to third parties out of this state, but of what portion has been negotiated plaintiff is ignorant.

Wherefore plaintiff prays the judgment and decree of this court, that all said bonds and coupons under the control of the defendant be brought into court and delivered to the plaintiff, and that the plaintiff recover in money the amount of all the aforesaid bonds and coupons not so brought into court and delivered to plaintiff, and the amount of money so paid as aforesaid by the plaintiff or the treasurer of said county of Douglas for interest on said bonds, with interest thereon from the date of such payment, and for such other and further relief

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as may be equitable and just, and the circumstances of the case may require, with costs of this action.

JOHN HUTCHINGS,

County Attorney for the County of Douglas.

A motion was thereupon filed by the defendant, to "require the plaintiffs to make their petition more specific and certain, in this, to-wit: That the plaintiff state the facts showing the fraudulent conspiracy of the defendant with George Cutter, G. W. E. Griffith and Aaron E. Platts, with relation to the bonds in the petition set forth; that the plaintiffs show or state the facts showing that the defendant 'fraudulently and corruptly' induced, and the means whereby they induced, the said Cutter, Griffith and Platts to deliver said bonds in the petition mentioned to this defendant." This motion was overruled, and this is the first alleged error. As a preliminary objection to this, it is insisted that the order overruling the motion does not disclose any particular part of the petition to which the motion was directed; that the motion does not become a part of the record until brought on by bill of exceptions, or case-made; and that therefore we are not advised as to its extent, and must presume in favor of the ruling of the district court, that it was directed to such portions of the petition as are full, specific and certain. In other words, if any portion of the petition is not open to objection in this respect, and the motion only ran to such portion, the court properly overruled it. Error is not presumed; it must be shown. It is not shown that the motion ran to other than the unobjectionable portion; therefore it is not shown that the court erred. We do not consider this objection well taken. It would seem from the order, that the motion ran to the entire petition. It reads:

"And now this cause came on to be heard, on the motion of the defendant to make the allegations of the petition more specific; and the parties appearing by their respective attorneys of record, the court, on consideration of said motion, doth overrule said motion—to which ruling of the court the defendant excepted."

"The allegations of the petition," seems to imply all the

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allegations, and not simply a portion of them. But the motion itself is a part of the record. While it is true, that the authorities cited by defendant in error, or some of them at least, assert that the motion does not become a part of the record unless brought on by a bill of exceptions, ^{1. Motion is part of record.} (State v. Marshall, 36 Mo. 400; Cornell v. Davis, 16 Wis. 686; Thompson v. Backenstoiles, 1 Oregon, 17,) yet such has not been, we believe, the general understanding of the profession, or the general practice and ruling in the courts of this state. In *McCullagh v. Allen*, 10 Kas. 150, we held that a motion for a new trial becomes, when filed, a part of the record, and need not be incorporated in a bill of exceptions. And this was but a recognition of the general practice already prevailing in the state. True, the motion is not generally entered upon the journal. Neither are the pleadings. But the judgment based upon the pleadings, and the order made upon the motion, must be. Gen. Stat., 707, § 414; page 769, § 705. And can there be any doubt that the pleadings are part of the record? Again, the law of 1862 required a final record in every case, unless waived; and the laws of 1868 provide for one when ordered by the court. (Comp. Laws of 1862, p. 189, § 400; Gen. Stat., p. 707, § 415.) This "record shall be made up from the petition, the process, return, the pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court. * * * Evidence must not be recorded." (Gen. Stat., p. 707, § 417.) The words, "all material acts and proceedings of the court," are broad enough to include motions to reform the pleadings. Indeed, it may be stated as a general proposition that the spirit and tendency of our code of procedure, civil and criminal, is to get onto, and make a part of the record, as much of the proceedings as possible. Notice the provisions as to instructions, and the number of journals and dockets. We conclude then, that the motion, and the ruling of the court thereon, are properly before us for consideration.

Ought it to have been sustained? And if so, was there substantial error in overruling it? The substance of this petition

is, that the company obtained the bonds of the county when it ought not to have received them, and ought therefore to return them, or their value. It charges that the company obtained these bonds by means of a fraudulent and corrupt combination and conspiracy between it and the gentlemen at that time representing the county as its board of commissioners. Now when this general charge of combination, fraud, and conspiracy is made, the company comes in and asks that the facts may be stated showing this fraud and wrong. Was money paid to these commissioners? and if so, how much? Were a portion of these bonds given to them? and if so, how large a portion? Were land or other property transferred to them? and if so, what amounts, and when? Were political inducements, or promises of office, or other reward, held out to them? In short, what was this conspiracy, its character, extent, and terms? It is a general proposition, that when fraud is charged, and made the basis of recovery, a mere general allegation of fraud is insufficient; the facts showing the fraud must be stated. In *Capuro v. Builders Ins. Co.*, 39 Cal. 124, the rule is thus declared: "The rule undoubtedly is, that when a party relies upon fraud, either to support his cause of action, or in defense, he must set up the facts which constitute the fraud. It follows, as a necessary consequence of that proposition, that he can prove only those facts which he has set up." See also, *Kinder v. Macy*, 7 Cal. 206; *Simple v. Hagan*, 27 Cal. 166; *Kent v. Snyder*, 30 Cal. 666; *Mingay v. Knight*, 8 Hare, 497; *U. S. v. Crafton*, 4 Cent. Law Journal, 442. Mr. Justice McLean, in *Moore v. Green*, 19 Howard, 69-72, says: "When fraud is alleged as a ground to set aside a title, the statute does not begin to run until the fraud is discovered, and this is the ground on which the complainant asks relief. But in such a case, the bill must be specific in stating the facts and circumstances which constitute the fraud; and also as to the time it was discovered. This is necessary, to enable the defendants to meet the fraud, and the alleged time of discovery." In *Williams v. First Pres. Society*, 1 Ohio St. 478-505, it is held, "Where the injury complained of is the result of actual com-

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bination and fraud, they must be averred, not in a mere general manner, but with the same precision that is required in other averments of facts." In this very case the statute of limitations is relied on as a bar, and it is claimed the transactions, whatever they were, took place more than two years before the commencement of this action. The quick and ready reply of the learned counsel for the county is, that the statute commences to run only from the time of the discovery of the fraud. The reply is correct, but instantly suggests the further query—*what* fraud? There can be but one answer, and that is, the fraudulent combination and conspiracy which it is alleged existed, but the nature and terms of which are not disclosed. To obviate this objection counsel say, and we quote from their brief:

"Intent is a pleadable fact, and it is not necessary, nor is it in general proper, to set out the evidence by which that intent is to be proved. And the same is true of intent to defraud. It should be pleaded as a fact; and the evidence to prove it, should not in general be pleaded. The defendant had no right to a motion to require us to show what evidence we proposed to give to sustain the petition. If on the trial we offered evidence of facts which should have been pleaded, the defendant had his right to object; and if his objection was overruled, to except, and bring that exception here, which he has not done. Besides, the facts which we clearly stated, if true, were conclusive evidence of a fraudulent intent and a conspiracy to defraud the county. That the issuing by county officers of county bonds without authority, and without other than a nominal consideration, and the receiving of them by one knowing the facts, and seeking to make them available, is a fraud by both against the county, is an irresistible conclusion of law; and as they are presumed to know the law, the presumption is absolute that they intended to defraud. And as one could not issue and deliver, and the other receive, without mutual agreement, they must have conspired to commit the fraud. Therefore, the proof of the agreement set up, and that it was carried into effect, was sufficient evidence of all the fraud and collusion we charged, and all that was specially set forth in the petition."

And again:

"We call the attention to the rule of pleading which we think governs this case. Where conspiracy is alleged, and the pur-

pose to be accomplished is unlawful, it is not necessary to state the means by which the conspiracy was effected. Lord Mansfield, in *Rex v. Turner*, 18 East, 230, uses the following language: 'The conspiracy is stated, and its object. It is not necessary that any means should be stated.' The distinction must be drawn between the case at bar, and that in which the act charged only becomes illegal from the means used to effect it. In this latter case such averments of fact should be made as explain the illegality, or constitute the fraud. See Russell on Crimes, vol. 2, pp. 691, 692."

In other words, the claim of counsel is, that inasmuch as the delivery of the bonds was without due authority, therefore it was done fraudulently, corruptly, and in pursuance of a corrupt conspiracy and combination between the commissioners and the company, and that the phrases asserting fraud, conspiracy, etc., are mere adjective clauses, qualifying the acts distinctively charged. It would follow from this, that if all these mere adjective clauses or phrases were omitted the petition ought still to disclose a complete cause of action; that the acts done would give a just basis for relief, independent of the motives for such acts, and the influences and inducements by which they were accomplished. Or to state it in different language, if the company honestly believed itself entitled to these bonds, and the commissioners honestly believed that the county ought to issue them, and in pursuance of this honest belief, and without other desire than to do and discharge the duties imposed upon them as representatives of the county the commissioners did in fact issue and deliver them, that still the county ought to recover. After giving the matter the most careful consideration we are constrained to hold that the petition does not carry or justify such a construction. Nor did the delivery of the bonds, under the circumstances charged, if done honestly, and without fraud, conspiracy, and combination, entitle the county to any relief. The petition plainly alleges that the acts of the commissioners were in pursuance of a fraudulent and corrupt conspiracy and combination between them and the company. It is not consistent with its language, to hold

3. Acts of public officers; motive and intent.

that the commissioners were acting in an attempted honest discharge of their duty, or in honest effort to further and protect the interests of the county whose representatives and agents they were. It does not simply aver that the acts were in excess, or in contravention, of their authority as agents, and therefore not binding on their principal; but adds, that these acts were done by them in pursuance of a fraudulent and corrupt conspiracy between them and the recipients of the bonds. As it stands, it does not simply impute error of judgment, or mistaken action; it brands them with personal infamy, and makes this personally-infamous conduct the basis of the county's cause of action. It is doubtless true, that as to many acts of public officials it is immaterial with what motives or under what influences they are done. Thus, the salaries of the various judges of the district and supreme court are fixed by law. If at the appointed time the auditor of the state draws his warrant in favor of one of such judges for the salary then due, the act is binding on the public, and it is entirely immaterial what may be passing in his mind, or what motives influenced him, or, so far as the state is concerned, whether such judge pays him more or less money to obtain the warrant. No allegation of corruption, conspiracy, fraud, or combination, will give to the state the right to recover the salary thus paid to such judge. Whatever steps he may have taken to acquire the money, he has only obtained that which was legally his due. On the other hand for instance, under the laws of 1868 the probate judge received certain fees, and "such other compensation as may be allowed by the county commissioners, not to exceed five hundred dollars per annum." Gen. Stat., p. 273, § 85. Here it was not obligatory on the commissioners to make any allowance, or to pay anything out of the county funds. Suppose a probate judge paid to the commissioners personally one hundred dollars, and thus bribed them to allow and pay him out of the public treasury five hundred dollars: can there be any doubt but that the county could recover this five hundred dollars? or that this recovery would be based upon

the fact that the allowance had been obtained by a fraudulent and corrupt conspiracy and combination between the commissioners and the judge? or, that in an action brought therefor by the county, the judge would have the right to insist that the petition should allege, not merely the existence of a fraudulent and corrupt conspiracy and combination, but also its nature and extent? And yet the allowance, if made by the commissioners honestly, and with unbiased judgment, would have been binding on the county. It was not binding, because of the fraudulent combination and conspiracy by which it was obtained. But, say counsel, the facts stated show the fraudulent intent, and the conspiracy; therefore any further statement of the means, nature, and extent of the fraud and conspiracy, was unnecessary.

Let us look for a moment at the facts alleged, omitting all averments of fraud, conspiracy, corruption, and the like: On 6th February 1867, a proposition was submitted to the qualified electors of Douglas county to subscribe for \$800,000 stock in the railroad company, and issue a like amount of county

bonds therefor. This proposition was carried. By it, authority was given to the commissioners to subscribe for the stock and issue the bonds. The

4. General
allegations
of petition.

county was not bound as a subscriber, for the vote was no subscription. But it had given authority for the subscription. It had placed this authority in its commissioners. It had given them discretion to bind the county by subscription. If that discretion was honestly exercised, and the subscription actually made, the county (waiving for the present the question of condition) would be bound thereby. If that discretion was not honestly exercised, but the subscription was obtained by the bribery and corruption of the commissioners, the county would not be bound. Nor was a mere formal subscription on the books of the company an essential prerequisite to the issue of the bonds. A delivery of proper certificates of stock by the company to the county at the time of the issue of the bonds, would have been sufficient, and valid, and binding on both parties. And this stock, thus received, was within the power

of the commissioners to sell and transfer. *Mo. R. Fl. S. & Gulf Rld. Co. v. Miami County*, 12 Kas. 482. Nor was there any legal objection to the commissioners negotiating and making arrangements to sell the stock prior to its actual receipt. Having determined to issue bonds and receive the stock, it was perfectly legitimate for them, if they deemed it more for the interests of the county to sell than to retain the stock, to make all arrangements for the sale before the actual receipt of the certificates, so that when the certificates were received they might be immediately transferred to the purchaser from the county. There remain therefore but two objections to the binding force and validity of the acts of the commissioners in respect to both bonds and stock, first, that the conditions prescribed in the vote were not complied with, and that therefore the authority to act at all never vested in the commissioners; and second, that there was no adequate consideration for the sale of the stock. Several conditions were named in the submission to the people, and prescribed by the vote. A failure of only one of those conditions is alleged, viz., a failure to complete and equip twenty-four miles of railroad track before the 1st of January 1868. The allegation of the petition is, "that up to the 1st of January 1868, and for some time thereafter, twenty-four miles," etc. How soon thereafter this condition was complied with, is not disclosed—perhaps one day, perhaps a year. Was time, in this, so much a matter of substance that a failure in this respect was an absolute revocation of authority in the commissioners, or, more correctly, an absolute bar to the vesting of any authority in them? or, was it a matter which could be waived by the commissioners, or if not binding on the county when waived by the commissioners alone, yet binding when waived by the commissioners in issuing the bonds and by the people in paying the interest thereon for a series of years? It is doubtless true, that the power to issue bonds in aid of railroads is not one of the ordinary powers of a county. Indeed, in the judgments of many, and among them of the writer of this opinion, it is a power which can never be granted to a county, or any

5. Bonds in aid
of railroads,
valid.

other municipal organization. This question was brought before this court years since, and the opinion then expressed by the writer has only strengthened with passing years and increasing information. If he may be permitted to paraphrase the words of the wisest of men, he would say to every one, Look not thou upon the voting of railroad bonds when it is new, for at the last it biteth like a serpent, and stingeth like an adder. But the judgment of the court then sustained the power, and repeatedly since that time has the power been recognized by both the judicial and legislative branches of the government. *City of Troy v. A. & N. Rld. Co.*, 11 Kas. 519; *Lewis v. Comm'rs Bourbon Co.*, 12 Kas. 186; *Gulf Rld. Co. v. Miami County*, 12 Kas. 280; *Railway Co. v. City of Ft. Scott*, 15 Kas. 434; *Railway Co. v. Comm'rs Anderson Co.*, 16 Kas. 302; *A. T. & S. F. Rld. Co. v. Comm'rs Jefferson Co.*, 17 Kas.; *Leavenworth Co. Comm'rs v. Higginbotham*, 17 Kas. 62; Laws of 1872, p. 110, ch. 68; Laws of 1873, p. 214, ch. 109; Laws of 1874, p. 41, ch. 89; Laws of 1875, p. 44, ch. 89; Laws of 1875, p. 68, ch. 50; Laws of 1875, p. 85, ch. 59; Laws of 1875, p. 190, ch. 125; Laws of 1876, p. 212, ch. 106; Laws of 1876, p. 217, ch. 107; Laws of 1877, p. 190, ch. 141; Laws of 1877, p. 191, ch. 142; Laws of 1877, p. 198, ch. 143; Laws of 1877, p. 194, ch. 144. And the people have accepted these declarations of the legislative and judicial departments as conclusive, and voted and issued bonds to the extent of millions of dollars. Whatever therefore may be individual opinions, it seems clear that at the present we must look upon the issue of railroad-aid bonds as the settled policy, and their validity as the settled law of the state. This power is, as stated, not one of the ordinary powers of a county. It is an extraordinary power, for which express authority is required. *Lewis v. Comm'rs Bourbon Co.*, supra. But though an extraordinary power, when attempted to be exercised, the validity of such exercise is to be determined by general rules regarding municipal action. It requires plain warrant of authority. It must be exercised in conformity to prescribed forms. Nothing is taken by implication. But it is

6. Authority
to issue.

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not a penal proceeding, demanding all the strictness of the ancient rules of the criminal law. Its validity does not depend upon the crossing of every *t*, or the dotting of every *i*. Any substantial departure is fatal. Thus, in *A. T. & S. F. Rld. Co. v. Comm'rs Jefferson Co.*, the majority of the qualified electors actually voted against the proposition. In *Lewis v. Comm'rs Bourbon Co.*, the same was true when the proposition was presented by itself, and while afterward an apparent majority was secured to an equivocal indorsement of it, it was only by uniting two propositions, enabling the strength of the one to overcome the weakness of the other, and thus secure a majority for both. There never was a direct and unequivocal assent of the people to the single proposition. In *Railway Company v. Comm'rs Anderson Co.*, the authority granted to the commissioners was never fairly exercised by them. Through the wrongful efforts of the railroad company two of the commissioners were gotten together in an illegal session, and without consultation with the other attempted to bind the county by a subscription of stock and an issue of bonds. The discretion vested in the three commissioners was never exercised, and its exercise was prevented by the wrongful and fraudulent acts of the railroad company.

Now the failure charged against the railroad company in this case, is a failure to complete the specified number of miles of road within the given time; not a failure to complete at all. The work was done, but not when it was stipulated to be done. How great was the delay, we are not informed. One day would satisfy the allegations of the petition. This matter of time was waived by the commissioners, and the bonds were issued. If the commissioners had refused to make the waiver, it is a different question whether the company could have compelled them to make it. But they did waive it, and did issue the bonds. Can this waiver now be repudiated, and the bonds or their value be recovered? But it is said that, being agents, and only agents, the commissioners had no authority to bind the county, the principal, by any waiver. It was not a part of the author-

7. Waiver of conditions.

L. L. & G. Rld. Co. v. Comm'rs of Douglas Co.

ity given, which was to do an act upon and only upon certain named conditions. But the failure on the part of the railroad company was in a matter of public knowledge. Whether a railroad is completed to a certain point within a certain time, is a matter which cannot be concealed from public knowledge. Anybody who had any interest in the matter could ascertain for himself. The people generally, the county, the principal in this matter, the obligor and payor of these bonds, had fullest and amplest opportunity and means of ascertaining this fact. Yet with this matter so public and open as this, the county not only raised no question as to this waiver for over two years, not only thus by silence gave consent, but also paid the coupons on these bonds for the two years as they were presented when due, thus in about the clearest way possible acquiescing and ratifying this waiver by their agents.

So far as the other matter is concerned, the adequacy of the consideration for the sale of the stock, we scarcely need do

more than refer to the case of the *M. R. Ft. Scott & G. Rld. Co. v. Comm'rs Miami County*, 12 Kas. 482.

Sale by county
of stock;
consideration.

The completion of an additional twenty-five miles of road, and through rates for local freight and passengers, seem as adequate consideration for the stock as the stock was for the bonds. But it is unnecessary to pursue this branch of the case. From the considerations we have already named, it seems to us that if all allegations of fraud, combination, corruption, and conspiracy, are stricken from the petition, no cause of action remains. There was therefore substantial error in overruling the motion to make the petition more definite and certain, and for this the judgment must be reversed, and the case remanded for a new trial.

The magnitude of the amount involved, the interest felt in the case by the parties, and the effect which it will have as a precedent in other controversies between municipalities and railroads, have caused us to give the questions involved a most careful examination. We have concluded that, if good faith characterized all the conduct of the commissioners, the county is bound by their

a. Specific statements of alleged fraud, required.

Opinion of the Court.

action; if fraud and corruption, then the company was entitled to have the facts showing such fraud and corruption fully stated, that it might go into trial knowing specifically what accusations it had to meet. It seems to us that this is right, beyond all mere technical considerations, and independent of all purely legal questions. As it now stands, three citizens of the county, honored by it with official trust, stand branded by the charge of the county and the judgment of the court with personal infamy. A like brand rests upon the officers of the company. It is due to all parties, the county making the charge, the commissioners of the county against whom the charge is made, that there be no indefiniteness in this accusation, but that it be made full, specific, and definite.

Another objection is, that the record discloses no finding upon which to predicate the judgment. The entry on the journal is as follows:

"And the court having duly considered the pleadings, evidence, and arguments, doth adjudge and decree that the board of county commissioners of the county of Douglas, plaintiff, do recover of and against the said Leavenworth, Lawrence & Galveston Railroad Company, defendant, the sum of \$489,539.43 damages, and the costs of the plaintiff herein expended."

The statute in reference to findings is section 290 of the code, Gen. Stat., p. 684, and is as follows:

"Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its findings *except generally* for the plaintiff, or defendant, unless one of the parties request it, with the view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall *state in writing*, the conclusions of fact found, separately from the conclusions of law."

On the part of the defendant in error it is insisted, that by plain implication of the language, a general finding need not be in writing, and that therefore we must presume that the court orally announced one; and further, that if a written finding is required, the omission in this case is not a substantial error, or one working any prejudice, as the judgment shows exactly what the finding

a. Findings, in writing, should be made.

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was. The plaintiff in error cites very many authorities from different states holding that a written finding is essential, and that a failure in the record to show one is fatal to the judgment. In addition to this long list of authorities, see a late case from California, reported in 8 Law & Eq. Rep., p. 407, in which the supreme court of that state hold that a finding "that all the material facts set forth in the complaint are true," will not support a judgment for the plaintiff. We are all of the opinion that the statute requires a written finding, and that a failure to incorporate one in the record is error; and Mr. Justice VALENTINE is inclined to the opinion that such an omission is fatal to the judgment, and of itself sufficient to compel a reversal, while the Chief Justice, and the writer of this opinion, are on the other hand inclined to regard the error, as in a case like the present, working no prejudice to the substantial rights of the defendant. We do not deem it necessary to consider any other question.

The judgment will be reversed, and the case remanded for a new trial.

All the Justices concurring.

MICHAEL MITCHELL V. COMM'RS OF LEAVENWORTH CO.

1. JAILS, AND GUARDS; *Powers of County Board.* The board of county commissioners of Leavenworth county have the authority to make contracts for the services of guards at the county jail of that county, when in their judgment there exists a public necessity for the employment of persons for such purpose.
2. ——— *Liability of County.* Where a guard at the county jail of Leavenworth county was originally employed by the sheriff of the county, without consultation with the members of the board, and the services of the guard were necessary, and required for the proper care and safety

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of the public jail, and prisoners, and the services of the guard were rendered with the knowledge of the board, and the board at a regular session, in consideration of such services, fixed the compensation therefor, and ordered that the person so employed should be paid said compensation, and had said orders duly entered upon the journal of their proceedings, and the services of the guard were of the full value of the compensation allowed, *held*, that the county is liable in an action to recover for such services, the compensation so allowed by the board.

Error from Leavenworth District Court.

MITCHELL claimed two hundred and fifty dollars for five months' services as guard at the county jail. The *Board of County Commissioners* disallowed his claim, and *Mitchell* appealed to the district court, where, at the September Term 1875, the action of the commissioners was sustained, and judgment rendered against *Mitchell* for costs. *Mitchell* now brings the case here on error.

Stillings & Fenlon, for plaintiff.

L. M. Goddard, for defendant.

The opinion of the court was delivered by

HORTON, C. J.: The plaintiff *Mitchell* sought to recover from the county of Leavenworth compensation for his services as guard at the county jail. The court below, on the agreed state of facts, found for the defendant, and the action is here for review. The facts are as follows: *Mitchell* was employed by the sheriff of said county, at the county jail, as a guard of prisoners confined in said jail. His services in such capacity were rendered with the knowledge of the board of commissioners, on the engagement of the sheriff as aforesaid, and were necessary, and required for the proper care and safety of the public jail, and prisoners therein confined. The sum of fifty dollars per month is a reasonable and fair compensation for such services. Said plaintiff rendered such services during the months of January, February, March, April and May, 1875. He duly presented his account, duly verified, for each of the aforesaid months, to the county clerk of said county,

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which accounts were disallowed by the said board of commissioners. On the 7th of June 1875, the board of county commissioners of said county adopted the following resolution, to-wit: "That the guards at the county jail be allowed \$50 per month salary, from January 1st 1875 until further order." The question presented is, whether the defendant in error is liable to the plaintiff in error.

The objections to the right of Mitchell to recover for the services from the county, are—*first*, because he was not employed by the county, or by any one authorized to employ him in its behalf; *second*, that, the statute imposes upon the sheriff the duty of employing guards at his own expense in counties of this class, and the county could in no event become liable to pay for such services. The facts show that the services were necessary, and required for the proper care and safety of the public jail, and prisoners; that they were rendered with the knowledge of the board on the engagement of the sheriff, and that the board by authorized action, (if such action could be authorized,) at a regular session fixed the compensation at the monthly salary of \$50, and provided that the guards at the jail should receive their salary at this rate from January 1st 1875. This was a sufficient ratification of the action of the sheriff in the employment of guards during said time as to fix the liability of the county for such services, unless the statute imposes upon the sheriff of Leavenworth county the duty of employing guards at his own expense. The statute relied upon to establish the proposition that the county could not be bound to pay for the services of guards, even by an express agreement made by the board of county commissioners, is section 1 of ch. 111, laws of 1872, page 249. This section prescribes, that—

"In counties of thirty thousand inhabitants or over, the sheriff of the county, by himself or deputy, shall keep the jail, and shall be responsible for the manner in which the same is kept. He shall keep separate rooms for sexes, except where they are lawfully married. He shall supply proper bread, meat, drink and fuel for the prisoners, at his own expense, and everything else necessary for keeping said prisoners, and shall

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receive such pay as may be fixed by the county commissioners, but not to exceed the sum of forty cents per day for each prisoner."

In our view, there is nothing in the provisions of said section militating against the power of the county commissioners to employ guards, if in their judgment the condition of the jail, or other circumstances, should so demand. The requirement to keep the jail, does not impose upon the sheriff the duty to construct a jail, or furnish the bolts, bars, and keys of the prison; if insufficient for the safe-keeping of prisoners, the county commissioners, within the scope of their general powers and authority, could employ guards to aid the sheriff in preventing the persons in such jail from escaping. The provision of the section, that "He (the sheriff) shall supply proper bread, meat, drink and fuel for the prisoners, at his own expense, and everything else necessary for keeping said prisoners," etc., refers to the *maintenance* of the prisoners, and not to the *protection* of the prisoners from escaping—neither to their safe custody. Generally it would be unnecessary, with a sufficient and properly-constructed jail, to employ any guard to watch the jail, or aid in securing the persons confined therein; but circumstances might arise, which, from the condition of the jail, the large number of persons committed thereto, or from other matters occurring, in the judgment of the county commissioners a guard of one or more persons would be absolutely requisite, and in such cases, the law authorizes the commissioners, by virtue of their duty "to establish and keep at the expense of the county a jail for the safe-keeping of prisoners," to employ and pay such guards. There is nothing in ch. 111, laws of 1872, to prohibit or restrict this power.

The judgment will be reversed, and upon the agreed state of facts the court below is required to render judgment for plaintiff.

All the Justices concurring.

MILTON TOOTLE v. L. O. SAVAGE, as Treas., &c.

1. SCHOOL-DISTRICT BONDS; *Taxes to Pay Interest, and for Sinking-Fund; Statute Repealed.* Section 5, of "an act to enable school districts in the state of Kansas to issue bonds," approved 26th February 1866, published as ch. 19, laws of 1866, and published in the general statutes of 1868 as chapter 93, and amended and published in the laws of 1871 as section 1 of ch. 38, was repealed by section 6 of chapter 94 of the laws of 1872, page 178. [*R. E. v. Williams*, 16-198.]
2. ——— *Amount of Levy, Not Restricted.* In 1875, the county commissioners of a county were not so restricted in their power to levy taxes to pay interest on school-district bonds and to create a sinking-fund for the final redemption of such bonds, that they could levy only two per cent. of the taxable property in the district for such purposes.

Error from Republic District Court.

INJUNCTION, brought by *Tootle* against *Savage*, as county treasurer. The commissioners of Republic county in 1875, "for the purpose of paying interest, and raising sinking-fund to pay principal of school-bonds," levied taxes upon the property of the respective school districts, as follows: in one district, 30 mills; in each of three districts, 35 mills; in one district, 40 mills; in another district, 45 mills; in each of two other districts, 60 mills; in another district, 80 mills, and in another, 100 mills. *Tootle* owned lands lying in each of said districts, and he claimed that the county board was restricted to "two per cent.," (20 mills,) for the purposes named, and that all in excess of that amount was void. He paid and tendered all other taxes; and when the county treasurer advertised his lands to be sold at tax-sale, for said school-district taxes, *Tootle* commenced this action, and moved for a temporary injunction. The judge of the district court, at chambers, on the 18th of August 1876, refused to grant the order, and from such refusal *Tootle* appeals, and brings the case here on error.

Doniphan & Reed, for plaintiff in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action to restrain the collection of certain school-district taxes, levied by the county commissioners of Republic county for the year 1875. These taxes were levied for the purpose of paying interest on certain school-district bonds, and of creating a sinking fund for their final redemption. These bonds were issued during the years 1871 and 1872. In some of said districts said taxes amounted to more than two per cent. of the taxable property in said districts respectively. The only question now presented is, whether the county commissioners had the power to levy a tax for such purpose of more than two per cent. on the taxable property in said district for any one year. In 1866 an act of the legislature was passed authorizing school districts to issue bonds. (Laws of 1866, page 60, *et seq.*) Section 5 of that act authorized the levying of a tax to pay interest on said bonds, and to create a sinking fund for their final redemption, but did not limit the amount of the tax. In 1867 sections 1 and 7 of the act of 1866 were amended, but the amendments do not affect this case. (Laws of 1867, pages 207, 208, 209.) The act of 1866, with amended sections 1 and 7, was published in the general statutes of 1868 as chapter 98, (Gen. Stat. 938 to 941.) Up to this time there was no restriction upon the amount of tax that might be levied for interest and sinking-fund on school-district bonds. But in 1871 section 5 of the act of 1866, and of chapter 98 of the general statutes, was so amended as to provide "that in no case shall the total amount of tax so levied, both to pay the interest on said bonds, and as a sinking-fund for the final redemption of said bonds, together, exceed two per cent. on the taxable property in the district." (Laws of 1871, page 80.) In 1872 an act was passed "amendatory of and supplemental to chapter 98 of the general statutes relating to school-district bonds," and also specially mentioning in the first section and amending "an act entitled an act to authorize school districts to issue bonds, approved February 26th, 1866." Section 6 of this act of 1872, reads as follows:

15—18 Kaa.

"That sections four, *five*, and eight of the act to which this is amendatory and supplemental, be and the same are hereby repealed."—(Laws of 1872, page 173.)

Now the only section "five" of the act of 1866, and of chapter 98 of the general statutes, was said section five as amended in 1871, and as embodied in section 1 of the act of 1871. Said section 1 of the act of 1871, provides in these words:

"That section 5 of an act entitled an act to enable school districts in the state of Kansas to issue bonds, approved February 26th 1866, be and the same is hereby amended to read as follows: SECTION 5," etc.

Here follows section five in full, taking the place of the original section five as published in the laws of 1866, and in the general statutes; and the original section five was, by virtue of this amendment, and of section 16 article 2 of the constitution, repealed. This section five, as amended in 1871, is the section that contains the restriction upon the power to levy a tax of more than two per cent., and also is by virtue of the act of 1871, and of said section 16, article 2, of the constitution, section five of the original act of 1866, and of chapter 98 of the general statutes of 1868. This section five as contained in section one of the act of 1871 was repealed by said section 6 of the act of 1872. This has already been so decided by this court; but the learned counsel for plaintiff in error have seemingly overlooked the decision. In the case of *A. T. & S. F. Rld. Co. v. Williams*, (16 Kas. 198, 199,) this court used the following language: "Section 5 of 'an act to enable school districts in the state of Kansas to issue bonds,' approved February 26th 1866, (Gen. Stat. 940,) is section 1 of 'an act to amend an act to enable school districts in the state of Kansas to issue bonds,' approved February 27th, 1871, (Laws of 1871, page 80,) and is section 101 of the school laws of 1871, (Supt. McCarty's edition, page 29;) and it was repealed February 29th, (March 21st,) 1872, (Laws of 1872, page 178, § 6.) Hence, said section 5, or section 1, or section 101, whichever it may be called, can have but little force or influence in the decision of this case." Now as said section 5 of the act of 1866, or section

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l of the act of 1871, was repealed in 1872, there was no restriction left, limiting in 1875 the power of the county commissioners in levying said taxes, and therefore the judgment of the court below must be affirmed.

All the Justices concurring.

JOHN P. USHER V. OLIVER S. HIATT *et al.*1. PLEADING; *Statement of the Facts, Sufficient; Motion to Make Definite.*

Where a petition sets forth a copy of a contract whereby H. & M. are to reset, cultivate and complete for U. a hedge upon three sections of land, and to so cultivate and maintain it in such a skillful manner that the same shall be sufficient to turn orderly stock, and become such a fence as is contemplated by the laws of this state, and so that when completed it will divide the sections of land into quarter-sections, and for the said work, labor, and the maintaining and cultivating of such hedge, U. is to pay H. & M. \$1,000 on July 1st 1871, \$500 on July 1st 1872, and upon the completion and turning over of the hedge to U., H. & M. are to receive another \$1,000, or the third thereof on the completion of the hedge upon a section, as the case may be, and the petition alleges that H. & M. continued during 1871, 1872, 1873, to June 24th 1874, to cultivate, train, plash and furnish plants, as agreed, and that H. & M. performed the said contract and had grown on the land a good fence, such as is contemplated by the laws of Kansas, excepting on the wet and seepy ground, and except where U. had destroyed the same, and that there was at the filing of the petition a good and lawful fence of over sixteen miles in length of hedge, on the land, planted and grown by the labor, skill and materials of H. & M., and which said petition further states in detail the acts of H. & M. in performing their contract, that said work, labor, care, diligence and materials are and were when furnished and bestowed of the value of \$2,500, the payment by U. of the first \$1,000, in August 1871, and the refusal of U. to make any other payments, and sets forth certain acts of omission and commission of U. whereby H. & M. were prevented from completing the hedge as agreed, and the said petition contains the proper prayer for relief: *held*, that the petition states facts sufficient to constitute a cause of action in favor of H. & M. against U., and that the district court did not err in overruling

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the motion of U. to compel H. & M. to make such petition more definite and certain, so that it should appear whether H. & M. sought to recover the contract-price for the performance of the contract, or on a *quantum meruit* outside of the contract, as the allegations of the petition were sufficiently definite and certain to fully inform U. of the precise nature of the claim against him. [*Akin v. Davis*, 11-580.]

2. **CONTRACT; Impossible and Absurd Acts, not Required.** A contract, such as above described, does not require the cultivation and maintaining of the hedge on such portions of the ground as were so wet and seepy as to render the growing of a hedge thereon an impossibility, as the law does not require a party to a contract to perform impracticable acts which could not have been expected or contemplated by the parties when the contract was made, and the effort to perform which would be palpably absurd. [*Usher v. Hiatt*, 21-548.]
3. **PROVINCE OF JURY—Exclusive Judges of Facts, Untrammelled by the Court.** The jury are the sole and exclusive judges of the facts, from the testimony in the case, and the district court has no right upon controverted questions, where there is a conflict of evidence, to suggest or dictate to the jury the answers to particular questions of fact submitted to them for findings thereon; and it is error for a trial court, when the special findings of fact returned by the jury are inconsistent with the general verdict, to take the special findings into its own hands and change materially the purport of such findings, and write other questions and answers thereto, and then submit the same for the signature of the foreman, and thereby make the general verdict and the special findings agree. [*Horne v. State*, 1-42; *Williams v. Townsend*, 15-564; *State v. Potter*, 16-82; *Seip v. Patrie*, 19-13.]
4. **CONTRACT—When Severable, and not Entire; Damages.** The contract above stated is a severable one, and not an entire and indivisible one; and held, therefore, that if H. & M. were prevented from completing the hedge by the wrongful acts of U., they could recover, and invoke the contract for the purpose of determining the measure of their recovery; and if H. & M. have been guilty of committing a breach of the contract, H. & M. can recover for their part performance, in accordance with the contract-price, but their claim will be subject to all damages resulting to U. from a non-performance of the agreement by them, which would include a consideration of the amount necessary to enable U. to have the contract completed and carried out according to the original intention of the contracting parties. [*Duncan v. Baker*, 21-99; *Quigley v. Comm'rs*, 24-300.]

Error from Leavenworth District Court.

ACTION by *Hiatt* and *Maris*, counting on a contract set out in full in the opinion, *infra*. The district court, at the January Term 1875, gave judgment in favor of plaintiffs for

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\$584.55, and *Usher*, defendant, brings the case here for review.

John P. Usher, plaintiff in error, for himself.

H. T. Green, for defendants in error.

The opinion of the court was delivered by

HORTON, C. J.: The parties to this suit made the following contract:

"It is agreed between John P. Usher, O. S. Hiatt and C. F. Maris, as follows: Said Hiatt & Maris agree to reset, cultivate and complete the hedges upon sections 23 and 24 of township 10, range 22, in Leavenworth county, and section 19, in Wyandotte county, immediately east of said sections, which were undertaken to be grown by A. S. Penfield; to cultivate and maintain said hedges in a skillful manner, until the same shall be sufficient to turn orderly stock, and such as is contemplated by the laws of Kansas relating to hedge fences. The above sections of land belong to said Usher, and the hedge, when completed, will divide these lands into quarter-sections. In consideration of this agreement to construct, and the construction of said hedges for the said Usher, he agrees to and with the said Hiatt and Maris that if they shall have said hedges set and reset in good and proper condition, and in proper cultivation, on or before the 1st day of July next, 1871, the said Usher will pay them at that date one thousand dollars; and if the said parties continue to cultivate and maintain said hedges, as before agreed, said Usher will pay them five hundred dollars on the 1st day of July 1872, and upon the completion and turning over of said hedges to said Usher, he will pay them one thousand dollars, or the third thereof on the completion of the hedge upon a section, as the case may be. If it shall then happen that in consequence of rains the parties cannot put all of said hedges in good condition by the 1st of July next, as above agreed, then said Usher will pay the \$1,000, as soon as the hedges are in such condition; and the parties mutually agree with each other, that the said Hiatt & Maris will set and reset and cultivate said hedges as aforesaid without any delay on their part, and said Usher will promptly and faithfully pay them as agreed herein. J. P. USHER, O. S. HIATT, C. F. MARIS.

"*Leavenworth, Kas., Nov. 5, 1870.*"

In the spring of 1871, Hiatt & Maris commenced work on

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the hedges under the contract, and in August 1871, Usher paid them the first installment of \$1,000. Differences having arisen between the parties as to the performance of the contract by Hiatt and Maris, and no other payment being made by Usher, on 24th June 1874 the defendants in error brought suit against the plaintiff in error to recover the other \$1,500 mentioned in the contract, with interest on \$500 from 1st July 1872. Plaintiffs in the court below, after setting forth the contract mentioned, stated among other things in their petition, "that they continued during 1871, 1872, 1873 and 1874, to the date of said petition, to cultivate, train, plash, and furnish plants, as they had agreed, and the defendant had full knowledge of what they were doing, and made no objection thereto, and that they performed their said contract; that they had grown on said land a good fence, such as is contemplated by the laws of Kansas, and except in the wet and seepy ground, and where the defendant had destroyed the same, there was at the commencement of the suit, a good and lawful fence, over sixteen miles in length, planted and grown by their labor, skill and materials; and but for the acts and omissions of Usher, all of said fence would at the filing of the petition have been completed as was agreed; that said work, labor, care, diligence and materials are and were, when furnished and bestowed, of the value of \$2,500; that said Usher did not keep and perform the contract and promises on his part; that he did not protect the hedges after July 1st 1872, nor did he keep said hedges fenced as agreed; that he rented the lands on which the hedges were being grown to some sixteen tenants, and erected tenement houses, and constructed cattle and horse lots, upon and across the line of hedges, and that stock were confined in said lots near many of the tenant houses; that Usher, since 1872, had placed large herds of cattle, horses, and hogs on three quarter-sections, on which there were then growing good and thrifty hedges, and without protecting said hedges; and without the fault of plaintiffs, said animals trampled over and ate the young cultivated and tender growth of each year, whereby said hedge is not a fence; that said Usher by his sons

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and tenants, who were his agents duly authorized, cut down the hedges and made wagon-and-cattle ways through and across the various lines of hedge; that said Usher did in the beginning require his tenants to protect said hedges, but since 1873 said Usher and his tenants had permitted the fire to destroy about two miles of good fence agreed to be protected, whereby its growth was destroyed; and finally, in May 1874, said Usher commenced plowing said hedge where his stock had destroyed it, and in some places where said hedge had been turned out, and was a good and lawful fence, protecting the crop of defendant; and then that said Usher wholly refused to pay any sum, and claimed that Hiatt and Maris had not fenced the land, and that he should not pay any sum for what had been done, and wholly repudiated and denied that Hiatt and Maris had any demand or right to any pay on account of the contract, work, labor, care, diligence and material furnished. Defendant Usher filed an answer, also setting up the contract, and denied any bad faith upon his part, denied any wrongful acts by him, either of omission or commission, and alleged a non-performance of the contract on the part of Hiatt and Maris, and claimed damages on account of breach of contract by Hiatt and Maris, and their actions in the premises of \$5,000. On the general verdict of the jury, and the findings of fact, as finally returned by the jury, with the aid and direction of the court, judgment was rendered against Usher for \$584.55. The jury, also, returned the following answers to certain questions submitted by Usher, viz.:

Question 1.—Did they, the plaintiffs, continue to properly, cultivate and maintain the hedge until July 1st 1872? *Ans.*—No.

Ques. 2.—What is the value of the hedge plants furnished, and labor bestowed, by the plaintiffs, in cultivating the hedge where practicable to cultivate and grow the same? *Ans.*—Don't know.

Ques. 3.—By what time ought the plaintiffs to have completed the hedge, so as to be sufficient to turn stock? *Ans.*—Don't know.

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Ques. 4.—If you find they hadn't done so, by what time, after waiting a reasonable time for plaintiffs to complete it, could defendant complete it himself? *Ans.*—Don't know. None.

Ques. 5.—During the interval between such times, what damage did or will defendant suffer in consequence of the hedge being insufficient? *Ans.*—None. Don't know.

Ques. 6.—Or, during such interval, by loss of rental, or other direct consequences of plaintiffs not completing their contract? *Ans.*—None.

Ques. 7.—What would be the cost of constructing a fence to take the place of the hedge at points wherein the plaintiffs have not attempted the growth of any hedge? *Ans.*—Don't know.

The transcript then states that—

“The jury having been out for about twenty-four hours, and their answers being as above, the court entered into a colloquy with the jury which resulted in the court taking the verdict into its own hands, and striking out the answer of the jury to the second question, and writing for the answer of the jury thereto, ‘\$584.55 in addition to the \$1,000 paid by the defendant in August 1871.’ The court also struck out the answer of the jury to the third question, and wrote thereunder, ‘Five years from date of contract.’ The court also struck out the answers of the jury to the fourth question, and wrote thereunder, ‘By May 1876.’ The court also struck out the last two words of the answer of the jury to the fifth question. The court also struck out the answer of the jury to the seventh question, and wrote thereunder, ‘There were no such places, except where the hedge crossed running streams.’ And the court at the same time wrote the following questions and answers thereto:

“*Question:* Did the defendant take possession of the hedges, and put an end to the contract? *Answer*—Yes, about the first of May 1874.

“*Question:* Did the plaintiffs continue to cultivate the hedge up to May last? *Answer*—Yes, but not as well as they should.

Which questions and answers were submitted to the jury, and the jury without retiring or consultation, other than as above stated, signed the same by their foreman, which the court received as the verdict of the jury, and discharged them.”

I. The first alleged error is, the action of the court in overruling the objection of Usher to the introduction of any evidence.

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The objection seemed to be based mainly upon the admission in the petition that there was no hedge grown "in the wet and seepy ground," and that hence The law never requires an absurdity nor an impossibility. Hiatt and Maris had not performed their part of the contract. The petition stated facts sufficient to constitute a cause of action, and the court committed no error in allowing evidence to be introduced in the case. The contract did not require the cultivation and maintaining of a hedge in running streams, nor in such portions of the ground as it was impracticable to grow a hedge. The law does not require a party to perform impossibilities or impracticable acts, which could not have been expected or contemplated by the parties when the contract was made, and the effort to perform which would be a palpable absurdity. As the petition shows that there was no willful departure from the terms of the contract, or any omission in essential points by Hiatt and Maris, and as they claimed therein they had fully performed the contract in all its material and substantial particulars, the law will not hold that they forfeited their right to compensation by reason of mere technical, or unimportant omissions, or their failure to grow successfully the hedge on the wet and seepy ground.

II. Pending the trial the defendants in error amended their petition by inserting, "and said plaintiffs aver that said work, labor, care, diligence and materials are and were when furnished and bestowed of the value of \$2,500;" and thereupon plaintiff in error moved the court to require Hiatt and Maris to make their petition more definite and certain, so Facts to be pleaded. Motion to make definite. that it might appear whether they sought to recover the contract-price for the performance of the contract, or on a *quantum meruit* outside of the contract, and that in default of such amendment, defendant have judgment on the pleadings. The motion was overruled, and the plaintiff in error now complains of such ruling; and in support of his complaint says:

"It will be seen that by the decision of the court in overruling defendant's motion, the plaintiffs had a sort of a double

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barreled affair. In the same paragraph of their petition they are claiming to recover on a contract performed, and for work and labor bestowed in performing such contract. The action of the court permitted the plaintiffs to have an undue advantage. The court ought to have required plaintiffs to have tendered the issue directly upon the performance of the contract, or upon the *quantum meruit*. *This was error.*"

We cannot agree with the learned counsel. By the code, the rules of pleading heretofore existing in civil actions have been abolished. Technical issues have been set aside. Where the plaintiff claims he has a right of action against a defendant, he must state the facts in his petition on which he grounds his right of action. These are to be stated in ordinary and concise language, and without repetition. The defendants in error having set forth, within the meaning of the code, a statement of the facts constituting their cause of action, and as the allegations of the petition were sufficiently definite and certain to fully inform the plaintiff in error of the precise nature of the charge against him, the court committed no error in refusing to compel them to inform him whether they were seeking to recover the contract-price for the performance of the contract, or on a *quantum meruit* outside of the contract.

III. The jury retired to consider of their verdict on the 8d of December 1874, and the next day returned into court with a verdict as follows: "We the jury find for the plaintiffs the sum of \$500, with interest from July 1st 1872"—

3. Province of
jury.

and reported that they were unable to agree upon the questions submitted by the court to be answered by them. The court thereupon instructed them to return a verdict for the amount of \$500, and to include the interest from July 1st 1872, and ordered the jury to retire and bring in the verdict as directed, and to answer the questions submitted. The jury on the same day rendered the following verdict: "We the jury find for the plaintiffs, and assess their damages at the sum of \$584.55"—and the questions were answered as before stated.

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Under the contract Hiatt & Maris were to have \$500 on July 1st 1872, in addition to the prior sum of \$1,000 paid in August 1871, if they continued to cultivate and maintain the hedge as agreed upon until that time, not otherwise. In their findings upon the questions of fact, the jury in answer to the question, "Did they, the plaintiffs, continue to properly cultivate and maintain the hedge until July 1st 1872?" said *No*; and to the question, "What is the value of the hedge plants furnished and labor bestowed by the plaintiffs in cultivating the hedge, where practicable to cultivate and grow the same?" answered, "Don't know." If these findings had been permitted to stand, the judgment, subsequently entered upon the general verdict, would have been inconsistent therewith. It is evident that the jury intended the verdict of \$584.55 to be for the installment due July 1st 1872, with the interest on the \$500, from that date; but as they found that Hiatt & Maris had not properly continued to cultivate and maintain the hedge until that time, the \$500 could not have been due on July 1st 1872, and hence the verdict of \$500, with interest thereon from July 1st 1872, could not be supported on said findings. It appears however that the court below must have noticed the difficulty of rendering judgment for the \$584.55 in opposition to the said special findings of fact, as it thereafter changed the answers as above stated, and also wrote the two additional questions and answers set forth in the statement of facts of the case. The answers thus changed were very material, and the new questions of fact, with the answers written by the court, were equally important. The evidence as to the findings of fact returned by the jury, prior to the changes made by the court in the verdict, is not brought here with the record, but it seems to us impossible that the evidence on the particular questions submitted to the jury, and the answers which were afterward modified by the court, was all one way, as the jury, after having been out about twenty-four hours, answered to the question, No. 2, "don't know," and this answer was changed by the court to, "\$584.55, in addition to the \$1,000 paid by the defendant in August 1871."

As to the question, "Did the defendant take possession of the hedges, and put an end to the contract?" and, the answer thereto written by the judge, the record presents all the evidence, *pro* and *con*. It makes over twenty pages of manuscript; and after reading it carefully, we cannot say that the answer is conclusively proven. If the question was a proper one to have been submitted under the pleadings, the jury should have been permitted to have taken it to their jury room, and to have then passed upon it, free from any order, influence, or intimation of the court. The act of the court in writing the interrogatory respecting the taking possession of the hedge, and the answer of the jury, was not justified by the record, and was manifest error. The evidence is not all one way upon the point, and there was in fact no submission of the question to the jury. The jury already had had several of their answers erased, changed and modified by the court; and when, under such circumstances, the court wrote out the question and answer, and handed them to the jury, the latter body only obeyed the direction of the court in signing the same through their foreman. There was no fitting consultation, no retiring to deliberate thereon, no real agreement thereto. The dictation of the court was as patent as if an order had been issued, requiring the facts to be found by the jury according to the *dicta* of the court. The only matter causing serious trouble in the case, owing to the condition of the record, is, whether the action of the court, in thus presenting to the jury the question and the answer already written, affected the substantial rights of the party complaining. As the jury originally returned their verdict for the full amount of the second installment, with interest from July 1st 1872, and afterward, upon the changes and modifications of the court, to undo the fatal finding of the jury under which said sum was not due on July 1st 1872, a verdict was rendered upon the basis that the value of the hedge plants furnished and labor bestowed by the plaintiffs in cultivating the hedge to the commencement of the suit (not including the payment of \$1,000) was the like sum of \$500, with interest from July 1st 1872, we cannot say but that the rights of the

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petitioner in error were prejudiced. It is certain, the verdict was transformed from the money supposed to be due, in the first general verdict, July 1st 1872, to the value of the plants and services of Hiatt and Maris; and in this change the jurors acted as automatons, directed by the will of the court. It is impossible to come to any intelligent conclusion, from a review of the action of the jury and court, upon what facts the judgment was supported. The trial of the case in the court below seems to have taken about sixteen days' time; and as one of the parties suggests, "the court was doubtless weary of the cause, and felt justified in taking effective measures to dispose of it." Perhaps substantial justice would be accomplished by allowing the judgment to stand, but upon the exceptions taken, we have no right to sanction the errors committed, and must therefore reverse the judgment.

IV. To facilitate the proceedings in another trial, we make additional comments. In the court below, and in this court, the plaintiff in error insisted and still insists, that the contract
a. Contract—
when severable. sued on was entire and indivisible. We are of a different opinion. The contract made provision for the payment of \$1,000 on July 1st 1871, upon certain work being done and material furnished; then \$500 to be paid on July 1st 1872, when additional work was done; and upon the completion and turning over of the hedge, the remaining \$1,000, or the third thereof, on the completion of the hedge upon a section, as the case might be, was to be paid. Within the authorities the contract was a separable one, and Hiatt and Maris became entitled to the various installments named therein, if at the dates thereof they had complied with their part of the contract. If they have been prevented by the plaintiff in error from completing the hedge, by acts of omission or commission, they can recover, and invoke the contract for the purpose of determining what the measure of their recovery shall be; and if it be admitted that there was a breach of the contract by Hiatt and Maris, they can also recover for their part performance, in accordance with the contract price, but their

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claim would be subject to any damages resulting to the plaintiff in error from a non-performance of the contract by them. We use, in this connection, the word "damages," in its broadest sense. It would include a consideration of the amount necessary to enable Usher to get the contract completed and carried out according to the original intention of the contracting parties.

Other errors are alleged, but as they may not arise in a new trial of the case, we do not think it necessary to refer to them.

The judgment will be reversed, and the case remanded for a new trial.

All the Justices concurring.

CHARLES DOUGHERTY v. WM. PORTER.

1. **ACTIONS, WHEN TRIABLE; Issues Made up.** Under the statute of 1871, (ch. 116, §5,) actions are triable at a term whenever the issues were actually made up ten days before the term, and it is immaterial whether they were so made up by the filing of the pleadings before or after the time fixed therefor by the statute. [See *Gapen v. Stephenson*, ante, 140, and cases there cited.]
2. ——— Where issues were joined in an action by the filing of a reply, and such reply was filed on the 27th of August, the action was triable at the term which commenced on September 6th, following.
3. **COMPUTATION OF TIME; Rule; Statute Construed.** In computing the time in such a case, the rule is to exclude the first day of the term and include the day of joining the issues by the filing of the last pleading. [*Hook v. Birby*, 13-164, 168; *Neitzel v. Hunter*, 19-222, 223; *Lanons v. McKinnon*, 19-411; *Reed v. Sexton*, 20-189, 201; *Garvin v. Stephenson*, 20-371, 373; *Stillings v. Porter*, 22-18; *Northrop v. Cooper*, 23-432; *Warner v. Bucher*, 24-478; *English v. Williamson*, 34-215.]
4. ——— **Quere:** Whether the use of the words, "ten clear days," or "at least ten days," might not have enlarged the time, suggested in connection with the provision of the statute concerning the time for filing depositions.

Error from Leavenworth District Court.

THE only question here is one of practice. *Porter* and two others, as plaintiffs, commenced an action against *Dougherty* and another, as defendants. Their petition was filed 27th July 1875. The answer-day fixed in the summons, was 26th August, and on that day the defendants filed their answer. The reply of plaintiffs was filed the next day, 27th August. Court convened on the 6th of September, and at that term the case was called for trial, and was tried. Defendants objected, claiming that as the plaintiffs were allowed ten days from the day on which the answer was filed, in which to file their reply, the issues were to be deemed to be made up, not on the day the reply was actually filed, but as of the last day on which it might have been filed—and that therefore the action was not triable at said September Term. The objection was overruled—the action tried—and plaintiffs had judgment. The defendants appeal, and bring the case here on error.

E. Stillings, for plaintiff in error.

Clough & Wheat, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: The only question presented is, whether the action was triable at the term at which it was tried; and that depends upon whether the issues were made up ten days before the term. The statute of 1871 was in force, a statute we have recently had occasion to examine in the case of *Gapen v.*

Stephenson, just decided; (*ante*, p. 140.) In that case we held that the statute referred to the time the issues were *actually* made up, and not to the time they *ought to have been* made up. And it makes no difference whether they were so made up by the filing of the pleading before, or after, the times fixed by statute. If the issues were actually made up in this case, ten days before the term, the action was triable; otherwise not. The term commenced Sep-

1. Actions triable; issues made up.

tember 6th. The reply was filed August 27th. Including the first day of the term, and the day upon which the reply was filed, there were eleven days; excluding both, nine days; while including one, and excluding the other, would give the requisite ten days. The language of the statute is, "are made up ten days *before* the term." In other words, if ten days before the term the issues are made up, the action is triable. And it seems to us, that in computing these ten days, the first day of the term should be excluded, and the day in which the issues were made up by the filing of the reply, included. This appears to be in accordance with the authorities. In the case of the soldier's voting bill, 45 New Hamp. 618, it was held, "that in the computation of time from a *date*, or from the *day of a date*, the day of the date is to be excluded; but that where a computation is to be made from an *act done*, or from the *time of an act*, the day in which the act is done, is to be included." To like effect are the cases of *Jacobs v. Graham*, 1 Blackf. 391, and *Chiles v. Smith's Heirs*, 13 B. Monroe, 461. In the latter case the court says:

"It was decided by this court in the case of *Woods v. Patrick*, Har. 457, that in calculating the thirty days, which were required by the statute to intervene between the lodging of the order and the commencement of the next term, to entitle the party to a change of venue, the day of depositing the order should be included. So where process is required to be served a certain number of days before the term, the day on which the process was executed is reckoned as one of the days in the computation of the time."

Applying this rule, and the day of filing the reply and joining the issue, the day of an act done will be included. In *Walsh, Trustee, v. Boyle*, 30 Maryland, 266, a distinction was noticed. In that case, by order of the court, testimony was to be taken upon giving one day's notice. Notice was given on the 28th, and the testimony taken on the 29th, and the notice was held sufficient. The court says, "Now it is true that when a statute or rule of court requires notice to be given of a certain *number of clear days*, both the day on which the notice is served and the day of the proceeding, must be excluded. *King*

3. Rules for
computing
time.

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v. Justices, &c., 8 Barn. & Ald. 581. It has also been held that a statute requiring fourteen days *at least*, means fourteen clear days, and the same rule must be adopted. *The Queen v. The Justices of Shropshire*, 8 Adol. & Ellis, 173; *O'Connor v. Towns*, 1 Texas, 107." But we take the law to be well settled, however, in matters of practice, where any particular number of days not expressed to be *clear days* is prescribed, the rule in regard to the computation of time, is, not to exclude both the day on which the notice is served, and the day on which the act is to be performed, but to exclude the one and include the other. This distinction may be important in determining when depositions must be filed, for the statute reads that they "must be filed *at least* one day before the day of trial." Gen. Stat. p. 698, §361. In *Vairin v. Edmonson*, 5 Gilman, 270, where a section of the attachment-act required that sixty days should intervene between the first publication of notice, and the term of court, the court held that in computing the time the day of the first publication of notice was to be excluded, and the first day of the term included. Doubtless a correct result was thus reached, but it occurs to us that the ruling would have been more in harmony with the course of decision if the day excluded had been included, and the day included excluded. In *Black v. Johns*, 68 Penn. St. 83, it was held that "a service of the 28th of October, the return-day being the 7th of November, is ten days before the return-day, that day being left out of the count." The spirit, if not the letter of our statute sustains this computation. It provides that "the time within which an act is to be done shall be computed by excluding the first day, and including the last." Gen. Stat. p. 771, §722. If the statute required ten days after a term of court, we should exclude the last day of the term and include the day of filing. We compute forward in that case, because the close of the term is the point from which the computation dates. In the case at bar, for like reason, we compute backward. The commencement of the term is the starting point, and we measure from that to

Sections 361
and 722, of
code, con-
strued.

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determine *how long before*, the issue has been joinad. In *Dutton v. Hobson*, 7 Kas. 196, cited by counsel for plaintiff, we held that a summons could not regularly be served *on* the return-day, for the statute says *before* the return-day." That excluded the return-day; so, "before the term," excludes the first day of the term. But computing from the term, as the starting point, and omitting the first day of the term and including the day of the act, the day of filing the reply and making up the issue, and we find that the issues were made up ten days before the term.

The judgment must be affirmed.

All the Justices concurring.

THE STATE OF KANSAS V. B. CRISSY *et al.*

1. PLEADING; *Action on Forfeited Recognizance.* Where a party relies upon the liberal provisions of section 154 of the code of criminal procedure, to sustain his petition, he must see that all the matters named therein clearly appear.
2. ——— In such case the petition must affirmatively show, that the prisoner was discharged from custody by reason of the giving of the recognizance.

Error from Mitchell District Court.

ACTION in the name of *The State*, brought by the county-attorney on a forfeited recognizance, against *Crissy*, as principal, and another as surety. A demurrer by defendants was sustained at the August Term 1875, and *The State* now appeals, and brings the case here on error.

Willard Davis, Attorney General, and *J. W. Bertram*, for The State.

The opinion of the court was delivered by

BREWER, J.: Action on recognizance. Demurrer to petition was sustained, and this ruling is the alleged error. The petition alleges in substance, the filing of an information against Crissy, his appearance in court, entering into a recognizance, (a copy of which is given,) the filing of the recognizance, Crissy's failure to appear at the next term, and the forfeiture of the recognizance. It is not claimed by the attorney general that this petition was sufficient under the rules of common-law pleading, but it is insisted that under the liberal provisions of section 154 of the code of criminal procedure, (Gen. Stat. 844,) it must be held to be sufficient. But we think under that section there is still a fatal omission. That section provides that no action upon a recognizance shall be defeated on account of any irregularities, omission, etc., "so that it be made to appear, that the defendant was legally in custody, charged with a public offense, that he was discharged therefrom by reason of the giving of the recognizance," etc. Now this last matter does not appear from the petition. It does not follow, from the mere giving of a recognizance, that the accused was discharged from custody by reason thereof, or indeed that he was discharged at all. For all this petition discloses, the accused may never have been discharged from custody, and the reason why he did not appear was because he was confined by the sheriff in the jail, and could not come to the court-house. Where a party relies upon the liberal provisions of this section to sustain his pleading, he must make all the matters named therein clearly appear, or his pleading will, on demurrer, be held insufficient.

The ruling of the district court will be affirmed.

All the Justices concurring.

ST. LOUIS, LAWRENCE & WESTERN RAILROAD CO. V. WILLIAM MILLER.

BILL OF PARTICULARS; Pleading; Sufficiency; Claim for Attorney-Fees, in Addition to Damages. M. commenced an action in a justice's court against a railroad company, under the "act relating to killing or wounding stock by railroads," and set forth in his bill of particulars a good cause of action for \$35 damages for killing his cow, and then alleged "that \$10 is a reasonable attorney-fee for the prosecution of this suit," and "prayed for judgment against the said defendant for the said sum of \$35, his damages sustained as aforesaid, and \$10 attorney-fee for the prosecution of this suit, and costs." In the district court, to which the case was afterward taken on appeal, the jury found from the evidence for the plaintiff, and assessed his damages at "thirty-five dollars, and ten dollars attorney-fee," and judgment was rendered accordingly, and it appears from the record that the plaintiff was assisted by an attorney. *Held*, That the judgment for the attorney-fee will not be reversed where no reason for such reversal can be given except that the said bill of particulars does not state facts sufficient to authorize such a judgment. [Cases relating to attorney's fee in such actions: *R. R. v. Yanz*, 16-583; *R. R. v. Ireland*, 19-405, 406; *R. R. v. Van Riper*, 19-317; *R. R. v. Shirley*, 20-660; *R. R. v. Nichols*, 24-242; *R. R. v. Armstrong*, 25-561; *R. R. v. Abney*, 30-41.]

Error from Johnson District Court.

MILLER had judgment at the November Term 1875, of the district court, and the *Railroad Company* brings the case here on error. All the facts appear in the opinion.

J. P. Usher, and *C. E. Bretherton*, for plaintiff in error.

John P. St. John, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by William Miller, under "an act relating to killing or wounding stock by railroads," (laws of 1874, page 143,) against the St. Louis, Lawrence & Western Railroad Company, for killing his cow. Judgment was rendered in the court below in favor of Miller and against the railroad company for \$35 damages for killing the cow, and for \$10 attorney-fees. The railroad company

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brings the case to this court, and assigns for error that, "said court erred in rendering said judgment for the following reasons, to-wit, that the bill of particulars on which said judgment was founded does not contain facts sufficient to constitute a cause of action against the defendant below." This is the only assignment of error in the case. The plaintiff in error now seems however to admit by its brief filed in this court that said bill of particulars does "contain facts sufficient to constitute a cause of action against the defendant below." The counsel for plaintiff in error now say in their brief, "we do not make any point on the judgment for value of the cow, but only that for attorney-fees." It will therefore be seen that the entire object of the litigation in this court is to avoid the payment of an attorney-fee of ten dollars, supposed to have been erroneously allowed, not because attorney-fees may not be recovered in this class of cases, and not because the evidence was not amply sufficient to authorize such recovery in this particular case, but merely because it is supposed that the allegations of the plaintiff's bill of particulars are not technically sufficient to authorize such a recovery. The action was originally commenced before a justice of the peace. The plaintiff below filed a bill of particulars, setting forth a good cause of action for \$35 damages for killing his cow, and then alleges, "that \$10 is a reasonable attorney-fee for the prosecution of this suit," and then "prays for judgment against said defendant for the said sum of \$35, his damages sustained as aforesaid, and \$10 attorney-fee for the prosecution of this suit and costs." This bill of particulars was evidently drawn by a lawyer, but the plaintiff in error has not seen fit, in bringing it here, to make it or any other part of the record show whether it was signed by the plaintiff below himself, or by his attorney, or whether it was signed at all, or not. Neither does the plaintiff in error bring any portion of the proceedings of the justice to this court, except said bill of particulars, and the appeal bond filed when it (the plaintiff in error) appealed from the judgment of the justice in this case to the district court. And hence we cannot tell whether the plaintiff below

was assisted by counsel in the justice's court or not. Neither has the plaintiff in error brought any of the proceedings of the district court to this court, except the journal entry of the proceedings on the trial, and the judgment. This journal entry shows that the case was regularly called, that the plaintiff below appeared by John P. St. John, his attorney, that the defendant did not appear, that a jury was impaneled to try the cause, that the cause was tried, and that the jury upon the evidence found the following verdict, to-wit:

"We the jury find for the plaintiff, and assess his damages at thirty-five dollars, and ten dollars attorney-fee."

Whether the plaintiff below was assisted by counsel at any time except during the trial, we cannot tell. Whether the plaintiff's bill of particulars was amended at any time, either in the justice's court or in the district court, we cannot tell; and what the evidence was respecting attorney-fees, or indeed respecting anything else in the case, we cannot tell. We have only detached portions of the record of the case before us from which to ascertain any of these things. We have "the bill of particulars of the plaintiff," "the appeal bond of the defendant," and "the journal entry of the trial and judgment." These are all that the plaintiff in error has chosen to submit to us; these are all that the clerk of the district court has certified to, and the certificate mentions them in the above words. What other proceedings were had in the case, we cannot tell. It does not appear that any bill of exceptions was drawn. Indeed, it does not even appear that any exception was taken. And it does not appear that any case was made under the statute for the supreme court. This is not such a case-made, nor does the plaintiff in error even claim that it is. It is merely a petition in error founded upon three detached and isolated fragments of the record. But even these detached, isolated, and selected fragments of the record, do not show that the court below erred. We would even infer from them that the court below did not err. The judgment of the court below must therefore be affirmed.

It is understood by counsel for the parties, that precisely the

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same legal questions are involved in the cases of this same plaintiff in error against Anson Sauers, and Robert Wilson, as are involved in this case. Therefore the judgments in those cases will also be affirmed.

All the Justices concurring.

JOSEPH KERMEYER V. KANSAS PACIFIC RLY. CO.

ORDER SETTING ASIDE JUDGMENT—*When not Appealable.* An order of the district court vacating a judgment rendered on a default, is not such an order as may be reviewed by the supreme court, while the suit is still pending in the district court. [*McCulloch v. Dodge*, 8-476.]

Error from Leavenworth District Court.

ACTION by Kermeyer as plaintiff, against the *Railway Company* as defendant. The only question here is one of practice, and all the proceedings taken in the court below are stated in the opinion. The plaintiff brings the case here.

F. P. Fitzwilliam, for plaintiff.

T. A. Hurd, for defendant.

The opinion of the court was delivered by

VALENTINE, J.: This action was commenced in the district court of Leavenworth county on June 29th 1875, during the May term of said court. The defendant failed to answer, or demur, or to make any other appearance in the case during that term. On August 30th, the May term still being in session, a judge *pro tem.* of said court was elected—the regular judge being absent—and the plaintiff obtained a judgment by default against the defendant. On the first Monday of September 1875 a new term of the district court was commenced. On October 16th, during said September term, the defendant made a motion to vacate said judgment, and on October 28d, during said September term, said motion was sustained. The plaintiff immediately made a case for the supreme court, and

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afterward brought the case to this court. No other proceedings appear to have been had in the district court. The plaintiff now claims that the court below erred in setting aside and vacating said judgment. This is the only ruling of the court below complained of. The first question arising in the case is, whether this ruling of the court below is at this time reviewable. This exact question, arising in another case, has already been decided in this court. In the case of *McCulloch v. Dodge*, 8 Kas. 476, it was held that "an order of the district court setting aside a judgment rendered on a default, and allowing the defendant to answer to the petition of the plaintiffs, is not such an order as may be reviewed by the supreme court while the suit is still pending in the district court." We do not think that the order vacating the judgment in the present case is reviewable at the present time. The case is still pending in the district court, so far as the record brought to this court shows. The petition in error in this case will be dismissed.

All the Justices concurring.

G. H. BRADFORD V. LORENZO PAULY *et al.*

1. **INDORSERS; Rights, and Liabilities.** Whenever a negotiable promissory note is drawn up and is signed by the maker thereof, and is then indorsed in blank, first by the payee thereof and then by a third person, and the note is then delivered by the maker thereof for a sufficient consideration to still another person, who thereby becomes the holder thereof, the presumption in such a case should be, and is, that the payee and said third person intended to assume, and did assume, all the rights and privileges, as well as all the obligations and liabilities, usually assumed by indorsers of negotiable instruments. [*Firman v. Blood*, 2-496; *Fuller v. Scott*, 8-25; *Joseph v. Bank*, 17-256.]
2. ——— Where a note is executed, indorsed and delivered in the foregoing manner, the indorsers will be discharged unless due demand of payment is made, and due notice of non-payment given to the indorsers. [*Swarts v. Redfield*, 13-550; *Stanley v. Bank*, 17-592; *Couch v. Sherrill*, 17-622; *Doolittle v. Ferry*, 20-230; *Braley v. Buchanan*, 21-274; *Shelby v. Judd*, 24-161; *Selover v. Snively*, 24-672.]

Error from Shawnee District Court.

ACTION by *Bradford* as plaintiff, commenced originally against *Nelson, Johnson, and Pauly*, and charging all as makers of a promissory note. No service on *Nelson*, and the action was dismissed as to him. Trial at the August Term 1875 of the district court, and findings and judgment in favor of *Pauly and Johnson*. *Bradford* brings the case here.

Martin & Case, for plaintiff, cited and relied on *Firman v. Blood*, 2 Kas. 496, and *Fuller v. Scott*, 8 Kas. 25.

David Brockway, for defendants, cited, *Cady v. Shepard*, 12 Wis. 689; *Davis v. Barron*, 18 Wis. 227; *Snyder v. Oatman*, 16 Ind. 265; *Clapp v. Rice*, 13 Gray, 408; *Greenough v. Smead*, 3 Ohio St. 415, 420; *Heath v. Van Cott*, 9 Wis. 516; *Vose v. Hurst*, 13 Ind. 551.

The opinion of the court was delivered by

VALENTINE, J.: This was an action on a certain promissory note, which reads as follows:

"\$75.00. TOPEKA, KANSAS, JANUARY 11th, 1874.

March 1st after date, for value received, I promise to pay to the order of N. A. Johnson seventy-five dollars at the Topeka National Bank, Topeka, Kansas, with twelve per cent. interest after maturity, and cost of collecting, including reasonable attorney-fees if suit be instituted on this note. F. G. NELSON."

Indorsed—"N. A. JOHNSON," "LORENZO PAULY."

G. H. Bradford, the plaintiff in error, was also plaintiff below, and is the owner and holder of said note. It does not appear that any demand of payment of said note was made at the time the same became due, or that any proper notice of non-payment was ever given to the indorsers, and therefore the question arises, (and it is the only question in this case,) are the indorsers, N. A. Johnson and Lorenzo Pauly, liable? The court below found the facts with reference to the execution and indorsement of said note to be as follows:

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"The note in suit in this case was payable to the order of the defendant Johnson, and was given as a renewal in part of a larger note made and executed in the same manner that this note was, the difference in amount between the notes having been paid in money at the time of making the note in suit. The Topeka National Bank acted as agent for the plaintiff, and drew the note for the purpose of having it executed. The defendant Nelson took the note, signed it himself, and then the defendant Johnson wrote his name across the back of the note, and after Johnson had so written his name the defendant Pauly wrote his name upon the back of the note. After the note had been executed, and the names of defendants Johnson and Pauly placed upon it as aforesaid, Nelson delivered the note and some money to the said Topeka National Bank, and received the above note referred to. Johnson and Pauly never had any further interest in the note than as above shown."

The judgment of the court below was in favor of the defendants Johnson and Pauly, and against Bradford for costs. We think this judgment was correct. Whenever a negotiable promissory note is drawn up as this was, and is then signed by the maker thereof, and is then indorsed in blank, first by the payee thereof, and then by a third person, and the note is then delivered by the maker thereof for a sufficient consideration to still another person, who thereby becomes the holder thereof, the presumption in such a case should be, and is, that the said payee and said third person intended to assume and did assume all the rights and privileges, as well as all the obligations and liabilities, usually assumed by indorsers of negotiable instruments. (See authorities cited in brief of counsel for defendants in error.) And it can make no difference in this case whether such presumption is conclusive, or only *prima facie*; for there is nothing in this case that tends in the slightest degree to rebut such presumption. All the parties connected with this note chose to make it appear as though Nelson, for value received, executed the note to Johnson, that Johnson then indorsed the note to Pauly, that Pauly then indorsed the note to the holder, and that the holder took the note thus executed and indorsed. And the holder in this case is more responsible for making the note so

Contract of in-
dorsement.

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appear than any other person connected with the note. He, through his agent, the Topeka National Bank, drew the note, and then had it executed and indorsed in the very manner in which it was executed and indorsed. If the holder of the note had desired to hold Johnson and Pauly as makers of the note, or as guarantors, or as indorsers waiving demand and notice, instead of indorsers with the usual rights and liabilities, he could easily have had it so arranged at the time of the execution and indorsement of the note, and have made the note itself so show it, provided of course that the other parties had so agreed. But probably (as counsel for the holder admit,) the holder himself (through his agents) wanted to hold Johnson and Pauly liable only as ordinary indorsers, so that he might afterward recover protest fees and damages, in case of non-payment of the note and suit thereon. Johnson and Pauly were probably only accommodation indorsers. It does not appear that they had any interest in the note, and it was Nelson, the payor, who finally delivered the same to the holder, and gave it force and effect. There is nothing in this case that tends to show that any person connected with the note intended that Johnson and Pauly should assume, or supposed that they did assume, any obligation or liability different from those ordinarily assumed by indorsers of negotiable instruments. Hence we think that they did assume just such obligations and liabilities, no more, and no less.

This case differs from the cases of *Firman v. Blood*, 2 Kas. 496, and *Fuller v. Scott*, 8 Kas. 25, in essential particulars. In those cases the notes were indorsed by *third persons*, prior to any indorsement made by the *payees*, and without any knowledge, intention or expectation that the notes ever would be indorsed by the payees; and the obligations of the indorsers in those cases were *to the payees*; and the notes themselves were in those cases *prima facie* evidence of those facts. Now in this case, Johnson was not a *third person*, but was the payee of the note; and Pauly did not indorse the note until *after* Johnson, the *payee*, had done so; and the obligation of Johnson was not to *himself as payee*, nor was the obligation of

LaRue v. Gilbert.

Pauly to Johnson, but *prima facie* the reverse. *Prima facie*, Johnson was under obligation as a prior indorser to Pauly, a subsequent indorser. But *prima facie*, and in fact, all the parties, Nelson, Johnson, and Pauly, were under obligation to Bradford, the holder of the note—Nelson as maker, Johnson as first indorser, and Pauly as second indorser. And as this was the only obligation which Johnson and Pauly were under to Bradford, and as no proper demand of payment was ever made, and as no proper notice of non-payment was ever given, we think Johnson and Pauly as indorsers were discharged.

The judgment of the court below was correct, and must be affirmed.

All the Justices concurring.

WM. J. LARUE v. WM. L. GILBERT *et al.*

HOMESTEAD RIGHTS, of Debtor and Family, Superior to Rights of General Creditors. A. and wife executed a mortgage to G. on their homestead, and on other real estate. Subsequently L. obtained a judgment against A. After A.'s death, his wife and children continued to occupy the homestead. G. foreclosed his mortgage, and in the decree, with his consent, it was ordered that the real estate other than the homestead be first sold. L., who was a party to the foreclosure proceedings, objected, and insisted that the homestead be first sold. *Held*, That there was no error in the order, and that the equities of the family of the mortgagor in the homestead were superior to the claims of the judgment creditor. [*Monroe v. May*, 9-466; *Hixon v. George*, post, 253; *Colby v. Crocker*, 17-527; *Sproul v. Bank*, 22-342.]

Error from Coffey District Court.

PREVIOUS to April 1873, Allen Crocker was indebted to LaRue, and an action was pending in favor of LaRue upon his claims, and judgment was given therein against Crocker,

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17th May 1873, for \$1,752.88. April 17th 1873, Crocker and wife executed their mortgage on 300 acres of land to and in favor of *Henry Gay*, to secure the sum of \$2,500 then due and owing by Crocker to the firm of *Gilbert & Gay*. November 17th 1873, said Crocker and wife, sold and conveyed to Geo. W. Welch by quitclaim deed 160 acres of the mortgaged premises. In February 1874, Crocker died. For several years before his death, and at that time, Crocker resided with his family on that portion of the mortgaged premises (140 acres) not sold to Welch, and claimed said 140 acres as his homestead. Since his decease, his widow and children still reside on said land, and claim it as a homestead. In October 1875, *Gilbert & Gay* commenced an action against the administrator, widow, and heirs of Crocker, to foreclose the mortgage given to *Gay* by Crocker and wife. *LaRue* was joined as a defendant by reason of his judgment-lien on that part of the mortgaged premises sold to Welch. He answered, setting up the foregoing facts, and asked that *Gilbert & Gay* be ordered and decreed to proceed first against the 140 acres occupied by the family of Crocker as a homestead before proceeding against the 160 acres sold to Welch, and on which his (*LaRue's*) judgment was a lien. His motion was denied. The case was tried at the December Term 1875. The amount found due *Gilbert & Gay* from Crocker's estate was \$3,060. A decree was entered, the plaintiffs consenting, that the 160 acres quitclaimed to Welch be appraised as one tract, and the homestead tract of 140 acres be appraised separately, and that the former tract be first offered for sale and sold to satisfy said mortgage-debt, the surplus if any to be paid to *LaRue* on his judgment; but if it should fail to bring a sum sufficient to pay the mortgage-debt and costs, that then the homestead tract should be sold for such deficiency, and the surplus if any to be paid to the widow and other heirs of Crocker. *LaRue* appealed, and he brings the case here on error.

Wm. L. McConnell, for plaintiff in error.

Gillett & Forde, for defendants in error.

The opinion of the court was delivered by

BREWER, J.: The controversy in this case grows out of the same facts as in the case of *Colby v. Crocker*, 17 Kas. 527, and which are fully stated in the opinion filed therein. Gilbert and Gay foreclosed their mortgage, and in the decree, with their consent, it was ordered that the property other than the homestead be first sold. To this LaRue, the administrator of the estate of the mortgagor, and holder of a judgment rendered against the mortgagor in his lifetime, and which was a lien subsequent to the mortgage upon the property other than the homestead, objected, and insisted that the order should be for the sale of the homestead first. We held in that case that an unsecured creditor had no superior equities over the family of the deceased mortgagor, which was continuing to occupy the homestead, and that, therefore, the mortgagee would not be required to exhaust his security in the homestead before touching the other property mortgaged. Does the holder of a judgment-lien stand in any better condition? Are his equities paramount to the homestead right? We think not. The same reasoning which led to the decision in that case, compels an affirmance of the judgment here. It is useless to restate it. The preservation of the homestead is, under the policy of our law, considered more important than the payment of debts. That is what a homestead means, exemption from debts. It is not given so much for the debtor, as for the debtor's family. And the family of the debtor have in this respect equities superior to the creditor. In giving a mortgage on the homestead, the debtor waives this homestead right, but only to the mortgagee, and does not therefore open the door to other creditors, or increase their equities. The case of *Chapman v. Lester*, 12 Kas. 595, cited by counsel for plaintiff in error, does not conflict with these views. In that we held that a mortgagee, holding a mortgage on both homestead and other property, might release the latter and still maintain his lien on the former. Both kinds of property were given as security, without any express preference of the one over the other, and we

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held that nothing was to be interpolated into the contract, no implied agreement to treat the outside property as the primary, and the homestead as only secondary security. But this was between the mortgagee and mortgagor, and the latter by giving the mortgage had waived his homestead-rights as against the mortgagee. We closed the opinion however by a recognition of the right of a court in foreclosure proceedings to direct that mortgaged premises be sold in parcels, and that the homestead be the last property offered for sale.

The judgment will be affirmed.

All the Justices concurring.

THOMAS W. WATERSON V. MATHIAS DEVOE.

1. **TAX DEED; Assignment of Certificate; When Deed Void on its Face.** A tax deed, which shows that the land intended to be conveyed thereby was sold to the county for delinquent taxes on May 5th 1863, and that the county treasurer on the 10th day of February 1865, assigned the tax-sale certificate to the person to whom, on May 11th 1865, the deed was executed, is void upon its face. [*Shoat v. Walker*, 6-65; *Sapp v. Morrill*, 8-682.]
2. **LIMITATION OF ACTION ON TAX DEED; Possession, and Color of Title.** The fact of possession, and claim of color of title in good faith under a tax deed, does not enter into, or constitute an element in the limitation prescribed by section 11 of the tax-law of 1862, or by subdivision third of section 16 of the civil code of 1868, to the effect that "an action for the recovery of real property sold for taxes can only be commenced within two years after the date of the recording of the deed."
3. ——— **When Deed Void on its Face.** The statute of limitation prescribed by said section 11, (page 879, Comp. Laws 1862,) or by said subdivision third, (Gen. Stat. 1868, page 633,) will not run in favor of a tax deed, void upon its face, even when the land intended to be conveyed by the tax deed has been in the actual, open and notorious possession of the holder of the void tax deed for two years after the date of the recording of such deed. [*Shoat v. Walker*, 6-74; *Sapp v. Morrill*, 8-682; *Hubbard v. Johnson*, 9-632; *Entreken v. Howard*, 16-551, 553; *Larkin v. Wilson*, 28-575.]
4. **TAXES ON MORTGAGED PREMISES; Mortgagee, not Bound to Pay, or Redeem.** A mortgagee, not in the possession of real estate, is under no obligation

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to pay the taxes on the mortgaged premises. Under section 135 of the tax-law of 1868, (Gen. Stat. 1062,) if the mortgagor failed or neglected to pay the taxes, or permitted the land mortgaged to be sold for taxes, the mortgagee could pay the taxes, or redeem the land sold, and the taxes so paid were a lien on the mortgaged property until paid back; but this section does not render it the duty of the mortgagee to pay the taxes, nor to redeem the land from tax sale. [*Clark v. Reyburn*, 1-281; *Chick v. Willets*, 2-384, 385; *Stanchift v. Norton*, 11-218; *Sharp v. Barker*, 11-381; *Opdyke v. Crawford*, 19-604; *Vanderslice v. Knapp*, 20-647; *Alexander v. Shonyo*, 20-707; *Seaman v. Huffaker*, 21-263; *Robbins v. Sackett*, 23-301; *Seckler v. Delfs*, 25-159, 165.

5. ——— The mere relation of mortgagee, will not prevent the person so related from acquiring title to the mortgaged premises by purchase at a tax sale.
6. PRACTICE, SUPREME COURT; *Party Complaining of Error, Must Bring his Separate Action to Obtain Review.* Where a party brings an action in the supreme court to have a judgment of the district court reviewed, and upon the hearing the alleged errors are held insufficient to reverse or modify the judgment, this court will not examine any errors in the judgment below, at the instance of the defendant in error, when such defendant has made no motion for a new trial, and has brought no separate action to have those errors corrected, or the judgment reversed. [See cases cited in *R. R. v. Muhlman*, 17-224; *Maynes v. Veale*, 20-386; *Perley v. Taylor*, 21-717.]

Error from Marshall District Court.

EJECTMENT, for the E. $\frac{1}{4}$ of N.E. $\frac{1}{4}$, the N.W. $\frac{1}{4}$ of N.E. $\frac{1}{4}$, and N.E. $\frac{1}{4}$ of S.E. $\frac{1}{4}$ of section 30, township 2, range 7—160 acres of land lying in Marshall county. Devoe, plaintiff, claimed as patentee. Defendant Waterson claimed under a tax deed issued to him and duly recorded in 1865, for taxes assessed in 1862. Action commenced in the spring of 1874. Second trial at November Term 1874, and judgment in favor of plaintiff. Defendant Waterson brings the case here on error.

J. D. Brumbaugh, for plaintiff in error.

A. E. Park, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: Action of ejectment by Devoe against Waterson. Defense, tax deed, and possession thereunder for more than two years after the date of the recording of the tax deed.

Opinion of the Court.

Reply, that the tax deed was void upon its face, and that as Waterson was the mortgagee of Devoe, and had foreclosed his mortgage prior to the purchase of the tax certificate, he was

Statement of the case. under such obligation to pay the taxes as to be precluded from acquiring and holding a tax deed against his mortgagor. The cause was tried by the court, a jury being waived. The court stated in writing the conclusions of fact found, separately from the conclusions of law. Among other findings of fact, the court found the following:

"On the 1st of May 1861 a patent from the United States was issued to Devoe, conveying to him the land in question; and said patent was recorded December 15th 1873.

"On the 11th of May 1865, the tax deed was executed to Waterson for said land, by the county clerk of the county of Marshall, and the tax deed was recorded July 24th 1865.

"Defendant Waterson took possession of and made lasting and valuable improvements on the land in controversy, in the spring of the year 1869, and has been in peaceable possession ever since.

"Defendant Waterson paid for the assignment of the tax certificate February 10th 1865, \$37.33, the same being the taxes, interest and penalties on said land at that time; and defendant paid subsequent taxes on said land as follows: November 18th 1865, \$8.65, being the taxes for the year 1865; February 8th 1867, \$11.84, being the taxes for 1866; December 16th 1867, \$17.78, being the taxes for 1867; January 4th 1869, \$17.15, being the taxes for 1868; January 8th 1870, \$16.57, being the taxes for 1869; December 5th 1870, \$23.75, being the taxes for 1870; December 25th, 1871, \$25.86, being the taxes for 1871; December 31st 1872, \$24.68, being the taxes for 1872; January 10th 1872, \$27.65, being the taxes for 1873; and December 3d 1874, \$30.72, being the taxes for 1874.

"The land was regularly assessed for the year 1862, and the plaintiff did not pay the taxes levied thereon for that year, nor the taxes for any subsequent year.

"A description of said land was not entered on the tax-roll for the year 1862. A description of said land was not published or advertised in the list of lands advertised for sale for taxes of the year 1862.* The tax-sale record in the county

[*THE land in controversy lies in section 14th, and was properly assessed and described by the assessor; but on the tax-roll, and in the advertisement of sale, what was intended as the same land, was described as being in section 13th.—REPORTER.]

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treasurer's office, of lands sold in May 1863 for taxes of the year 1862, showed that the land in question in this case was sold to Marshall county.

"The plaintiff executed and delivered to the defendant a mortgage on the land in dispute on the 28th of January 1862, to secure the payment to the defendant of the sum of \$72.43, and said mortgage was foreclosed at the December term of the district court for Marshall county, in the year 1864, but the land was never sold under such judgment. Such judgment, so far as it was *in personam*, was kept alive by the issuing of executions, and was finally paid and satisfied in full on the 26th of December 1873, by the voluntary payment thereof by plaintiff."

The conclusions of law were —

"1st, That the tax deed above set out is void on its face.

"2d, That the possession of the defendant together with the tax deed did not start the statute of limitations to running in favor of said deed.

"3d, That plaintiff's right of action is not barred by the statute of limitations.

"4th, That the defendant, being a mortgagee of the land in dispute, could acquire no tax deed for the same under a sale for taxes for the year 1862.

"5th, That the defendant has a lien on said land for the amount paid for the assignment of the certificate, and for the amount of all subsequent taxes paid on said land, and that he is entitled to interest on the amount paid for the assignment of the tax certificate at the rate of twenty per cent. per annum, and also to interest on the amount of taxes paid subsequent to the date of said tax deed at the rate of twenty-five per cent. per annum, and said defendant also has a lien on said land for the amount of said interest. The amount of defendant's lien for taxes and interest is \$434.17, that being the total amount said defendant paid as taxes, and for the assignment of certificate, and interest to the first day of this term of court.

"6th, That the defendant has a lien for the improvements made on said land." (The plaintiff excepted to the fifth conclusion of law. Defendant excepted to all the findings and conclusions.)

The material questions presented in this case for our determination relate, first to the effect of a tax deed, void upon its face, in starting, or setting in motion the statute of limitation, (which statute is, "that an action for the recovery of real

Opinion of the Court.

property sold for taxes can only be brought within two years after the date of the recording of the tax deed," when the party claiming title thereunder has actual, open and notorious possession of the premises described in the tax deed; and second, to the validity of the purchase of a tax certificate by a mortgagee, and of the deed to him on the certificate, before a sale under foreclosure, and when the mortgagee is not in the possession of the mortgaged premises.

In this case, the tax deed was made to Waterson on May 11th 1865. It recites that on the 5th of May 1863, the land in dispute was sold to Marshall county for the taxes of the year 1862, and that on the 10th of February 1865, the tax-sale certificate, which had been issued to Marshall county for said land, was assigned by the county treasurer of Marshall county to Waterson. Within

1. Tax-sale
certificate;
assignment
by county
treasurer.

the decision of *Shoat v. Walker*, 6 Kas. 65, the deed relied upon by Waterson is void upon its face. This court has frequently held that the statute of limitation will not run in favor of such a tax deed, while the land intended to be conveyed by the tax deed remains vacant and unoccupied.

2. Tax deed;
limitation.

Shoat v. Walker, supra; *Sapp v. Morrill*, 8 Kas. 677; *Hubbard v. Johnson*, 9 Kas. 632. This court has also held, that the statute of limitations will not run in favor of a tax deed void upon its face, where the owner of the land is in possession of and occupies the same. *Sapp v. Morrill*, supra.

Does the actual, open and notorious possession of the premises by the holder of a tax-deed, void upon its face, change the rule, as above cited? The authorities upon this question are conflicting. The Wisconsin decisions support the doctrine, that a person who has been in the possession of the real estate for the time within which an action can be brought to recover

3. Possession
by grantee,
and color of
title.

property sold for taxes, after the date of recording of the tax deed, (and in that state the time is three years,) claiming title in good faith under the tax deed, can successfully plead the statute of limitations, although the deed is void upon its face. We are however not satisfied with the reasoning of the decisions of that state in reaching

this conclusion. The decision strongly relied upon, is the case of *Lindsay v. Fay*, 25 Wis. 460. That decision is based mainly upon the case of *Edgerton v. Bird*, 6 Wis. 527, decided in 1858. That the opinion in *Edgerton v. Bird* was not so luminous and satisfactory as to be entirely acceptable to the bar of that state, is evident from some of the remarks in the decision rendered in the case of *Lindsay v. Fay*. In commenting upon the cases of *Edgerton v. Bird*, supra, and *Sprecker v. Wakeley*, 11 Wis. 432, Dixon, C. J., says:

"And yet, notwithstanding those decisions, the question has of late years been often raised in this court, as if it was still an open one; and now this case comes up, and most elaborate printed arguments have been submitted on the same supposition. It is certainly time the question was put at rest, and an end had of argument upon it. Aside from the considerations generally prevailing to induce an adherence to past decisions, and settled points, the question here is one to which the doctrine of *stare decisis* applies with somewhat peculiar force. It is certainly better that almost any question should be settled, if even upon doubtful principles, than that it should not be settled at all."

The case of *Edgerton v. Bird*, from the argument therein adduced, was decided principally upon some statute of that state making possession an aid of a tax deed, or making adverse possession or claim under color of title a basis for the statute of limitation. The court discusses at considerable length "color of title," and holds, "that the tax deed was sufficient to show *color of title* in *Bird*, without regard to its intrinsic worth as a title, or the informality in its execution," and is of the opinion, "that the tax deed was properly admitted in evidence in that case to show colorable title in the husband of the defendant, and the character of that possession." In the conclusion of the opinion, "the limitation of three years" within which an action must be brought from the time of recording the tax deed of sale, is referred to as also decisive of the case, but no authorities are stated in support of this conclusion, and the judge merely adds:

"If any force or effect is given to this provision of law, it

Opinion of the Court.

must, under the facts and circumstances of this case, defeat the action. The defendant has possession under a recorded tax deed, and had had possession under such a deed more than three years at the time the suit was brought. The tax deed was given in 1841, and it does not seem very inequitable to apply this statute of repose as a shield to protect the possession of the defendant."

In the case of *Sprecker v. Wakeley*, 11 Wis. 482, the case of *Edgerton v. Bird*, supra, is cited and affirmed, and the only additional argument added to the former opinion, as to the three-years statute of limitation, is the language of Cole, J., to the effect, that, "this is substantially the plain, positive and express language of the statute, and must be regarded by the courts, unless they are able to discover some principle by which they can overrule and disregard it. I have not been able to discover any ground upon which I could declare this provision of law void, unless I went to the extent of denying to the legislature power to pass statutes of limitations, a position which would be contrary to all the authorities." In the opinion in *Lindsay v. Fay*, supra, the learned judge concedes, "that as the statute is silent upon the question of possession, and *bona fide* claim of title, if it is extended to tax deeds void upon their face, it must be by the spirit of it, and by analogy to the provisions of the other statute, and not because such cases are within the letter of it." We do not note the cases of *Hill v. Krick*, 11 Wis. 442; *Knox v. Cleveland*, 13 Wis. 245, and others of like character, holding that the recording of a tax deed draws after it the constructive possession in a case where the premises are unoccupied, as this court in cases already decided, and hereinbefore cited, has not sanctioned this rule, when applied to tax deeds void upon their face.

We have thus fully quoted from the Wisconsin decisions, because they are relied upon in this case to sustain the claim of plaintiff in error, and are so frequently cited as conclusive upon this question. The case of *Moore v. Brown*, 11 How: 414, is in direct conflict with the decisions in 6 Wis. 527, 11 Wis. 482, and 25 Wis. 460, as the supreme court of the United

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States therein holds, that a tax deed, void upon its face, does not bring a defendant within the benefit of the statute of limitations. Most, if not all of the adjudged cases referred to in the text-books in support of the propositions maintained by the Wisconsin decisions on this point, are made under statutes differing materially from those of Kansas. Notably is this true in the case of *Cofer v. Brooks*, 20 Ark. 542; *Hoffman v. Harrington*, 28 Mich. 90, and *Washburne v. Culler*, 17 Minn. 361. All of these latter cases are upon the question that tax deeds, even if irregular and worthless, are admissible in evidence, in connection with proof of possession, to show claim under color of title in good faith to let in the statute of limitations. While such decisions to some extent tend to support the position of counsel for plaintiff in error, they are not exactly in point, and hence not conclusive, even if sustained by reason. The fact of possession, and claim or color of title in good faith under a tax deed in this state, does not enter into, or constitute an element in the limitations prescribed in the two-years statute of 1862, (Comp. Laws, § 11, p. 879,) or in the statute now in force, (Gen. Stat. of 1868, 683, § 16, subdivision 3d.) We cannot change said subdivision third to read that, "an action for the recovery of real property sold for taxes, can only be brought within two years after the date of the recording of the tax deed, where the person holding such deed has been *in possession* of the premises from the date of such recording under claim or color of title made thereunder in good faith." The law, as it stands upon the statute book, is the same as to persons out of possession, and claiming title to property under tax deeds, as to those in possession. The statute of the two years, by its terms, applies as much to the one, as to the other. Possession is not referred to therein; nor does any claim of title, or entry under color of title in good faith, or otherwise, make a part of the provision of limitation. We have no right to extend its conditions. We are only interpreters of the law. This court having already held that a tax deed, void upon its face, will not start the statute of limitation

of two years, it follows also, that a tax deed void upon its face will not protect a person in possession of the premises for two years under a like deed.

In answer to the conclusion to which we have arrived, it may be urged, that no distinction should be made against a party in possession, claiming title in good faith, between a tax deed void upon its face, and one regular in form, but which on account of a fact existing outside of the deed may be invalidated in a court by the introduction of evidence *dehors* the deed. We do not think this suggestion, or rather objection, of any great weight. The law makes a tax deed, valid on its face, *prima facie* evidence of the regularity of all proceedings, from the valuation of the land by the assessor, inclusive, up to the execution of the deed; and a person receiving such a deed may justly and properly rely on its recitals. He need not look, and indeed is not expected to look, into the facts appearing elsewhere in the recorded proceedings for the levy and collection of the tax. The legislature intended to extend its protection of the two-years statute of limitation to persons holding tax deeds, regular in form, against proof *aliunde* which would rebut or destroy such *prima facie* title, when such tax deeds have been duly recorded, whether the party claiming title thereunder takes possession of the premises or not. If he takes possession, the law wisely provides, that he shall recover for all lasting or valuable improvements made upon the premises, whether the tax deed be void upon its face, or may be avoided by a fact existing in the proceedings for the assessment and collection of the tax for which the land was sold. *Smith v. Smith*, 15 Kas. 290. Nor do we think the principle we have adopted, inequitable or unjust. At the time Waterson took the assignment of the tax certificate from the treasurer, the treasurer had no more authority to assign the same to him, than the counsel appearing in this case, or any other person not an officer of Marshall county. In March previous to the assignment of the tax certificate, the law giving the county treasurers the right to make such transfers, was repealed. Re-

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ferring again to the case of *Shoat v. Walker*, supra, we quote: "A tax deed to be sufficient, when recorded, to set the statute of limitation in operation must of itself be *prima facie* evidence of title. It is not necessary that the deed be absolutely good under all circumstances. It is not necessary that it be sufficient to withstand all evidence that may be brought against it to show that it is bad; but it must appear to be good upon its face; it must be a deed that would be good, if not attacked by evidence *aliunde*. When the deed discloses upon its face that it is illegal, when it discloses upon its face that it is executed in violation of law, the law will not assist it. No statute of limitations can then be brought in to aid its validity. The party accepting it, and claiming under it, has full notice of its illegality, and must abide the consequences of such illegality. He has no reason to complain." And we add, that actual, open and notorious possession will not bring such a deed within the provisions of the two-years statute of limitations.

This conclusion disposes of the case against the claim of the plaintiff in error; but as a very important question has been presented by the defendant in error, which is in the record,

4. Taxes on mortgaged property. Rights and liabilities of mortgagor and mortgagee.

and which has been argued to the court in regard to the relations of mortgagors and mortgagees in tax matters, we will consider whether the situation of Waterson, as mortgagee, would prevent him from acquiring title to the mortgaged premises by his purchase of the tax certificate, if the assignment had been valid, and obtaining thereon a tax deed, so as to cut off the rights of Devoe, his mortgagor, in the premises. This involves two inquiries—first, was there any obligation on the part of Waterson to pay the taxes? and second, was there such a relation of trust or confidence existing between Waterson, the mortgagee, and Devoe, the mortgagor, as to preclude the former from becoming the purchaser of a tax title on the mortgaged premises in his own behalf? It is settled, that a party under obligation to pay taxes, cannot acquire a title at a tax sale. In this state, the common-law attributes of mort-

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gages have been by statute wholly set aside, and the ancient theories demolished. The mortgagee has a mere security, creating a lien upon the property, but vesting no title, and giving no right of possession whatever, either before or after breach. The statute confines the remedy of the mortgagee to an ordinary action, and sale of the mortgaged premises. *Clark v. Reyburn*, 1 Kas. 281; *Chick v. Willets*, 2 Kas. 385. Waterson neither had the actual possession, nor the right of possession of the premises, as mortgagee. He was required to pay taxes to the state on his note and mortgage, and he performed his obligation, so far as his note and mortgage were concerned, when he discharged that duty. By loaning money to Devoe, and taking mere security, it cannot be said that he either covenanted or promised to pay Devoe's taxes. The contrary is true. Devoe was not only under obligation to pay the taxes on the land he owned, but he was under duty to protect the lien, or security, of Waterson, by providing for the payment of the taxes, so that such lien or security should not be destroyed by his default or negligence. It is a well-settled rule of equity, that a party shall not take advantage of his own wrong. Yet the argument is made in this case, that because Devoe refused to perform his obligation to pay taxes, refused to comply with his written promise to pay his note, so acted as to compel Waterson to advance additional moneys, not contemplated when the loan was made and the security taken, in order to save his security, that thereby, such a relation of confidence existed between Waterson and Devoe as to make the taking of a tax deed by the former an act of fraud against the rights of the latter. The argument is fallacious. The reasons are all in favor of holding that a mortgagee, under our laws, not in possession of the premises may obtain title to the mortgaged property by a fair purchase at a tax sale. It cannot be said that Waterson was under obligation to pay the taxes, he not having been in possession at the time of the assessment; nor were the lands assessed against him, nor was there any agreement with the mortgagor to pay the same. He cannot

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be held liable as having any title in the land, as our statute negatives the idea of title in the mortgagee. If the theory be advanced, that the mortgagee is precluded from accepting a tax deed for his own benefit, because the law will presume that he did so for the protection of his own interest merely, and not to acquire title, we answer, then, in this case such a presumption of the law cannot be sustained. Waterson did not step forward and redeem the property from sale, but he took or attempted to take a transfer of the tax certificate, and thereafterward obtained the tax deed. This action on his part, and like action on the part of any mortgagee similarly situated, shows an intention, or an election on the part of such person, to occupy the relation of purchaser, with all the rights and incidents which the law attaches to it. The acts of a person, under such circumstances, do not support the presumption which the authorities holding contrary to the doctrine herein expressed would have the law imply. The fact that, under our statute, the mortgagee may pay and discharge the taxes on the mortgaged premises, and collect the amount so paid in his foreclosure suit, does not change the rule. Such provision of the law gives him the choice, if he desires, of paying the taxes, and secures him in the way of a lien for the amount so paid. It does not make it obligatory upon him to do so, nor does it create the relation of trust and confidence between him and the mortgagor. This statute does not change the obligation, in this respect, of the mortgagee. Section 135, Gen. Stat. 1868, p. 1062; §148, Laws 1876, p. 97. We think that a review of the authorities will sustain our conclusion. In the case of *Williams v. Townsend*, 81 New York, 415, the question was directly presented and decided, as above stated. *Smith v. Lewis*, 20 Wis. 369, is in support of the same view. In *Chapman v. Mull*, 7 Ind. Eq. R. (N. S.) 292, it is held, "that the principles in relation to dealings between trustee and *cestui que trust*, as adopted by courts of equity, do not apply to the case of mortgagor and mortgagee. Dependence, and the duty of protection, are not involved in this relation, and they may

deal, subject only to the ordinary principles." In *Walthall's Ex'rs v. Rives*, 34 Ala. 91, it is held, "that the acceptance of a mortgage does not estop the mortgagee from purchasing the mortgaged property under judgments having a lien paramount to that of the mortgage." In *Harrison v. Roberts*, 6 Florida, 711, it is also held, "that there is no rule of law, or principle of equity, which prevents the first mortgagee from purchasing the mortgaged property when sold at sheriff sale under a judgment prior to the mortgage; and, in such a case, he takes absolute title." The cases that support the rule, that a mortgagee cannot affect the rights of a mortgagor by purchasing the property at a sale for delinquent taxes accruing on the premises, are either made in states where the common law prevails as to the character of mortgages, or in actions in which the mortgagee was in the actual possession of the premises. In *Chickering v. Faile*, 26 Ill. 507, the argument of the court shows that, in that state, by the mortgage-deed the legal title passes to the mortgagee, but in equity the right of redemption remains in the mortgagor, even after condition broken. Upon a failure to perform the condition, the title apparently becomes absolute in the mortgagee, and is clearly color of title, and, after condition broken, the mortgagee, at law, may bring his action of ejectment and recover possession. This is not so in Kansas; and hence, in this state, the Illinois authorities are not in point on the question decided. In *Brown v. Lemons*, 44 N. H. 475, where it was held the mortgagee could not acquire title against the mortgagor, the mortgagee was in actual possession, taking the rents and profits. The court below held differently in its conclusions of law as to the rights of a mortgagee, than here decided; but as the deed was properly held void on its face, and the statute of limitations held not applicable, and as Water-son was allowed by the court the benefit of both the occupying-claimant act, and section 117 of the tax-law, (Gen. Stat. 1868, p. 1057,) no error was committed affecting any right of the plaintiff in error to his prejudice.

The counsel for the defendant in error, assuming that this

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court would hold the purchase of the tax certificate, and the acceptance of the tax deed by the mortgagee, as redemption of the land from taxes for the benefit of the mortgagor, asks us to modify the judgment of the court below, so as to allow to Waterson only seven per cent. interest upon the taxes paid by him, and to refuse him the benefits of the occupying-claimant act. We do not think the questions can be raised by the defendant in this way. The only party who has filed a petition in error here, is Waterson. Devoe does not come to this court alleging error in the action of the court below. He has filed no motion for a new trial, and he cannot now, simply on his brief, ask the rulings of the court below to be reversed or modified at his instance. He is not the complaining party. He has filed no petition in error. He is held satisfied with the judgment originally rendered.

The judgment will be affirmed.

BREWER, J., concurring.

VALENTINE, J., not expressing any opinion.

WILLIAM ENDRESS v. M. L. ENT *et al.*

1. UNDERTAKING, *To Release Attached Property; Not Affected by Surplusage.* Where E. causes an undertaking to be executed, in a civil action pending before a justice of the peace in which an order of attachment has issued, and a levy made on E.'s personal property, to obtain a release of the property from attachment, in which undertaking the defendant and his surety bind themselves "to the plaintiff, in the sum of eighty-five dollars that the defendant shall perform the judgment of the said magistrate in this action touching the attachment herein," and such undertaking is approved by the justice and filed with him: *Held*, That the undertaking is in effect a statutory bond; that the words, "touching the attachment herein," should be treated as surplusage, and that the defendants are liable on the undertaking, on failing to pay the judgment in the original action.

Statement, and Opinion.

2. ——— *Action on Undertaking; Parties; Defense.* All the parties in an undertaking in attachment may be sued thereon, without issuing execution against the principal. It is sufficient to set forth in the bill of particulars the bond, a release of the attached property thereon, the judgment, and its non-payment. It is a matter of defense to show a satisfaction of the judgment.

Error from Leavenworth District Court.

ACTION brought by *Endress* on an undertaking given by *Ent* as principal, and *Douglass* as surety, in July 1875, to release certain property of *Ent's* which had been seized and was held under an order of attachment. At the trial in the district court, at the December Term 1875, when *Endress* rested, the defendants demurred to the evidence. The court sustained the demurrer, and gave judgment in favor of defendants for costs. Plaintiff brings the case here.

C. F. W. Dassler, for plaintiff.

Douglass & Ent, defendants, for themselves.

The opinion of the court was delivered by

HORTON, C. J.: *Endress* sued *Ent* before a justice of the peace on an account for goods sold, payment to be made on delivery. *Ent* failing to pay, the identical property sold was seized on attachment. To release the property from attachment, *Ent* as principal, with John C. *Douglass* as surety, executed the following undertaking:

(*Court, and Title.*) "We bind ourselves to the plaintiff, William *Endress*, in the sum of eighty-five dollars; that the defendant, M. L. *Ent*, shall perform the judgment of the said magistrate in this action touching the attachment herein."

This undertaking, and the security therein, were approved and accepted by the justice of the peace. *Endress* recovered judgment against *Ent*, and the judgment remaining unsatisfied, suit was brought against *Ent* and *Douglass* on said undertaking, and judgment rendered by the justice of the peace against them. From this judgment an appeal was taken to the dis-

strict court, and judgment rendered in favor of defendants for costs. The only question raised is, whether defendants are liable on the undertaking, on failing to pay the judgment in the original action. Section 52 of the justices act, (Gen. Stat. 1868, p. 787,) provides, that—

“If the defendant, or other person in his behalf, at any time before judgment, cause an undertaking to be executed to the plaintiff, by one or more sureties, resident in the county, to be approved by the justice, in double the amount of the plaintiff's claim, to be stated in his affidavit, to the effect that the defendant shall perform the judgment of the justice, the attachment in such action shall be discharged, and restitution made of any property taken under it, or the proceeds thereof. Such undertaking shall also discharge the liability of a garnishee, in such action, for any property of the defendant in his hands.”

Omitting the words, “touching the attachment herein,” the bond in question conforms to the above section of the statute. Does the addition of these words avoid the bond, as a statutory obligation? We think not. Technically, there could be no judgment “touching the attachment herein.” These words are meaningless. In an action where an order of attachment has been issued, and a levy made thereunder, if judgment be rendered for the plaintiff, and no bond has been executed that the defendant shall perform the judgment of the justice, the property attached is sold, by order of the justice, under the same restrictions and regulations as if levied upon by execution, and the judgment is satisfied from the proceeds of such sale, if sufficient therefor. An order to sell the attached property, made by a justice, is not a judgment touching the attachment. The words, so unnecessarily added to the undertaking, as used, have no certain meaning, and must be treated as surplusage. With the words, “touching the attachment herein,” disregarded, the undertaking was executed in full compliance with the provisions of said section 52, and we hold, under this view, that the defendants are liable on the undertaking, on failing to pay the judgment in the original action.

It is insisted by the defendants, that the undertaking was

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not vitiated
by surplus-
age.

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intended as a forthcoming bond, as described in section 38 of the justices act, (Gen. Stat. 782,) and they cite the action of the justice in overruling the motion of Ent to discharge the attachment. The bond is very dissimilar from the undertaking required by said section 38, and cannot, by us, be construed into an undertaking that the property attached in this action, or its appraised value in money, should be forthcoming to answer the judgment of the court. The constable did not take the bond in question, and no appraisement was had; it was approved by the justice, and filed by him, and thereupon the property was left with Ent by the order of the justice. At the time Ent made the motion to discharge the attachment, there was in fact no attachment in the case to be discharged, the attachment issued and levied having been previously discharged by virtue of the acceptance by the justice of the undertaking given by the defendants, and the release of all the property thereon to Ent. Upon the rendition of the judgment, no order was made to sell the attached property, and this shows that the justice considered the undertaking conditioned for the payment of the judgment, and not for the forthcoming of the property, or its value in money, on the day of sale. Afterward, the same justice rendered judgment on the undertaking in this action against the defendants, thus conclusively proving that he treated the undertaking as given in pursuance of said section 52, and not under section 38.

The defendants further insist, that the court below properly sustained the demurrer to the evidence, and rendered judgment for the defendants, because there was no evidence introduced on the trial that the judgment against Ent remained unsatisfied. On the hearing of the case, the plaintiff produced the undertaking sued on, the execution of which defendants admitted, and then gave in evidence all the proceedings in the case of the plaintiff against the defendants in the action to recover on the undertaking, and also all the proceedings in the original case of the plaintiff against Ent, including the release of the attached property on the undertaking, and the rendition of the

2. Action; necessary facts; proof.

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original judgment of \$42.50, and \$8.85 costs. This evidence was sufficient. The production of the judgment against Ent, with the docket of the justice, and all the proceedings and papers in that case, showed that the judgment had been duly rendered, and still remained unsatisfied. If the defendants contested the question as to said judgment being unsatisfied, that was a matter of defense, and they should have offered the proof, if any existed, to the contrary.

The judgment of the court below will be reversed, and a new trial ordered.

All the Justices concurring.

JOHN B. MUNSON V. COMM'RS OF MORRIS COUNTY.

COUNTY ATTORNEY; *His Power to Represent County, Ceases with His Term of Office.* The authority of a county attorney to represent the county terminates with his term of office. Payment to him thereafter, by the clerk of the district court, with knowledge of the expiration of his term of office, of money collected on a judgment in favor of the county, is not payment to the county, notwithstanding such judgment was rendered in an action brought by him as county attorney during his term of office.

Error from Morris District Court.

THE board of county commissioners recovered a judgment against *Munson* and five others, at the November Term 1875, of the district court. The defendants bring the case here.

T. K. Johnston, for plaintiffs in error.

A. Moser, county attorney, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This was an action brought by the board of commissioners of Morris county against John B. Munson, as

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clerk of the district court, and the other defendants below, as his bondsmen, to recover the sum of \$600, which plaintiff below alleged had been received by the said Munson in his official capacity as said clerk, as a part payment upon two several judgments before that time obtained by said board of commissioners, against John R. Horner and others, and which said judgments were then remaining of record unsatisfied in said clerk's office; and which said sum of money the said Munson had refused to pay over to said board on demand. The defendants answered, by admitting that Munson was clerk of said court, that said defendants executed the bond as alleged in the petition, and that said board had recovered a judgment against Horner and others, but denied generally all the other allegations of the petition. Upon these pleadings the case was tried, and judgment was rendered in favor of the board of commissioners for the sum of \$600, and costs.

Upon the trial, it appeared that the cases against Horner and others had been commenced for the board of commissioners by Duncan McDonald, who was at that time county attorney of Morris county, but that before the judgments were obtained his term of office had expired, and A. Moser had been elected as his successor at the election held in November 1874. There was also the testimony of the county clerk, that the records of his office showed no employment of McDonald in the cases subsequent to the expiration of his term of office; the testimony of the chairman of the county board that McDonald was not employed, and of Moser that he never recognized McDonald as having any connection with the case. It also appeared that \$3,000 had been properly received by the clerk on the Horner judgments above referred to, and paid by him over to McDonald, and by the latter, save \$600 which he claimed as attorney-fees, paid over to the county treasurer. The journal entries of the two judgments read, that the plaintiff appeared by McDonald as well as by Moser. Munson was clerk at the time of these entries, but by whom they were prepared, does not appear. There was testimony also that Munson said he knew that McDonald's term of office had expired,

but thought it was his duty to prosecute the cases he commenced to final judgment, and that the county commissioners were trying to beat him out of his fees. No special findings were made, but only a general finding for plaintiff.

The clerk having in his official capacity properly received the money due on the judgments to the plaintiff therein, can defeat this action only by showing that he had paid the same over to the plaintiff, or some party legally entitled to receive it. It is no defense, that he paid the money to some creditor of the plaintiff; and it matters not therefore whether McDonald had a legal claim against the county for the money by him retained. When a private party, who has been represented in a litigation by an attorney whom he had employed, discharges such attorney from further employment in that litigation, he is no longer bound by the acts of such attorney; and if knowledge of this discharge is brought to the clerk, the latter cannot thereafter relieve himself from liability to the party by payment to the attorney. Employment of an attorney, does not constitute a permanent agency, but is as a rule terminated at the will of the employer; and the authority of the attorney ceases immediately upon the termination of the employment. Now, the relation of attorney and client, between the county attorney and the county, subsists only by virtue of the occupancy of the office, and terminates with the end of the official term. So long as he holds the office of county attorney, he is authorized to represent the county. This authority comes with his office, and goes when his official term expires. Whenever the people elect a successor, it is tantamount to a revocation of authority. So when McDonald's term of office expired, and Moser succeeded him therein, his authority to represent the county ended. Payment to him thereafter, discharged no liability to the county. That his term of office had expired, the clerk as a matter of fact knew, even if he was not charged with notice thereof. The testimony discloses no private employment; in fact, it shows there was none. He had no authority to receive this money, and the clerk in paying it to him in no manner discharged

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his liability to the county. We see no error, and the judgment must be affirmed.

All the Justices concurring.

ELIZA C. ABEEL V. GEORGE H. HARRINGTON.

1. **PLEADING; Averment as to Execution of Note.** Where a petition alleges, that "the defendant, by Charles A. Phillip and John T. Abeel, her attorneys-in-fact, made and delivered to one L. M. Taylor, her promissory note of that date, and thereby promised to pay to said L. M. Taylor or order," etc., and a copy of said note is attached to said petition as a part thereof, which is signed as follows: "Eliza C. Abeel, by Charles A. Phillip and John T. Abeel"—(Eliza C. Abeel being the defendant, and the sufficiency of the petition not being in any manner attacked until after judgment)—*held*, that the allegations of the petition, with regard to the execution of the note, are sufficient to charge the defendant.
2. **ATTORNEY-FEE; Judgment upon Default.** Where the court in rendering judgment on a promissory note includes in such judgment an attorney-fee of fifty dollars, and afterward, on a motion being made by the defendant to vacate the entire judgment, overrules said motion, but at the same time so modifies the judgment as to make it a judgment only for the amount of the note and interest, and costs, *held*, that the judgment as thus modified is not erroneous, even if it was erroneous to the extent of said attorney-fee, as originally rendered.

Error from Sedgwick District Court.

ACTION by *Harrington*, on a promissory note, and judgment at the May Term 1874. The facts, and proceedings, are fully stated in the opinion. *Abeel* brings the case here.

Geo. H. English, for plaintiff in error.

Stanley & Hatton, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action on a promissory note. The first question presented in this court is, whether the peti-

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tion below sufficiently alleged that the note was executed by Abeel, defendant below. With regard to this matter, the petition below alleged as follows: "On the 26th of May 1873, the defendant, by Charles A. Phillip and John T. Abeel, her attorneys-in-fact, made and delivered to one L. M. Taylor her promissory note of that date, and thereby promised to pay to said L. M. Taylor or order, four months after the date thereof, the sum of two hundred and eighty dollars. * * * A copy of said note, with all the indorsements thereon, is hereto attached, marked exhibit 'A,' and made a part of this petition." Exhibit "A," attached to the petition, was a written instrument, dated "Wichita, Kansas, May 26th, 1873," and commenced as follows: "For value received, four months after date, I promise to pay," etc.; and it was signed as follows: "Eliza C. Abeel, by Chas. A. Phillip & John T. Abeel."

The defendant made no appearance in the court below until after judgment was rendered against her on the allegations of said petition. The judgment was by default. We think the petition sufficiently alleged that the defendant executed said note. But if the defendant had desired that the plaintiff should state more specifically in his petition, in what manner she gave authority to Charles A. Phillip and J. T. Abeel to execute said note for her, she should have appeared in the case, and have moved the court to require the plaintiff to make a more specific statement concerning such matter. In the absence of any such a motion, the allegations which were actually made in said petition we think are amply sufficient.

The next and only other question is, whether the court below, by including in the judgment as originally rendered, an attorney-fee of fifty dollars, so vitiated the entire judgment, that no part of it could afterward be allowed to stand. The facts upon which this question is raised are as follows: The summons which was served upon the defendant was indorsed as follows: "Suit brought for the recovery of money; amount claimed \$280, with interest from the 23d of September 1873, at the rate of twelve per cent. per annum, and an attorney-fee

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of \$—, and costs of suit." The court rendered judgment originally, not only for the amount of the note and interest, and costs, but also for an attorney-fee of fifty dollars. Afterward the defendant appeared in the case, and moved the court to vacate the entire judgment, upon various grounds. The court overruled the motion, but at the same time so modified the judgment as to make it a judgment only for the amount of the note and interest thereon from October 23d 1873, and for costs, not including the costs of said motion. There can certainly be no valid objection to the judgment as thus modified, even if it was erroneous as originally rendered. And the court below certainly did not commit any error against the defendant below by thus modifying the judgment.

The judgment as thus modified will be affirmed.

All the Justices concurring.

ATKINSON, TOPEKA & SANTA FE RLD. CO. v. JOHN L. RETFORD.

1. *Instructions; Particular Facts; Error.* It is often unwise for a trial court to select a single circumstance from the evidence, and thereupon found a special and separate instruction to the jury. Such action may cause a misdirection to the jury, and be considered substantial error, although the instruction itself is not clearly erroneous. [*Head v. Dyson*, 31-74, 76.]

2. *Practice; Excepting to Instructions.* Where the court gives a series of instructions, each of which is separately stated and numbered, and the record of the exception reads as follows: "At the time of reading the above instructions to the jury, the defendant duly excepted to all of them to each and every of them"—the supreme court will presume that exceptions were duly taken to each of the instructions separately. [*Barstow v. Elston*, 31-274, 276.]

3. *Evidence; Preponderance of Testimony.* An instruction stating, "that a preponderance of the evidence does not necessarily imply the greater amount of evidence, but that which is most reasonable and easy of belief, under all the circumstances surrounding it," held, misleading. [*See Callison v. Smith*, 20-28; *Garvin v. Jennerson*, 20-373.]

Error from Lyon District Court.

RETTFORD sued the *Railroad Company*, and recovered judgment at the March Term 1875, of the district court. *The Railroad Company* brings the case here on error. The facts, and the proceedings in the court below, sufficiently appear in the subjoined opinion.

Ross Burns, and *J. G. Waters*, for plaintiff in error.

Ruggles & Sterry, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: Retford brought suit against the plaintiff in error to recover damages for permanent disability of body and mind, resulting from an injury received by him on May 20th 1873, while in the performance of his duty as baggageman on one of the trains of the A. T. & Santa Fé R. R. Co., in being hurled from the car by coming in contact with a coal-chute, erected by the railroad company at a switch, or station, called Peterton, and which coal-chute defendant in error claimed was within six inches of where the cars of the said railroad passed in going along the track, and thereby dangerous to the passengers and employes upon the cars passing the chute. He also alleged in his petition that the accident occurred without any fault on his part, while he, in a careful and prudent manner, and as a part of his duty, attempted to throw and toss letters and packages he had in his possession for the station of Peterton, to the station-agent there, the train at the time not stopping, but proceeding past the place at the rate of fifteen miles per hour. The plaintiff in error answered, denying all the allegations contained in the petition, and for a second defense admitted that Retford received an injury of some kind about the time stated, but averred that such injury was received without the fault of the plaintiff in error; that afterward, and before the bringing of this action, Retford made a claim for damages for such injury, and the plaintiff in error delivered to Retford \$146. he accepting and receiving it in full

Statement of
the case.

Opinion of the Court:

satisfaction and discharge of the damages and cause of action alleged in his petition. Retford replied, denying the allegations contained in the second defense, and for a further reply alleged, that if he did receive the said sum of money it was received by him as and for wages due at that time from plaintiff in error for services rendered at the instance and request of plaintiff in error, and not in satisfaction of his claim mentioned in his petition. On the trial a general verdict was returned, assessing the damages of Retford at \$4,500; and the following answers to the questions of fact submitted to the jury were also returned:

Question 1st.—Who located the coal-chute at Peterton, against which the plaintiff struck? *Ans.*—Charles Thatcher, the company's engineer.

2d.—Was or not the person who located and fixed the distance from the track of the coal-chute at Peterton, against which the plaintiff struck, a competent and skillful person for that purpose? *Ans.*—We do not know.

3d.—Did or not the person who located and fixed the distance of the coal-chute at Peterton, against which the plaintiff struck, use his best judgment and skill in determining the distance from the track? *Ans.*—We do not know.

4th.—State whether or not the coal-chute was located at the distance from the track, usual and customary among railroads for such structures to be located and placed? *Ans.*—It was not.

5th.—What was the distance from the track of that portion of the coal-chute against which the plaintiff struck? *Ans.*—Three feet, four inches.

6th.—What was the distance from the outside of the baggage car in which plaintiff was at the time of the injury, to that portion of the building against which the plaintiff struck? *Ans.*—Eleven inches.

7th.—State whether or not coal-chutes along the line of railroads should not be, for convenience and use, placed as near the track as is compatible with the safety of passing trains? *Ans.*—Yes.

8th.—What was the speed of the train, at the time of the injury to the plaintiff? *Ans.*—Ten miles an hour.

9th.—What was the position of plaintiff while approaching

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the coal-chute against which he struck? *Ans.*—Standing in the door, with his head and body partly out.

10th.—Did or not the plaintiff have his head and shoulders protruding from the side of the car, immediately prior to being struck? *Ans.*—Partly.

11th.—Did or not the plaintiff go to the side door of the car, when the train first struck the switch? *Ans.*—No.

12th.—What was the distance from the building against which the plaintiff struck, to the switch? *Ans.*—Six hundred feet.

13th.—Was there, or not, any obstruction on or near the track to prevent the plaintiff from seeing the coal-chute, from the time of his first going to the door? and if so, what were the obstructions? *Ans.*—There were no obstructions.

14th.—Was he not, immediately before receiving the injury, leaning out of the car-door next the coal-chute, with his back toward the engine and coal-chute, talking and laughing with a person near the track, to whom he had thrown a paper? *Ans.*—Yes.

15th.—If the jury answer the last (or 14th) question in the negative, then state what the plaintiff was doing, and his position immediately before receiving the injury? *Ans.*— —.

16th.—Was there negligence on the part of the plaintiff, and if so, of what did it consist? *Ans.*—No negligence.

17th.—Was there negligence on the part of the defendant, and if so, of what did it consist? *Ans.*—Yes. In erecting the coal-chute nearer the track than usual, or customary.

18th.—Did the plaintiff execute the receipt marked "B"? *Ans.*—Yes.

19th.—Did the plaintiff execute the receipt marked "A"? *Ans.*—Yes.

Judgment was rendered for Retford for \$4,500. Upon the trial, defendant in error offered evidence, against the objection of the railroad company, showing that soon after the injury to Retford the track was moved, at Peterton, so as to throw it about eight inches further out from the coal-chute. On the part of the plaintiff in error, it was shown by one Norton, who in June 1873 took charge of the track of the railroad at the place of the injury, that in the latter month he ordered the track moved back toward the coal-chute from four to six inches, which was done, and that he

1. Instructions;
particular
facts.

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intended to move it still nearer to the chute. Upon the point, of the change of the distance from the track to the coal-chute, the court, against the objection of the railroad company, gave the following instruction to the jury:

“If you are satisfied from the evidence that soon after the happening of the injury complained of, the track of defendant's road was moved back some distance from the coal-chute, this you may consider as a circumstance tending to show negligence on the part of the defendant.”

We do not think that there was any error committed in admitting the evidence as to the removal of the track after the injury. The jury could consider it for what it was worth, and with proper instructions it might have aided, in some degree, the jury in determining whether the railroad company changed the track on account of it being in too close proximity to the coal-chute for the safety of its employés, or for other reasons. The circumstance was a slight one in the case, but was not wholly immaterial. The instruction however, based upon this evidence, while possibly not erroneous, yet placed too much prominence upon the change of the track, and in view of the evidence, and the other instructions, had the tendency to mislead the jury. Frequently it is unwise for a trial court to select a single circumstance from the testimony, and upon that found a special and separate instruction, thus making it, as it were, the leading and prominent point for the jury to consider. In this case, such action was more than usually injudicious. Retford had rested his case, so far as the evidence on his part was concerned, upon his own evidence as to the injury, and proof that soon after the accident the track was thrown out about eight inches from the coal-chute. The railroad company in rebuttal mainly offered evidence as to the distance of the coal-chute from the track at the time of the accident; that it was erected at a safe distance from the track; and that the injuries which Retford received resulted from his own negligence in leaning outside of the car, while passing the coal-chute. This instruction, so objected to, brought the removal of the track prominently before the mind of the jury, and

made this circumstance, to the exclusion of other matters, the great and absorbing question in the determination of the alleged negligence on the part of the railroad company, and thus resulted, unintentionally, in a misdirection of the jury. In the case of the *St. Jos. & D. C. Rld. Co. v. Chase*, 11 Kas. 47, where evidence was produced that the smoke-stack of an engine was changed after sparks therefrom set fire to and burned certain hay, because of the defective condition of the smoke-stack, Mr. Justice Valentine, in delivering the opinion of the court, held the instruction, limited and restricted as that was, not erroneous, but said, "The court possibly, however, gave too much prominence to a slight circumstance, such as this was." In that case, the instruction as to the change of the smoke-stack, after the firing of the hay from the sparks which escaped from such smoke-stack, did not state, as in this case, that such change could be considered a circumstance tending to show negligence.

On the trial, the counsel for the plaintiff in error asked the court to instruct the jury, "that if they believed from all the evidence in the case that the plaintiff had knowingly and willfully testified falsely to some material fact in the case, they were *at liberty* to disregard the whole of his testimony." This instruction was refused, and thereafter the court gave to the jury thirteen instructions in the case, the second one of which was as follows:

False witnesses.

"You are the exclusive judges of the evidence, of the facts proved or disproved, of the credibility of the witnesses, and of the weight to be given to their testimony. The law you will take from these instructions; and if you believe from the evidence that any witness has willfully and knowingly testified falsely to any material fact, you *shall totally disregard* all such witness's testimony."

Upon the giving of said series of instructions, numbered from one to thirteen inclusive, the counsel for plaintiff in error excepted "to all, and to each and every one of them." The exception to said second instruction was duly taken. *Kas. Pacific Rly. Co. v. Nichols*, 9

2. Excepting to instructions.

Kas. 256. Such instruction was erroneous. *Shellabarger v. Nafus*, 15 Kas. 547.

The fourth instruction given by the court to the jury, was as follows:

"A preponderance of the evidence does not necessarily imply the greater amount of evidence, but is that which is most reasonable, and easy of belief, under all the circumstances surrounding it."

Clearness, as well as accuracy in an instruction, is of the first importance; and if an instruction permits the jury to draw an incorrect inference, or is given in so bungling a manner as rather to make the case obscure than to throw light upon it, the party aggrieved has just reason to complain. This instruction is justly open to the criticism of being inaccurate, and awkwardly drawn. As given, it could not have aided the jury in their deliberations. If the court had stated, that the preponderance or weight of evidence did not reasonably imply the testimony of the greatest number of witnesses, it would have more correctly stated the law upon the point sought to be explained. Neither is a "preponderance of evidence" accurately defined by the statement "that it is that evidence which is most reasonable, and easy of belief, under the circumstances surrounding it." We think that in this instruction, the court in the haste of the trial, used inapt language to express the idea intended to be conveyed.

If the above instructions had been given in a case where an examination of the record disclosed clear and convincing proof in support of the verdict below, we might not disturb a judgment founded thereon; and if but one of said instructions had appeared in this case, we would have had doubts of ordering a new trial. But taking all the instructions above commented upon, and the closeness of the case, a combination of errors, slight under some circumstances, but serious in view of the surrounding facts, is presented which we cannot overlook. The special findings of the jury do not satisfy us that the plaintiff in error suffered no prejudice on account of the giv-

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ing of these instructions. On the other hand, some of the findings of the jury can only be accounted for, on the theory that they were misled by the instructions of the court.

The judgment is reversed, a new trial awarded.

VALENTINE, J., concurring.

BREWER, J.: I concur in the judgment of reversal in this case, but rest my conclusions upon grounds somewhat different from those expressed by the Chief Justice in the opinion of the court. I am forcibly impressed with the conviction that the conduct of Retford, as disclosed by himself, and by the findings of the jury, was negligent, and such negligence as would bar any recovery. The coal-chute was eleven inches from the outside of the baggage car. It was built at a station where the trains of the defendant occasionally stopped, and where was a switch, and side-track. Retford was leaning his head and shoulders out of the baggage-car far enough to reach the coal-chute, with his back toward the engine, and, without looking to see whether there was anything to render such a position dangerous, was talking and laughing with a person to whom he had thrown a paper. There was nothing to have prevented his seeing the coal-chute if he had turned his face in that direction. Now it seems to me, that it was negligence for an employé on a train, familiar with these facts, when approaching a place where he might reasonably expect that there would be buildings or other erections, temporary or permanent, to lean his body so far out of the car without looking to see what might be there to endanger such action. It seems to me that the jury failed to give sufficient consideration to these facts. It seems to me also, that the damages assessed were very large for the injuries testified to by the plaintiff. I agree with the other justices, that it is probable that the jury were misled by the instruction in reference to the moving of the track, after the injury, inasmuch as a matter of trivial importance seemed to be given undue prominence. I agree with them also that there was error in the instruction as to disregarding the entire testimony of a

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witness who has willfully testified falsely on a material matter. I cannot think however that they were possibly misled by the instruction concerning the preponderance of testimony.

G. C. HIXON & Co. v. THOMAS J. GEORGE *et al.*

1. **ISSUES, IN EQUITY CASES; Trial of; Discretion of Court.** In an action in the nature of a suit in equity, the court may in its discretion send any or all of the issues in the case to a jury to be tried; and if it sends all such issues to a jury, it may do so by a general order, without even mentioning any particular issue; and the jury may then (unless the court should otherwise order, either on its own motion, or at the request of one of the parties,) find a general verdict upon all such issues. [*Kimball v. Connor*, 3-432; *Clemenson v. Chandler*, 4-558; *Gillespie v. Lovell*, 7-424; *Carlin v. Donegan*, 15-495; *McCardell v. McNay*, 17-433; *Williams v. Elliott*, 17-523; *Houston v. Comm'rs*, 19-396; *Emporia v. Soden*, 25-602; *Carpenter v. Carpenter*, 30-719; *Woodman v. Davis*, 32-344.]
2. **HOMESTEAD; Purchase by Husband; Title in Name of Wife; Claims of Creditors.** Where a husband purchases land with his own money, but in his wife's name, for the purpose of placing the property beyond the reach of his own creditors, and then with his own money makes improvements on said land, and then enters upon said land and occupies the same with his family as his residence and homestead, *held*, that such transactions are not fraudulent as to *subsequent* creditors of the husband, and that they (the creditors) cannot look to the land as being subject to the payment of their claims. [*Bank v. Wheeler's Adm'r*, 20-632.]
3. ——— And generally, the expenditure of money in purchasing a homestead, or in subsequently paying therefor, or in making improvements thereon, can never be charged as a fraud upon the rights of creditors or others, unless the complaining party had, at the time of such expenditure, some special interest in, or claim upon, the funds used for such purpose. [*Monroe v. May*, 9-476, 477.]
4. ——— And it can make no difference in such a case, whether the husband, or the wife, owned the money, or in whose name (of the two) the title to the homestead was taken. In any such case the property would be exempt from forced sale.
5. ——— **Unincorporated Village.** Probably no spot can be found in Kansas where a homestead may not be taken and held under the homestead-exemptions laws, provided of course that the property may be owned and occupied as the residence of a private individual. Even within the limits of an unincorporated town or village, such a homestead may probably be so taken and held.
6. **PLEADING; Allegation, "Incorporated Town;" Word, "Corporation," defined.**

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It was alleged in both the petition and the answer, that the property claimed as a homestead was situated in the town of Muscotah. The answer alleged that said town was incorporated; and there was no pleading in the case, verified by affidavit, putting in issue this allegation. *Held*, That said allegation must, under the statute (civil code, § 108,) be taken as true, and that said property was subject to be held under the homestead-exemption laws. The word "corporation," as used in said section, means municipal corporation, such as cities, towns, and villages, as well as private corporations. [*Leroy v. McConnell*, 8-273, 276; *Ferguson v. Tutt*, 8-376; *Reed v. Arnold*, 10-104; *R. R. v. Wilson*, 10-111; *Sch. Dist. v. Carter*, 11-446; *Washington v. Hobart*, 17-276, 277; *Wands v. Sch. Dist.*, 19-204.]

7. **ABANDONMENT OF HOMESTEAD; Title; Creditors of Husband.** Where the title to certain land, which is the homestead of the husband and wife and their family, is in the wife, and not in the husband, and they all abandon such land as their homestead, this abandonment does not of itself authorize the land to be taken for the husband's debts; and this would be true even if the land was originally purchased with the husband's money. [*Randall v. Elder*, 12-257; *Tarrant v. Swain*, 15-146; *Moore v. Reeves*, 15-150; *Dayton v. Donart*, 22-271; *Mouriquand v. Hart*, 22-597.]
8. ——— **Sale of Homestead, No Fraud Against Creditors.** A debtor cannot commit a fraud upon his creditor by disposing of his homestead. A debtor, in the disposition of his property, can commit a fraud upon his creditor only by disposing of such of his property as the creditor has a legal right to look to for his pay. [*Morris v. Ward*, 5-239; *Monroe v. May*, 9-476; *Mitchell v. Skinner*, 17-565; *Sproul v. Bank*, 22-342.]
9. ——— **Temporary Absence, No Abandonment.** A husband and wife, who temporarily leave their homestead in Kansas and sojourn in the Indian country in the service of the United States, do not thereby lose their homestead rights, so long as they intend to return to their homestead, and do not acquire another residence; and it makes no difference that they may rent their homestead to tenants in the meantime. [*McDowell v. Diefendorf*, *McCahon* (Dassler), 648; *Edwards v. Fry*, 9-425; *Gilworth v. Cody*, 21-702, 704; *Hogan v. Mannors*, 23-560.]

Error from Atchison District Court.

ACTION by *Hixon* and two others as partners, against *George* and wife, to subject certain lands claimed by defendants as a homestead, to sale upon an execution. The opinion, *infra*, contains a full statement of the facts and proceedings. The district court, at the June Term 1875, gave judgment in favor of the defendants, and the plaintiffs bring the case here on error.

B. P. Waggener, for plaintiffs.

D. Martin, for defendants.

The opinion of the court was delivered by

VALENTINE, J.: The facts in this case are substantially as follows: On 21st June 1869, Thomas J. George purchased in the name of his wife, Caroline George, lots 1, 2 and 3, in block 19, in the town of Muscotah, in Atchison county, for which he was to pay \$205. One-half of the purchase-money was paid at that time, and the other half was to be paid in one year. During the summer of 1869 said Thomas J. built a dwelling-house, and made other improvements on said lots, worth, in the aggregate, about \$1,200, and during the said summer he and his family moved into said dwelling-house; and from that time till October 1872 they occupied said property as their homestead. The other half of said purchase-money was afterward paid by George, and on May 29th 1871, the grantor executed to Mrs. George a deed for said premises. All of said purchase-money, and all the money that it took to pay for said improvements, belonged to George, and not to Mrs. George; and the lots were purchased, and the title taken in her name, for the purpose of keeping the property beyond the reach of George's creditors. The jury say in their findings, that said lots are not farming lands, and whether the town of Muscotah is incorporated or not, is not shown. The defendants however had previously alleged in their answer that the said town of Muscotah was incorporated, and this allegation is not denied by plaintiffs by any pleading verified by affidavit. On May 1st 1871, Thomas J. George was indebted to the plaintiffs Hixon & Co. on an account for the sum of \$858, the first item of which account was made on May 12th 1870; but what the nature of this item was, is not shown; and on June 15th 1871, judgment was rendered on said account in favor of said Hixon & Co. and against George for that amount. In October 1872, Thomas J. George went with his family to the Indian country, in the employment of the government of the United States; and they are still there, in such

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employment; but during all that time, they have not acquired any other residence, but have always intended and still intend to return to their former homestead, which homestead has during all that time been occupied by tenants of theirs from whom they have collected rents.

On September 15th 1873, Hixon & Co. commenced this action for the purpose of subjecting said lots to the payment of their said judgment. The case was tried by the court and a jury. "The court held that special issues or questions of fact might be submitted to the jury, but no general verdict could be rendered" in the case. Therefore, only "special issues or questions of fact" were submitted to the jury, and upon these special issues or questions the jury made special findings. These findings covered nearly all the issues in the case, and also some special matters which were not in issue. After these special findings were made, the court itself, upon these special findings, and the pleadings and the evidence, made a general finding in favor of the defendants George and wife, and against the plaintiffs, and thereupon the court rendered judgment in favor of the defendants and against the plaintiffs for costs. This judgment the plaintiffs now seek to have reversed.

We proceed to consider the various questions involved in this case, not in the exact order in which they have been presented to us by counsel, nor even in the exact order in which we have stated the facts of the case, but in an order equally as convenient. The court of course erred in holding that no general verdict could be rendered in the case. The court could, if it had so chosen, have ordered all the issues in the case to be tried by a jury, and could have done so by a general order, without the slightest mention of any particular issue; and then the jury could, (unless the court had otherwise ordered, either on its own motion, or at the request of one of the parties,) have found a general verdict upon all such issues, without mentioning any particular fact or issue in the case. But the error was immaterial; for in an equity case, like this, involving many issues as this does, the

1. Trial of issue
in equity.

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court has the power, without giving any reason therefor, to send any portion of the issues which it chooses to a jury to be tried, and to require the jury to make a separate finding upon each of such issues; and the court may try the other issues in the case itself, or it may send them or any portion of them to another jury, or to a referee, to be tried. (Gen. Stat. 680, § 267; *Carlin v. Donegan*, 5 Kas. 496, 497.) In this case, neither party requested that the court should make separate findings, either of fact or of law, and therefore the court did not err in finding generally. (Gen. Stat. 684, § 90.)

Upon the facts of the case, as thus found by the court and jury, and admitted by the pleadings, can the plaintiffs recover? We think not. No part of the plaintiffs' claim accrued prior to May 12th 1870; but long before that time said lots had been purchased in the wife's name; long before that time all the money ever expended by George, either for the land itself or

1. Homestead;
purchase
by husband;
sola.

for any improvement thereon, except \$102.50 of the purchase-money for the land, had been paid out and expended by George, and had wholly ceased to be

his property; and long before that time George and his wife and family were residing upon said land, and occupying the same as their homestead; and it must now be presumed, as nothing appears to the contrary, that the plaintiffs were fully aware of all these facts, not only at the time they gave the credit to George for which they now desire to have said lots made liable, but long before that time. Therefore, no fraud upon their rights can be imputed because said lots were purchased in George's wife's name, or because of his expenditure of said money. Nor can any fraud be charged even in regard to said \$102.50 last expended. And generally, the expenditure of money in purchasing a homestead, or in subsequently paying therefor, or in making improvements thereon, can never be charged as a fraud upon the rights of creditors, or others, un-

2. Claims of
creditors.

less the complaining party had at the time of such expenditure some special interest or claim upon the funds used for such purpose. Now in this case the plaintiffs had no interest in or claim upon said \$102.50. And as it was

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expended in the payment for property which was already the homestead of both George and his wife, it passed beyond the reach of George's creditors, and neither it nor the homestead can be taken for George's debts. And it would have made no difference if the title to the property had been taken in George's name, and not in his wife's name. In either case, the property would have been exempt from the claims of any general creditor of either George or his wife. And it cannot make any

4. Title immaterial.

difference in any case whether the husband, or wife, pay the purchase-money, or which of the two takes the title. In any case, the one may pay the purchase-money, and the other take the title, without committing any fraud upon creditors, or giving to creditors any interest in the homestead. *Monroe v. May*, 9 Kas. 476, 477; *Cipperly v. Rhodes*, 53 Ill. 346; *Orr v. Shraft*, 22 Mich. 260, 268, 264; *Dreutzer v. Bell*, 11 Wis. 114; *Pike v. Miles*, 28 Wis. 164.

But it is claimed that said property never was such a homestead as is contemplated by the homestead-exemption laws of Kansas. (Const., art. 15, §9; Gen. Stat. 473.) And it is so

5. Unincorporated villages.

claimed because the property is neither farming land, nor situated within the limits of any incorporated town or city. Now we would think that no spot in Kansas could be found where a homestead might not be taken and held under the homestead-exemption laws, provided of course that the property might be owned and occupied as the private residence of private individuals—that even within the limits of an unincorporated town or village such a homestead might be so taken and held. But under the pleadings in this case we hardly think that this question was put in issue in the court below, and if not, then the question need not be decided in this court. Both the petition and the answer alleged that the property was situated in the town of Muscotah. The answer alleged that the said town of Muscotah was incorporated; and there was no pleading verified by affidavit denying said allegation of the answer. Therefore, under the statutes,

6. Word "corporation," defined.

and the pleadings, it must be taken as true that the said town of Muscotah was incorporated, and that the property claimed as a homestead in this case

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was subject to be held under the homestead-exemption laws as a homestead. The statute provides that "allegations" "of the existence of a corporation," "shall be taken as true, unless the denial of the same be verified by the affidavit of the party, his agent or attorney." (Gen. Stat. 650, § 108.) Now we think that the word "corporation," as used in the statute, means municipal corporations, such as cities, towns, and villages, as well as private corporations. If we are correct in this, then the defendants' property was situated in the incorporated town of Muscotah, and therefore the claim of the plaintiffs, that this property was and is situated in a place where no legal homestead, under the homestead-exemption laws, can be taken or held, must fail. But suppose the plaintiffs' reply really did

Finding of put in issue the allegation in the answer, that the
fact. said town of Muscotah was incorporated, still the court below made a general finding upon all the issues in the case in favor of the defendants, and against the plaintiffs.

But it is claimed that the defendants abandoned their homestead in October 1872. Now suppose they did: will that give to the plaintiffs any right to have the property subjected to the payment of their judgment? We think not. It must be remembered that the property belongs to Mrs. George; that it belonged to her both before and at the time when

7. Abandonment, when title is in wife. said judgment was rendered; that it never did belong to George; and that the judgment was not rendered against Mrs. George, but was rendered against George alone. The property was purchased in 1869; the defendants made it their homestead in 1869; Mrs. George's title thereto was completed on May 29th 1871, and said judgment was not rendered until June 15th 1871. After said judgment was rendered, but before the defendants removed from their homestead, to-wit, in May 1872, they placed on record the deed conveying the property to Mrs. George, thereby showing that they still intended that the property should belong to her, and not to her husband. The homestead right of the defendants was good before they got full and complete title. (*Randall v. Elder*, 12 Kas. 257; *Tarrant*

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v. Swain, 15 Kas. 146; *Moore v. Reeves*, 15 Kas. 150.) It was good in 1869, when they first occupied the premises; and it certainly remained good up to October 1872, when they removed therefrom. Now suppose that at any time from 1869 up to October 1872 George had owned any interest in the property, still, he would have had the power, with the consent of his wife, to have transferred that interest to any person whom he might have chosen, and with or without any consideration therefor, and no such creditor as the plaintiffs would have any right to complain. (See cases heretofore cited, and *Morris v. Ward*, 5 Kas. 239; *Mitchell v. Skinner*, 17 Kas. 565; *Crummens v. Bennett*, 68 N. C. 494; *Vogler v. Montgomery*, 54 Mo. 584; *Sears v. Hanks*, 14 Ohio St. 298; *Wood v. Chambers*, 20 Texas, 247, 254.) Such a transfer would not have been any fraud upon the rights of the plaintiffs. A debtor cannot com-

8. Creditor has no claim on homestead.

mit a fraud upon his creditor by disposing of property "toward which the eye of the creditor need never be turned." *Monroe v. May*, 9 Kas. 476. A debtor in the disposition of his property can commit a fraud upon his creditor only by disposing of such of his property as the creditor has a legal right to look to for his pay. Now if George ever had any interest in said property, he disposed of that interest long before he abandoned the property as his homestead, by having the absolute and unconditional title thereto placed in his wife's name, and having the deed to her for the property recorded. There was no fraud in this; *Dreuzer v. Bell*, 11 Wis. 114; *Pike v. Miles*, 23 Wis. 164; *Cippery v. Rhodes*, 53 Ill. 346.

But the defendants never did abandon their homestead. They only left it temporarily while in the service of the government in the Indian country, and they always have intended to return to it, and still intend to return to it. Such a removal from the homestead, and such a sojourning elsewhere,

9. Temporary absence no abandonment.

does not destroy the homestead right. *McDowell v. Diefendorf*, supreme court of Kansas, reported in *Dassler's Digest*, page 92, § 23; *Tomlinson v. Swinney*, 22 Ark. 400; *Moss v. Warner*, 10 Cal. 296; *Cippery v. Rhodes*, supra;

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Gouhenant v. Cockrell, 20 Texas, 96; *Drury v. Bachelder*, 11 Gray, 214; *Lazell v. Lazell*, 8 Allen, 575. And it makes no difference in such a case, that the owners lease the premises during their absence. *Wetz v. Beard*, 12 Ohio St. 481; *Wiggins v. Chance*, 54 Ill. 176; *Campbell v. Adair*, 45 Miss. 170; *Shepherd v. Cassidy*, 20 Texas, 24; *Dulanty v. Pynchan*, 6 Allen, 510; *Locke v. Rowell*, 47 N. H. 46.

The judgment of the court below will be affirmed.

BREWER, J., concurring.

HORTON, C. J., not sitting, having been of counsel in the court below.

LEAVENWORTH, LAWRENCE & GALVESTON RLD. Co. v.
ROBERT COOK.

1. PRACTICE IN SUPREME COURT; *When New Trial Granted on Facts*. Where a district court overrules a motion for a new trial *pro forma*, and does not approve or disapprove the verdict of the jury, the supreme court will order to be done in the case what it thinks the district court should have done; and if the verdict of the jury in such a case is not sustained by sufficient evidence, the supreme court will order that the verdict be set aside, and that a new trial be granted. [*State v. Bridges*, 29-138; *R. R. v. Kunkel*, 17-145, 146.]
2. FIRING PRAIRIE; *Unavoidable Casualty*. A railroad company, in the usual and ordinary performance of its business, is not liable for a purely accidental fire caused by fire escaping from one of its engines. [*R. R. v. Betts*, 7-308; *R. R. v. Davidson*, 14-349; *R. R. v. Riggs*, 31-622.]

Error from Allen District Court.

ACTION by Cook, to recover damages alleged to have been caused by the carelessness and negligence of the *Railroad Company*. Judgment for plaintiff at the November Term 1874, and the *Railroad Company* brings the case here on error.

S. O. Thacher, for plaintiff in error.

Murray & Richards, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This action was commenced by Cook against the plaintiff in error before a justice of the peace, and thence appealed to the district court, where the trial resulted in a judgment against the company, and thereupon the case was brought here. The case was tried in both the justice's court and the district court, on the following bill of particulars:

The Leavenworth, Lawrence & Galveston Railroad Company,
To ROBERT COOK, Dr.:

To \$72.00 damages, resulting from the burning up and total destruction of 18 tons of hay in the county of Allen, state of Kansas, on or about the 18th of November 1873, by and on account of the agent and servants of the said Leavenworth, Lawrence & Galveston Railroad Company, while in the ordinary and usual performance of their duties as such agents or servants, carelessly and negligently setting fire to the prairie in said county of Allen, on or about said date, by which said fire in its spread and course said hay was burned and consumed, the same being reasonably worth at the time, the sum of \$4.00 per ton, \$72.00.

The jury returned a general verdict, in favor of the plaintiff below, and against the defendant for \$72 damages, and also, in response to the following questions submitted to them, made the following answers, to-wit:

"1.—Was the fire that injured plaintiff's property caused by the defendant? *Yes.*

"2.—Was the fire caused by sparks from the engine. *No.*

"3.—Was it caused by coals from the ash-pan of the engine? *No.*

"4.—Was it caused by fires from stoves on said defendant's train? *Stoves or furnaces.*

"5.—If fire was caused by fire taken and thrown from stoves on train, who was it thrown by? *By employes of said road.*

"6.—Was the fire caused by the employes maliciously? *We cannot answer.*" * * *

"And thereupon the defendant moved the court to require the jury to make certain answers to the 4th and 6th questions, and thereupon the jury retired and after consideration returned to the 4th question the following answer: 'From the evidence we cannot say;' and did not change their answer to the 6th

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question, and thereupon the defendant moved the court to require the jury to answer said 4th and 6th questions certainly and specifically, which the court refused to do, to which refusal the defendant excepted.

"And thereupon on the same day came on for hearing the defendant's motion for a new trial herein, which is as follows:

"(*Court, and title.*) 'And now comes the defendant and moves the court for a new trial herein, for the following reasons:

"'1st. The court erred in not requiring the jury to render certain and specific answers to each of the 4th and 6th questions submitted to the jury.

"'2d. The said verdict of the jury is not sustained by the evidence, and is contrary to the evidence.

"'3d. The special findings of fact by the jury are contrary to the evidence.

"'4th. The general verdict of the jury is not consistent with the special findings of the jury.'

"And thereupon both parties expressing a desire to have the question at issue passed upon by the supreme court, the court made the following order:

"'And now this cause came on for hearing on the defendant's motion for a new trial herein, and the court doth *pro forma* overrule said motion, inasmuch as the parties desire the opinion of the supreme court on the issues involved. To which ruling and decision, the defendant excepted.' The court then rendered judgment in favor of the plaintiff and against the defendant for \$72, and costs."

The defendant now seeks to have that judgment reversed; and one of the first questions raised is, that the verdict of the jury is not sustained by sufficient evidence. All the evidence introduced on the trial in the court below has been brought to this court, but we shall give only such portions thereof as we may find necessary in the discussion of the different questions of law involved in the case. It will be noticed, that the court below in this case does not approve the verdict and findings of the jury, as is usually done by trial courts in similar cases when they overrule a motion to set aside the verdict. But in this case the court merely overrules the motion to set aside the verdict and findings *pro forma*, and consigns the whole question to the supreme court, unembarrassed by any approval or disapproval of the verdict on the part of the district court. We are therefore in this case perfectly at liberty to order to be done what we think the district court should

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have done. Now in this case we do not think that the verdict is sustained by sufficient evidence; and acting as a district court should do in such a case, we must order that the verdict be set aside, and that a new trial be granted. We think that the evidence shows that the fire was caused by fire escaping from one of the defendant's engines, but we do not think that the evidence shows that the defendant, or any one of its agents or servants, was guilty of any negligence. The fire in this case seems to have been a purely accidental fire; and this case seems to have come within the decisions rendered in the cases of the *K. P. Rly. Co. v. Butts*, 7 Kas. 308, and the *M. K. & T. Rly. Co. v. Davidson*, 14 Kas. 349; and therefore the railroad company in this case is not liable. We have said that we think the evidence shows that the defendant's engine caused the fire. This is not the verdict of the jury however. The jury say otherwise. In answer to the second question, which was, "Was the fire caused by sparks from the engine," the jury answer, "No." In answer to the third question, which was, "Was it caused by coals from the ash-pan of the engine," the jury also answer "No." But the evidence tends to show strongly that the fire was caused by the defendant's train as it passed, and there was not a particle of evidence tending to show that there was any fire on or about the train except in the engine. The theory of the plaintiff below seems to be, that the fire was caused by fire taken by some one of the company's employes from a stove or furnace, and thrown out upon the dry grass. But there was not a particle of evidence in the case from which such a theory could logically be drawn. And the entire evidence was against any such theory. Every one of the company's employes testifies that he did not throw out any fire at that place, and there was no proof that any one of them did so. Indeed, there was no proof that there was any furnace on the train except the one connected with the engine; and the only proof that there was any stove on this particular train, was the testimony of the witness Thorp, who merely testified on this subject that, "As baggage-master I [he] had charge of the stove in the baggage car." And there

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was no proof that there was any fire in even this stove. Indeed, as we have before stated, there was no proof that there was any fire about the train except that in the engine.

There was a pile of cinders and ashes afterward found in a ditch at or near where the fire started. This pile of cinders and ashes indicated that there had been from a quart to a half-gallon of coals and cinders thrown there. The ashes, coals and cinders do not seem to have been scattered, but were all together; and the pile made such a hot fire that the ground beneath it was burned red like brick dust for from one to two inches deep. This pile of cinders was found from six to eight feet east of the east end of the cross-ties. At the time that this fire occurred, the train was going north at the rate of about twenty miles an hour, and "at that time a very extraordinary and high wind was blowing from the northwest" against the train. Now is it possible that said pile of cinders could have been thrown from that train as it was moving and under such circumstances? Two of the witnesses say not. It must be remembered that the train did not stop at that place, but passed on north. The theory of the plaintiff below, that the fire was caused by fire thrown from stoves, or furnaces, by the defendant's employés, is not sustained by sufficient evidence, and the special findings of the jury negative any other supposable theory which might be advanced, and which would make the defendant liable.

The judgment of the court below must be reversed, and cause remanded for a new trial.

All the Justices concurring.

J. HENRY BLAKE *et al.* v. COMM'RS OF JOHNSON COUNTY.

1. **ADMISSION OF FACTS, in Pleadings; Contradictory Facts, in Agreed Statement.** In an action on a county treasurer's bond, pleadings were duly filed—petition, answer, and reply. The petition alleged the execution of the bond in proper form, setting it out in full, and the answer contained no denial under oath. Thereafter an agreed statement of facts was prepared, signed by the attorneys, and to which was attached an affidavit of the county attorney, alleging all the matters prescribed in section 525 of the civil code, which provides for submitting a controversy without action; but said statement did not purport on its face to supersede the pleadings, and there was no dismissal of the action as presented by the pleadings; and the journal entries of the trial of the cause and of the judgment show that the case was submitted and judgment rendered upon the pleadings and agreed statement: *Held*, That the execution of bond disclosed in the petition was an admitted fact, and that the admission was not avoided by a statement in the agreed statement of facts that the treasurer executed a bond running to the wrong parties. [See cases cited, *ante*, 254.]
2. **BOND OF COUNTY TREASURER; Board of Commissioners, Proper Plaintiffs.** Where, under the laws of 1862, a bond of the county treasurer was duly executed to the county commissioners, *held*, that they were proper parties plaintiff in an action on such bond, although the money for which the action was brought was school-money, and to be distributed to the various school districts of the county. [*Comm'rs v. Craft*, 6-145.]
3. **COUNTY TREASURER; Duties, and Liabilities.** The county treasurer is the proper party to collect and receive moneys due the county on a judgment rendered in an action on a forfeited recognizance. He is not authorized to receive anything but money thereon, and if notwithstanding he receive other property in full satisfaction and discharge of such a judgment, he becomes himself immediately responsible for the full amount of such judgment.
4. ——— Where a county treasurer received on such a judgment county scrip in full satisfaction and discharge thereof, and thereafter delivered the county scrip to the county superintendent, who sold it at a discount, and handed the proceeds to the treasurer, *held*, that such treasurer and his sureties were responsible for the amount of such discount.
5. ——— Proof of these facts disclosed a breach of official duty, and *prima facie* a loss to the county, and therefore a liability on his official bond; and notwithstanding he claims that he made good the amount of this loss, this is a matter of defense and must be shown by him affirmatively.
6. ——— *Breach of Official Duty; Demand Not Necessary.* In an action on his official bond brought after the termination of his term of office.

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in which the above breach of official duty is shown, it is not necessary to prove a special demand on the treasurer for the amount of the loss occasioned by the unauthorized receipt and sale of the scrip.

Error from Johnson District Court.

ACTION by the *Board of County Commissioners* against *Blake* and others. The opinion, *infra*, states the facts and proceedings. Judgment for plaintiff at the August Term 1878, of the district court, and the defendants bring the case here for review.

A. S. Devenney, for plaintiffs in error.

J. W. Greene, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: Action on county treasurer's bond. The first question arises on these facts: Pleadings were duly filed—petition, answer, and reply. The petition alleged the execution of a bond payable to the county commissioners, setting out the bond in full. This under the law in force at the time, (Comp. Laws 1862, p. 428, § 104,) was the proper bond. No denial under oath was filed. Therefore the execution of such a bond was admitted. The case however was tried on an agreed statement of facts, and the first fact in the statement showed the execution of a bond payable to the state of Kansas. This agreed statement was signed by the attorneys, and to it was attached an affidavit of the county attorney alleging all the matters prescribed in section 525 of the code, which provides for submitting a controversy without action. And the claim is, that this agreed statement, fully satisfying all the requirements of said section, must be considered as having superseded the pleadings, and as proceeding under said section; and that therefore the only matters to be considered are the facts in the statement. We cannot assent to this view, and for several reasons. There was an action pending. There was no pretense of any dismissal. There was no determination of the issues raised by those pleadings, otherwise than by the judg-

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ment herein. The agreed statement does not purport on its face to supersede the pleadings, or to be a matter outside of the action then pending. The agreed statement is of facts embraced in the issues raised by the pleadings. The journal entry of the trial reads, that the parties "submitted their cause to the court for trial and the determination of all the issues, as well of law as of fact, made by the said pleadings on file herein, upon the agreed statement of facts signed by the parties respectively." A similar recital appears in the entry of the judgment. Now it seems to us a fair deduction, that court and parties alike looked upon this agreed statement as made in the case already pending, and as simply dispensing with further or other evidence in the case, and that it must be so regarded in this court. Of course then, it stands as admitted, that the proper bond was given. Do the further facts show any liability upon this bond? These are the facts:

At the October term 1868, the State of Kansas obtained a judgment against one Thomas Casad and his sureties, upon a forfeited recognizance for the sum of \$5,000 in the district court of Johnson county, which judgment was never vacated, reversed, set aside, or modified.

On the 23d of June 1869, said J. Henry Blake, as county treasurer, received from the judgment-debtor the sum of \$4,900 of Johnson county "scrip," or written promises to pay \$4,900, commonly called "scrip," at the *face* thereof, in full payment and satisfaction of said judgment—\$100 having been, prior thereto, paid to John T. Burris, county attorney, as his fees on said judgment of \$5,000.

Said \$4,900 in "scrip," less the *lawful* commission of said treasurer, was placed to the credit of the "school fund" of Johnson county, by said treasurer; and afterward the said treasurer (J. Henry Blake) delivered said \$4,900 of county "scrip" to one Rev. C. E. Lewis, the county superintendent of schools of Johnson county, who discounted said "scrip" in the market at and for 75 cents on the dollar; that is to say, he sold said "scrip" at 25 cents less than its face. Johnson county "scrip" then, and at the time said J. Henry Blake received said \$4,900 in "scrip" from the judgment-debtor, and at the time said Lewis as superintendent sold same, was selling, generally, in the market at such discount:

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Said C. E. Lewis, county superintendent, after the sale of the \$4,900 of "scrip" as aforesaid, paid to J. Henry Blake, treasurer, the sum of \$3,675, the proceeds of said sale of county "scrip," which the said treasurer placed to the credit of the common-school fund of Johnson county, and which said sum was duly apportioned among the various school districts in Johnson county by said Lewis, and was paid out by the said treasurer to the proper officers of said school districts upon the written orders of said superintendent, from time to time.

Said treasurer retained as his commission, on the \$4,900 of "scrip" the sum of \$147, and placed the residue, being the sum of \$4,753 in "scrip," to the credit of the "school fund," and disposed of it as hereinbefore stated.

There has been no settlement of the foregoing matters between the plaintiff and defendants, or either of them; and the said J. Henry Blake, defendant herein, waives all statutes of limitations in this case.

Upon these facts we remark, in the first place, that it has been already decided that the county commissioners were proper party plaintiffs in an action like this, although the funds when collected do not belong to the county for general use, but only for distribution to the various school districts. *Comm'rs of Jackson County v. Craft*, 6 Kas. 145. In the second place, the county treasurer is by statute made the proper party to collect the moneys due upon such a judgment of forfeiture, as is disclosed by the agreed statement. Gen. Stat. 873, § 332; Gen. Stat. 929, § 75. Having authority to collect, if he receive anything other than money in full satisfaction and discharge of the judgment, he renders himself liable for the amount thereof. If in the case before us he had taken a certain number of wagons in satisfaction and discharge of this judgment, he could not have turned the wagons over to the county, or to the school districts, and thus relieved himself from responsibility. This is not like the case in which the treasurer assumes a personal trust toward the judgment-debtor by receiving property upon a promise to dispose of it and apply the proceeds on the judgment; in which case he perhaps might not be responsible for anything more than the proceeds; nor is it a

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case in which there was only a partial collection of the judgment. He was under no obligations to receive this scrip in payment of the judgment; and if he did so, and satisfied and discharged it, he must make good the amount thereof. We remark again, that he could not discharge himself from liability by turning the scrip over to the county superintendent. His duty was to pay over school moneys to the school-district treasurers, and he had no authority to intrust either money or scrip to the superintendent. Gen. Stat. 929, §§ 74, 75.

And finally, it was unnecessary to prove a special demand, for the act of receiving the scrip in satisfaction of the judgment, and then delivering it to the county superintendent, was wrongful. If the testimony had disclosed simply that he had received the full amount of the judgment in money, it would doubtless be incumbent on the county to prove that he had failed to pay over this amount to the district treasurers, or to his successor in office. But the condition of his bond was that he should "faithfully and promptly perform the duties of his said office," should "well and truly pay according to law all moneys which shall come to his hands as treasurer," and should "deliver to his successor in office or to any other person authorized by law to receive the same, all moneys, books, papers and other things appertaining thereto, or belonging to his said office." Now he had not faithfully performed the duties of his office, for he had received scrip, when he should have received money; he had given this scrip to a person unauthorized to receive scrip or money from him, and in return had received a less amount in money. This was a breach of official duty, and *prima facie* entailed a loss. If notwithstanding, he claims that he made good this loss, and reimbursed the county, it is for him to make this appear. It may perhaps be proper to add, that as this action was not brought for more than two years after the expiration of the term of office for which this bond was given, and as the constitution provides that a county treasurer shall not hold more than two terms in succession, it is apparent that he had ceased to be county treasurer before the commencement of this action. At any rate,

the term for which this bond was given had long since expired.

We see no error in the proceedings, and must affirm the judgment.

All the Justices concurring.

D. S. M. FRETWELL V. CITY OF TROY *et al.*

1. MUNICIPAL CORPORATIONS; *Power to Tax Employments.* There being no special restriction thereon in the constitution of this state, the legislature may confer upon municipal corporations the power to tax employments, as well as property. [*Comm'rs v. Nelson*, 19-241; *Newton v. Atchison*, 31-154, 156, 157; *McGrath v. Newton*, 29-364; *Leavenworth v. Booth*, 15-627.]
2. LICENSE-TAX; *Revenue.* Section 48 of chapter 60 of laws of 1871, which in terms authorizes cities of the third class to levy and collect a license-tax on certain occupations, was designed for purposes of revenue, rather than of police regulation, and authorizes a tax on those occupations.
3. ——— Whether it be true or not, that a license-tax falls within the general rule of taxation, that it knows no other limit than the discretion of the taxing power, it cannot be doubted that before an ordinance of a city authorized to collect taxes should be declared void on account of the amount of the license, it should appear that an unjust discrimination has been made against the business licensed by casting upon it an undue share of the expenses of the city government; for though the license-tax be large, *non constat* but that all other occupations and property are proportionally taxed.
4. ——— *Per Diem License-Tax.* In cities of the third class, that is, cities containing not more than 2,000 inhabitants, and in which it is matter of common knowledge that permanent auction stores are scarcely ever found, a license-tax of five dollars a day for sales by auction, is not so high that courts can adjudge it void as unreasonable and oppressive, or in restraint of trade.
5. ——— A provision in the statute, that license-taxes "shall be at such rate per year as shall be just and reasonable," does not render void an ordinance requiring in cases of auction licenses the payment of so much "for each day of the continuance of such auction." [*McGrath v. Newton*, 29-369; *Newton v. Atchison*, 31-154.]
6. "AUCTION;" "AUCTIONEER;" *Separate Licenses Required.* In the first section of an ordinance it was provided that "before any person shall proceed to sell at public auction merchandise of any class whatever, he

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shall first obtain a license for an auction;" and in the second, that "any person desiring to exercise the office or calling of an auctioneer, shall first obtain a license therefor." *Held*, That there was no identity between these two sections in the subject-matter of the license; that the first refers to the party who has goods which he is seeking to have sold by auction, and the second to the party by whom the outcry of the sale is to be made. [*State v. Simmons*, 21-686.]

Error from Doniphan District Court.

FRETWELL was an auctioneer, carrying on his avocation as such in the *City of Troy*, Doniphan county. He paid the regular license-tax, and procured an "auctioneer's license," 21st January 1875, for one year from that date. On the 3d of February following, the city council duly passed an ordinance, which was duly published on the 5th, as follows:

ORDINANCE NO. 47—IN RELATION TO AUCTIONS, AND AUCTIONEERS.

Be it Ordained by the Mayor and Council of the City of Troy:

SECTION 1. Before any person shall proceed to sell at public auction within the limits of the city of Troy, merchandise of any kind whatever, he shall first obtain a license for an auction, and shall pay the sum of five dollars for each day of the continuance of such auction.

SEC. 2. Any person desiring to exercise the office or calling of an auctioneer, within the city, shall first obtain a license thereof by paying into the city treasury the sum of ten dollars per year; provided, that a license may be granted to an auctioneer for less than one year by the applicant paying one dollar per day for such license.

SEC. 3. Any person convicted of carrying on an auction without license in violation of the provisions of section one of this ordinance, shall be fined not less than \$25, nor more than \$50, for each offense. And any person acting as auctioneer without license, in violation of section two of this ordinance, shall on conviction be fined not less than \$5, nor more than \$25, for each offense.

SEC. 4. Ordinances Nos. 22 and 23, in relation to auctions, and auctioneers, are hereby repealed.

On the 6th of February *Fretwell* was arrested by City Marshal *Bailey*, and taken before Police Judge *Soper*, charged with violating section one of said ordinance No. 47. It does not appear from the record that *Fretwell* was required to take out a new license as "auctioneer," but the complaint was, that he had not obtained "a license for an auction." He claimed that "he the said *Fretwell* had no interest whatever in the goods he was selling, or that he proposed to sell, but was selling the same for another person"—but it is not shown who such "other person" was. The police judge fined him \$25, and

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costs. He thereupon commenced an action in the district court against the *City of Troy*, and against *Bailey* and *Soper*, marshal and police judge, to enjoin them from enforcing the collection of said fine and costs, and to restrain them from interfering with him in the further prosecution of his business or calling of auctioneer, which he claimed the right to carry on under his license of 21st January, without procuring license to conduct an "auction." He applied to the district judge, at chambers, on the 15th of February, for a temporary injunction, which application was denied. Afterward the defendants demurred to the plaintiff's petition, on the ground that it did not state facts sufficient to constitute a cause of action; and the district court, at the March Term 1875, sustained said demurrer, and gave judgment against the plaintiff for costs. From the order refusing a temporary injunction, and from the decision sustaining the defendants' demurrer, *Fretwell* appealed, and brings the case here on error.

D. M. Johnson, and *W. D. Webb*, for plaintiff.

N. B. Wood, and *N. Price*, for defendants.

The opinion of the court was delivered by

BREWER, J.: Two questions are presented in this case. The first turns on the validity of an ordinance of the city of Troy, a city of the third class, imposing a license-tax on auctions. This ordinance was passed on the 3d of February 1875, and required that for all sales at public auction a license should be obtained, and that for this license five dollars a day should be paid. It is said that this ordinance is void because "in contravention of common right, unreasonable, and in restraint of trade," and because the council "had no authority to tax by the day, only by the year." Neither of these objections, we think, is good. Express authority is given by the statute to levy and collect a "license-tax" upon various exhibitions, professions, and avocations, including therein "merchants of all kinds;" and to make more clear that it is not regulation, but

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revenue, which is authorized, the section closes with a proviso as follows: "provided however, that all scientific and literary lectures, * * * shall be exempt from such taxation," etc. (Laws 1871, p. 180, § 48.) That in the absence of constitutional restrictions, and we have none thereon, the legislature may authorize municipalities to tax employments as well as property, must we think be conceded. Judge Dillon thus sums up the authorities: "These cases show some diversity of opinion as to the right to tax particular employments, as distinguished from property; but the correct view, it is submitted, is this: unless specially restrained by the constitution, the legislature may provide for the taxing of any occupation or trade, and may confer this power upon municipal corporations. But such taxes are apt to be inequitable, and the principle not free from danger of great abuse. Hence, ordinances of this character ought not to be sustained, unless the authority be expressly, or otherwise unequivocally, conferred." Dillon on Munic. Corp., § 291, note. See also *City of Leavenworth v. Booth*, 15 Kas. 635; *Cooley on Const. Lim.* 201, 495; *Duraile's Appeal*, 62 Penn. St. 491; *Hodgson v. New Orleans*, 21 La. An. 301; *St. Louis v. Boatmen's Ins. Co.*, 47 Mo. 150; *St. Louis v. Marine Ins. Co.*, 47 Mo. 168; *St. Louis v. Laughlin*, 49 Mo. 559; *St. Charles v. Noble*, 51 Mo. 122; *Osborne v. Mobile*, 44 Ala. 498; *Bates v. Mobile*, 46 Ala. 158; *Goldthwaite v. Montgomery*, 50 Mo. 486; *Mason v. Trustees Lancaster*, 4 Bush. (Ky.) 406; *Kinper v. Louisville*, 7 Bush. 599; *Walcott v. The People*, 17 Mich. 63; *Kitson v. Ann Arbor*, 26 Mich. 325; *Darling v. St. Paul*, 19 Minn. 389; *Comm'rs Edenton v. Caplehart*, 71 North Car. 156; *Wiggins v. Chicago*, 68 Ill. 372; *Collinsville v. Cole*, 78 Ill. 114; *Wright v. Mayor*, 54 Ga. 645; *State v. Gagley*, 5 Ohio, 14. Regarded as a tax, therefore, it comes within the general proposition concerning taxation, that it knows no limit other than the necessities of the public treasury, and the discretion of the taxing power. Or perhaps more correctly, it may be said in respect to this, as a municipal tax, that the mere amount of a tax does not prove its invalidity. The amount of the city indebtedness, the necessary expenditures of the

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municipality, may require an equally high rate of taxation upon all employments, and all property, so that however large this might seem to be, being in harmony with all other taxation, and necessary to meet the legitimate demands on the treasury, it could not be said to be unreasonable. This seems to avoid the argument of the learned counsel, that such a license, amounting in a single year to over \$1,500, is oppressive, unreasonable, and in restraint of trade. For while it may not be true, that a city having authority to collect revenue by license may impose any sum, however large, as license, and thus in effect destroy certain kinds of business, yet before in such a case an ordinance imposing a license is declared void on account of the amount therefor, it should appear that the necessities of the city do not require so large a revenue, or that there has been an unjustifiable attempt to discriminate against certain kinds of business by casting the whole burden of taxation upon them.

But is the amount charged for license in this case so enormous as to be unreasonable and oppressive? To pay over \$1,500 a year for carrying on a permanent auction business, would seem excessive. But we must notice that this provision is for cities of the third class, cities not containing more than 2,000 inhabitants, and that in places of such small size a permanent auction-store is a thing almost unheard of. The only auctions there held, are, when some citizen closes out his household or other goods by an auction of one or two days' duration; or when some wandering merchant comes with a flourish of handbills, posters, and other advertisements, to work off a stock of goods by a week or two's rapid sales at auction. The latter really interferes with the business of the regular merchant; and for neither, is a license-tax of five dollars a day apparently exorbitant. A license of fifty dollars a day is no uncommon demand upon circuses, and other traveling shows, and may be fair and reasonable, while a similar demand upon permanent exhibitions would work a practical destruction of the business. Nor does the provision that license taxes "shall be at such rate per year as shall be

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just and reasonable," prevent a charge of so much per day. The purpose of that section was to prescribe the method of computing the amount of taxes, and that was by the time and not by the amount of business. It did not compel the council to exact a year's license in every case, or prevent them from graduating the amount of the license by the actual time employed in the business licensed. We are forced therefore to the conclusion that, with no other evidence than that now before us, the ordinance must be held valid. With the wisdom or policy of such municipal legislation, this court has nothing to do. That is a matter for the separate determination of each municipality.

The other question involves the relation of the terms "auction," and "auctioneer." The ordinance purports to require licenses for both auctions, and auctioneers. The first section reads: "Before any person shall proceed to sell at public auction, * * * merchandise of any class whatever, he shall first obtain a license for an auction," etc.—while the second is as follows: "Any person desiring to exercise the office or calling of an auctioneer, * * * shall first obtain a license therefor," etc. Do these two sections reach to the same matter, so that obtaining a license under one, is equivalent to a license under both, and a bar to any prosecution under either? We think not. There is a clear distinction between the two. The one applies to the party who has goods which he desires to dispose of by auction, and the other to the party who makes the outcry. The same party may occupy both positions. He may have goods to sell at auction, and he may be his own auctioneer; but this is neither necessarily or generally so. The rule is, for one to act as the salesman, the auctioneer, for others who have goods to sell. One, breaking up housekeeping, advertises his furniture for sale at auction. Another, desiring to close out a stock of goods, does the same, and each names a third party as auctioneer. The latter is simply the crier, one who makes it a business to act as the agent of others in this particular manner of selling goods. His business is that of an auctioneer; and for carrying on that business he is

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required by the second section to have a license. The party who has goods to sell, and desires to sell them at auction, and obtains the services of the auctioneer therefor, is the party who must take out the license required by the first section. These considerations dispose of the case, and compel an affirmance of the judgment.

It is understood that case No. 679, between the same parties, is controlled by the same questions; and the same judgment will be entered in that case.

All the Justices concurring.

HALL'S HEIRS v. S. H. DODGE.

1. **EJECTMENT; General Denial; Defense.** Under a general denial, in an action in the nature of ejectment, the defendant may show, by any legal evidence which he may have, that he is the owner of the land in controversy. [*Bancroft v. Chambers*, 10-384; *Martin v. Gray*, 29-468; *Armstrong v. Brownfield*, 32-143.]
2. **SALE FOR TAXES; Separate Parcels or Tracts of Land.** A tax deed which shows upon its face that two or more separate and distinct tracts of land were sold together, is void upon its face. [*McQuenden v. Swope*, 12-32; *Matthews v. Buckingham*, 22-169; *Corbin v. Inslee*, 24-159; *Watkins v. Inge*, 24-614; *Cartwright v. McFadden*, 24-662, 669; *Long v. Wolf*, 25-523; *Dodge v. Emmons*, 24-736.]
3. **VOID TAX DEED; Statute of Limitations.** Such a tax deed, even when recorded, is not sufficient, in and of itself, to cause the two-years statute of limitations to run in its favor. [*Shoat v. Walker*, 6-65, 75; *Sapp v. Morrill*, 8-677, 685.]
4. ——— A person who holds such a tax deed, duly recorded for more than two years, but who has never had any actual possession of the land which the deed purports to convey, gets no interest in the land. [*Taylor v. Miles*, 5-515, 516; *Bowman v. Cockrill*, 6-337, 338.]

Error from Morris District Court.

EJECTMENT for the N.W. $\frac{1}{4}$ of section 7, and the S. $\frac{1}{4}$ of N.W. $\frac{1}{4}$ of section 6, in township 20; of range 12, in Lyon county, brought by the widow and children of Wm. Hall, deceased. The two tracts were conveyed to said Wm. Hall, by separate

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patents, in 1860. Hall died intestate, in January 1872, leaving a widow and six children, the plaintiffs in this action, and they claimed the land in fee as the heirs of Hall. Action commenced in July 1872. *Dodge*, defendant, at the trial, to show title in himself, offered in evidence two tax deeds. One of such tax deeds recites, that—

“WHEREAS, the following described real property, viz., the N.W. $\frac{1}{4}$ of section 7, township 20, of range 12, the S.W. $\frac{1}{4}$ of section 20, township 18, of range 12, the N.W. $\frac{1}{4}$ of section 12, and N. $\frac{1}{4}$ and S.W. $\frac{1}{4}$ of N.E. $\frac{1}{4}$ of section 21, in township 17, of range 11, and the N.W. $\frac{1}{4}$ of section 5, township 18, of range 11, situated in the county of Lyon, in the state of Kansas, were subject to taxation for the year 1862; and whereas, the taxes assessed upon said real property for the year aforesaid remained due and unpaid at the date of the sale hereinafter named; and whereas, the treasurer of said county did on the fifth day of May 1863, by virtue of authority in him vested by law, at the sale begun and publicly held on the first Tuesday of May 1863, expose to public sale at the county-seat in said county, in substantial conformity with all the requisitions of the statute in such case made and provided, the real property above described, for the payment of the taxes, interest and costs then and there remaining unpaid on said property; and whereas, at the time and place aforesaid, W. S. McCurdy, of the county of Douglas, and state of Kansas, having offered to pay the sum of twenty-six dollars and sixty-two cents, being the whole amount of taxes, interest and costs then due and remaining unpaid on said property for the said [*again describing all said lands, as above,*] which was the least quantity bid for, and payment of said sum having been by W. S. McCurdy made to the said treasurer, the said property was stricken off to him at that price,” etc.

The other tax deed contained similar recitals, and described the S. $\frac{1}{4}$ of N.W. $\frac{1}{4}$ of section 6, township 20, of range 12, and four other separate tracts of land not contiguous to each other. The action was commenced in Lyon district court, and taken by change of venue to Morris county, where it was tried at the October Term 1875. Verdict and judgment in favor of *Dodge*, defendant, and the plaintiffs bring the case here on error.

Almerin Gillett, for plaintiffs.

E. S. Waterbury, for defendant.

The opinion of the court was delivered by

VALENTINE, J.: This was an action in the nature of ejectment, commenced under section 595 of the code, (Gen. Stat. 747,) and under section 118 of the tax law of 1868, (Gen. Stat.

1057, 1058.) The answer of the defendant was a <sup>1. Ejectment;
general denial;
practice.</sup> general denial. Under such an answer we think the defendant had a right to show, by any legal evidence that he might have had, that he was the owner of the property in controversy. (Gen. Stat. 748, § 596; *Bancroft v. Chambers*, 10 Kas. 864.) In this respect this kind of action is similar to the action of replevin. In this case, the defendant attempted to show that he was the owner of the property in controversy, by introducing in evidence two certain tax deeds. If these tax deeds were valid, then he is undoubtedly the owner of said property, and is entitled to recover in this action; but if on the contrary such deeds are invalid, then he is not the owner, but the plaintiffs, who hold their title directly from the original patentee, are the owners; and in that case it seems to be admitted by the defendant that they are entitled to recover. That is, the defendant has raised no question either in this court or in the court below as to the right of the plaintiffs to recover, provided the defendant's tax deeds are void. Both parties seem to desire to have the case decided upon its merits, and do not raise any technical objection to the plaintiffs' right to maintain this particular action, provided the property in law belongs to them. The only question then for us to determine is, whether said tax deeds are valid or not. They are alike in form, and in every essential particular, except as to the descriptions of the land, and the amounts of the taxes. Both were executed July 24th 1865, for the taxes of 1862, 1863 and 1864, upon a sale made 5th May 1863 for the taxes of 1862; and both deeds were recorded July 28th 1865. This action was commenced July 18th 1872.

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Each tax deed is for several separate and distinct tracts of land, situated in different parts of Lyon county, and in different townships and ranges; and each deed shows that all these different tracts were sold together in one single sale. Now, such a sale is void; and a tax deed showing such a sale, is also void. This follows from general principles, and is also in consonance with all the statutes of this state, which may in any manner affect the question. Sections 31, 36, and 38, of the act having application to this case, (Comp. Laws of 1862, pp. 865, 866,) tend to prove it, and section 40 is not at variance with it. Of course, where two or more tracts of land adjoin each other, and are used and occupied as one tract, they may all be taxed together and sold together as one tract. (*McQuesten v. Swope*, 12 Kas. 32.) But that is not this case. In this case the different tracts do not adjoin each other, but are widely separated. Said deeds are void upon their face; that is, they present the evidence of their own invalidity upon their face. Such a deed cannot even when recorded set the statute of limitations in operation. (*Shoat v. Walker*, 6 Kas. 65, 75.) In the case just referred to, this court said: "A tax deed, to be sufficient when recorded to set the statute of limitations in operation, must of itself be *prima facie* evidence of title. It is not necessary that the deed be absolutely good, under all circumstances. It is not necessary that it be sufficient to withstand all evidence that may be brought against it to show that it is bad; but it must appear to be good upon its face; it must be a deed that would be good if not attacked by evidence *aliunde*. When the deed discloses upon its face that it is illegal, when it discloses upon its face that it is executed in violation of law, the law will not assist it. No statute of limitation can then be brought in to aid its validity. The party accepting it, and claiming under it, has full notice of its illegality, and must abide the consequences of such illegality. He has no reason to complain." In the case of *Sapp v. Morrill*, 8 Kas. 667, 685, this court said: "There would seem to be no reason why a void tax deed should cause the

2. Tax sale; separate tracts—separate and distinct sales.

3. Statute of limitations.

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statute of limitations to run in its favor. Does a party holding such a deed constructively oust the original owner by simply putting his deed on record, whether the original owner be in the actual possession of the property covered by the tax deed, or not? A void tax deed cannot draw after it, nor to it, the constructive possession of the property, although the property may be vacant and unoccupied. Then why should the original owner commence any action to test the validity of the tax deed? He need not commence an action for the recovery of his property, for he is already in the constructive if not in the actual possession thereof; and his title is as good as it ever was. He need not commence an action to remove a supposed cloud from his title, for a deed void upon its face is no cloud upon his title. He need not commence an action to have the deed declared void, for the deed itself upon its face furnishes sufficient evidence of that fact, and about as good evidence as a record of a court declaring the fact would be. Indeed, there would seem to be no reason whatever in any such case for the owner of the land to invoke the interposition of a court of justice. The instrument itself would always furnish sufficient evidence to defeat any claim set up under it."

In the present case the property is vacant and unoccupied, and it never has been in the actual possession of the defendant. And the tax deeds of the defendant being void, they could not draw to him the constructive possession of the property. He has therefore never had any interest in the property. His tax deeds, being void upon their face, could not give him any title, or any possession, constructive or otherwise, and he never had any actual possession. It seems to be admitted that the defendant had no interest in the land under his void deeds until the two-years statute of limitations are supposed to have run, and then it is claimed that his title became complete. That is, the whole title, and the whole possession, constructively were in the plaintiffs, and no part of the title or possession or any other interest was in the defendant, until the end of the two years, and then at the expiration of the two years, and at the com-

4. Void deed,
does not give
constructive
possession.

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mencement of the third year, the whole title and whole constructive possession all at once passed from the plaintiffs to the defendant simply because the defendant had had a *void tax deed* on record for two years! We think this can hardly be so. (With reference to the operation of the statute of limitations, see *Taylor v. Miles*, 5 Kas. 515, 516; *Bowman v. Cockrill*, 6 Kas. 387, 388.) It is claimed that the supreme court of Iowa held that their five-years statute of limitation will run in favor of a tax deed like those we now have under consideration. The cases of *Thomas v. Stickel*, 32 Iowa, 71, and *Douglas v. Tullock*, 34 Iowa, 262, come the nearest holding as defendant claimed, and yet they probably do not intend to go to the extent that he claims. If they do, then we cannot agree with them. But see *Boardman v. Bourne*, 20 Iowa, 134; *Byam v. Cook*, 21 Iowa, 392; *Ferguson v. Heath*, 21 Iowa, 488; *Harper v. Sexton*, 22 Iowa, 442; *Hurlburt v. Dyer*, 36 Iowa, 474; *Weaver v. Grant*, 39 Iowa, 294; *Greer v. Wheeler*, 41 Iowa, 85, 86, 87, 88. These cases will hardly sustain the claim of the defendant; and they go to the extent of holding that a tax deed, showing that two or more tracts of land were sold together for a gross sum, is void. In this we agree with them. There is no necessity for a party putting a defective or void tax deed upon record in this state; for where a person is entitled to a good tax deed he may have as many tax deeds executed as he desires until he gets a good tax deed.

We think there is no necessity to discuss in this case any distinctions which may exist between a tax deed which is incurably void upon its face, and one which though void on its face may be aided and cured by the introduction of extrinsic evidence; for there was no such evidence introduced in this case. We would think however that the statute of limitations would not run in any case in favor of a tax deed void on its face.

The judgment of the court below will be reversed, and cause remanded for a new trial.

All the Justices concurring.

KANSAS INSURANCE COMPANY V. R. S. CRAFT *et al.*

1. FIRE INSURANCE COMPANIES; *Investment of Funds; No Power to Purchase Claim against Policyholder, to Use as a Set-Off.* Under section 29 of chapter 93 of laws of 1871, page 225, which authorizes fire insurance companies to "invest their capital and funds accumulated in the course of business in bonds and mortgages," such an insurance company has no power to purchase upon credit the mortgage-obligation of one insured by the company, and entitled to indemnity for a loss, for the purpose of setting off such mortgage against the policy.
2. ——— The purchase upon credit by an insurance company of the promissory notes or other obligations of one entitled to indemnity from the company, involving no investment of surplus funds, is not only without the limits of the company's charter, but directly opposed to its leading objects.

Error from Marshall District Court.

CRAFT, as assignee of Cummings, brought suit to recover the amount due upon a policy of insurance issued by the *Kansas Fire Insurance Co.* to Cummings upon a certain hotel building situated in Blue Rapids. This action was commenced in February 1875. Another action was then pending in the same court, commenced in July 1874, wherein the *Kansas Fire Insurance Co.* was plaintiff, and said Cummings, Craft and others were defendants, wherein said *Insurance Company* sought to enforce and foreclose a certain mortgage given by one Hiscox to C. E. Olmstead, the payment of which had been assumed by Cummings before he assigned his insurance policy to Craft. These two actions were afterward consolidated, and tried together as one action, at the August Term 1875. The material facts, and the questions involved, are sufficiently stated in the opinion, *infra*. The district court gave judgment in favor of Craft for the full amount of the policy, and determined that the *Insurance Company* had no such interest in the mortgage as would enable it to set off the same against its indebtedness on its policy-contract. The *Insurance Company* brings the record here for review.

J. W. English, for plaintiff in error.

B. P. Waggener, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: The facts in this case are these. William Hiccock owned certain premises upon which was situated a hotel. This property he mortgaged to C. E. Olmstead. He then sold an undivided-half to Palmer Cummings, the latter, in part consideration therefor, agreeing to pay the mortgage. Cummings insured his interest in the Kansas Insurance Company. Olmstead, the mortgagee, insured his interest in the St. Joseph F. & M. Ins. Co. The building burned. The St. Jos. company paid Olmstead his policy, taking an assignment of his mortgage. It then assigned the mortgage to the Kansas Insurance Co., receiving as consideration therefor one dollar in cash, and a due-bill for \$500. The mortgage interest assigned was the same in amount as the policy in the Kansas Insurance Company, to-wit, \$1,000. Cummings assigned his claim on the policy to Craft, but the assignment was not made until after the assignment of the mortgage to the Kansas Insurance Company.

Could the Kansas Insurance Company off-set the mortgage against the policy? No question is made of the validity of the mortgage, but it is insisted that it was *ultra vires* of the corporation to use its credit in purchasing obligations of the insured for the purpose of discharging its liabilities to him on its policy. It is not doubted that an insurance company may legally invest its funds in obligations, properly secured, of parties whom it has insured, and then in case of loss off-set the obligations against the policy. But here, after a loss, it goes into the market and buys upon credit an obligation of the insured, and proposes to discharge its liability therewith. Can this be tolerated? The question, in view of the immense insurance business of to-day, both fire and life, is one of no little importance. And it is one whose solution will largely affect the practical value of insurance. For if this is tolerated, it will be a constant temptation to insurance companies to withhold payment for the purpose of seeing whether obligations of the insured cannot be purchased at a discount, and by the

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very fact of non-payment diminishing his credit, and increasing the discount. It is of course a question whose solution depends upon the statute, for it cannot be doubted that the legislature may grant to them that unlimited control of their means and credit which will warrant a transaction like the one before us. Has it done so? It is elementary, that a corporation takes nothing by implication, that it possesses only the powers expressly granted, and those necessary for the execution of those expressly granted. "Being the mere creature of law, it (the corporation) possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." Ch. J. Marshall, in *Dartmouth College v. Woodward*, 4 Wheat. 518. The buying up of the obligations of an insured, is no part of an insurance contract, nor essential to the due execution of the power to insure. But we are referred to § 29, p. 225, laws 1871, as granting the power to do that which was done in this case. That reads—

"It shall be lawful for any insurance company * * * to invest its capital and the funds accumulated in the course of its business or any part thereof in bonds and mortgages on real estate, * * * and to lend the same or any part thereof on the security of such stocks or bonds, * * * and to change and re-invest the same as occasion may from time to time require."

This authorizes an investment of capital and funds, nothing more. But here was no investment of capital or funds, but simply the use of its credit to purchase a mortgage. It exchanged its own obligation for the obligation of the insured—for the cash part of the consideration was merely nominal, and the real consideration was its due-bill. The jury found that the purchase was not as an investment, but for the purposes of an off-set. And the circumstances could lead to no other conclusion. The insurance company proved that Hiscock and Cummings were insolvent; and it appeared from the testimony of the secretary of the St. Jos. Ins. Co., that the lots, after the fire, were no security for the mortgage. Hence, there was nothing to induce a purchase as an investment. But an investment presupposes something in hand to invest, some por-

tion of capital or surplus funds, to be placed where it will be secure, and at the same time draw interest. But nothing of that kind took place here. If it had any funds, it did not use them in this purchase. All that it invested was its credit. Authorities are not wanting on this precise question. In the case of *Smith v. Alabama Life Ins. & Trust Co.*, 4 Ala. (N. S.) 558, it appeared that the company was authorized to invest its funds in bonds and mortgages. It gave its own bond payable in New York as sole consideration for a bond and mortgage it took from Smith. The latter was held void, and the transaction unauthorized by its charter. See also, *Ins. Co. v. Ely*, 5 Conn. 560; *F. & M. Bank v. Baldwin*, Sup. Court of Minn., reported in Al. Law Journal Dec. 9th 1876, p. 391. But a case still stronger than these, and almost identical with the one before us, is that of *Strauss v. Eagle Ins. Co.*, 5 Ohio St. 59. In that case the insurance company after a loss bought upon credit the obligations of the insured, and sought to off-set them against the policy. It had authority "to invest all or any part of its capital stock, money, funds or other property, in such a way as the directors may deem best, for the safety of the capital and interest of the stockholders," and such authority was relied upon to support the transaction. But the court held it *ultra vires*, and rendered judgment on the policy. The case is so clearly in point, and the views of that court so fully in harmony with our own, that we quote the following from their opinion:

"The power of the investment therein conferred was designed to enable the company to make a profitable use of its surplus funds, by placing them at interest, with a view to their safety and the interest of the stockholders. But how the purchase upon credit of the promissory notes of one entitled to indemnity from the company, involving the use of no such funds, can be regarded as a fair execution of this power, is not readily perceived. Indeed, we are very clear, that it is not only without the limits of the charter, but directly opposed to its leading objects. We are not to assume that this corporation was created for the mere benefit of the stockholders. The general assembly must be supposed to have had a view to the public good, when they authorized the

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company to make contracts for indemnity against the calamities of fire. They must be presumed to have known, that the largest class of persons likely to avail themselves of this security would be merchants, whose all was invested in perishable property, and whose earnings for years might be destroyed in an hour; and whose credit must, of necessity, suffer unless prompt payment was made. To have furnished inducements for withholding prompt payment, for the purpose of depressing the credit of the insured, thereby enabling the company to purchase his paper at a greater discount, would have been an act of most unaccountable folly and injustice. If it had been plainly proposed to arm the corporation with such a power, no one could for a moment suppose that it would have received any favor from any legislative body that ever sat in the state. To engraft it upon the charter by construction, instead of conforming to the intention of the legislature, would be to disregard and defeat it. I should therefore have been of opinion that the company could not use its surplus funds, even in a manner so destructive to the purpose of its creation. But it is only necessary now to say, that it could not, under the power of investment, employ its credit to purchase claims for such a purpose; that it had no power to become a party to the contract of indorsement, by which it obtained the notes in question, and no capacity to take or hold the legal title."

We see no other question in the case not already decided by this court.

The judgment will therefore be affirmed.

VALENTINE, J., concurring.

HORTON, C. J., not sitting in the case.

WM. F. GROSS v. J. C. BOGARD *et al.*

REPLEVIN; *Who may Bring Action.* Under our statutes an action of replevin can be maintained against an officer for the recovery of personal property which he holds by virtue of a previously existing order of delivery, provided the plaintiff in the last action was no party to the first action, or first order of delivery. The same rule obtains as to property held under an order of delivery as to that held under an execution or any other mesne or final process; and the party against whom the writ runs is the only one who may not assert his rights to the property by an action of replevin. [McKinney & Purcell, 28-452.]

Error from Labette District Court.

REPLEVIN, for a yoke of oxen, brought by *Gross*, as plaintiff, against *Levi Greenfield* and *J. C. Bogard*, as defendants. *Gross* claimed the oxen as owner. He testified among other facts, that he purchased the oxen from one *Wilson*, in May 1875, and loaned them to *Greenfield* afterward, to do some breaking; that on the 21st of the following June he applied to *Greenfield* for them, and ascertained that *Bogard*, as constable, had taken them under a writ of replevin issued at the suit of a *Mrs. Knight* against *Wilson*. It appeared that *Bogard*, after having taken the cattle under his writ had left them in *Greenfield's* care. *Gross* demanded possession, which was refused, and thereupon he commenced this action. Trial at the November Term 1875. Judgment was given for the defendants, upon demurrer to the evidence, and *Gross* brings the record here for review.

J. G. Parkhurst, for plaintiff.

A. H. Ayres, for defendants.

The opinion of the court was delivered by

BREWER, J.: *Gross* brought an action of replevin against the defendants. Upon the trial he proved title in himself, possession in defendants, and demand, and rested. In his testimony it appeared that one of the defendants claimed pos-

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session as constable, and by virtue of a writ of replevin in a suit of Knight against Wilson. A demurrer to the evidence was sustained.

The ruling of the district court can be sustained only upon the theory, that an action of replevin will not under any circumstances lie against an officer to recover property held by him under a writ of replevin. The question must be settled by a reference to our statutes, for it will not be doubted that, at common law, property in the hands of an officer under a writ of replevin was in *custodia legis*, and could not be taken from him by means of another writ. And the same was true of executions, and other process. 1 Chitty's Pl. 164. Our statute has modified the common-law rule, at least as to all process except the writ of replevin, or (as it is termed in the code,) the order for the delivery of property. *Westenberger v. Wheaton*, 8 Kas. 178. That was a case where the defendant in an execution attempted to replevy, and the court held that as to him the common-law rule applied. It however stated the exceptions to that rule in these words, Ch. Justice Kingman delivering the opinion: "The code has so modified this, that any person other than the judgment-debtor, or person against whom the process is issued, may have this remedy because the issues made in any such proceeding by a stranger raise no question as to the validity or regularity of the judgment or process." While this reason does not apply with equal force in the case at bar, because the command to the officer in a writ of replevin is specific, to seize the particular property and deliver it to the plaintiff, and so in a certain sense the second action challenges the propriety of the first writ, yet it must be remembered that no question is made as to the validity of the proceedings, or regularity of the process, as between Knight and Wilson. The plaintiff claims adversely to both Knight and Wilson. And so far as appears from the testimony offered, his property was, without the slightest pretext or excuse, seized and held by the officer in a proceeding to which he was not a party, and in which he could claim no benefit of the plaintiff's undertaking as a protection against

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injury. While he might have been made a party to that action, yet it could have been done only upon leave of the court, (Gen. Stat. 637, § 42,) and the property itself might have been gotten out of the way long before this order could have been obtained, while stipulations between the parties might have settled the judgment to be entered, and released the sureties on the bond. But turning to the statute, and it seems to us that the same rule there obtains, in case of property taken under a writ of replevin, as when taken under execution. The party against whom the writ runs cannot litigate its validity in an action of replevin, but a third party may assert his right to the property in the possession of the officer. The statute provision concerning the affidavit is, (see sub. 4 of sec. 177, Gen. Stat., p. 661,) "That it was not taken in execution on any order or judgment against *said plaintiff*, or for the payment of any tax, fine, or amercement assessed against him, or by virtue of an order of delivery issued under this article, or any other mesne or final process, *issued against said plaintiff*." Now the last four words may, it is true, be construed as limiting only the clause, "any other mesne or final process," and leaving the clause immediately preceding entirely independent and unaffected by them. But it seems to us a better construction is to consider both clauses limited by the words, "issued against *said plaintiff*." While the punctuation is not of much weight, yet so far as it goes, it tends in this direction, for we find a comma after the word "process," which we should not expect if the subsequent words only qualified those immediately preceding. Again, the use of the words, "or any other," seem to bind the two clauses together as one, so as to make any subsequent limitation applicable to both. And finally, if it was not the purpose to have the same rule applicable to writs of replevin, as to all other process, we think the legislature would have made the intention clear. The very fact that language is used susceptible of either construction, seems to compel the conclusion that the legislature intended that the same rule should apply to all process.

The district court therefore erred in sustaining the demurrer

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to plaintiff's evidence, and the case must be remanded with instructions to grant a new trial.

All the Justices concurring.

H. M. MAYBERRY v. A. SIVEY.

1. CARELESSNESS; NEGLIGENCE; *Reckless Driving; Liability for Injury.* Where M., being the owner and in the possession of a horse and buggy, driven by himself, asks S. to ride with him, and S. accepts the invitation, and thereafter M. overtakes C. on a public highway driving a team of horses, and, attempting to pass C. and his team, races with him on the road against the protest of S., and refuses to stop and let S. out of the buggy as he requests, and drives so carelessly and negligently that his buggy strikes the fence along the side of the road, and overturning throws S. violently out against the fence, and on the ground, and S. is injured thereby, *held*, that M. is guilty of such negligence as to be liable to S. for the injuries received by him in being thrown from the buggy. [*Mayberry v. Sivey*, 21-679.]
2. WITNESS—*Must be Sworn, or Affirmed.* Before a person can give evidence in a court, he must take an oath, or affirmation, as required by the provisions of our statute.

Error from Bourbon District Court.

ALL the facts will appear in the opinion, *infra*. Judgment was given for *Sivey*, at the December Term 1875, and *Mayberry*, defendant, brings the case here.

McComas & McKeighan, for plaintiff in error, that there was no want of care or diligence, cited Wharton on Neg., § 82; and that witness Hayes was improperly permitted to testify, 1 Greenl. Ev. § 829; 1 Phil. Ev., ch. 2, p. 7.

C. O. French, for defendant in error, that the fact that *Sivey* was riding free, did not affect the question of liability, cited

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14 How. 468; that the testimony of Hayes was properly received, Gen. Stat., p. 695, § 339, and p. 598, §§ 3, 5.

The opinion of the court was delivered by

HORTON, C. J.: This was an action for personal injuries. The petition alleged among other things, that in the month of February 1875, the defendant was in the city of Fort Scott, and the owner and in possession of a buggy and one horse, which he was then driving; that defendant lived and resided near plaintiff, some four miles from Fort Scott; that he asked and invited plaintiff to get into his buggy, and ride home with him; that plaintiff accepted the invitation, got into the buggy with defendant, and started for home; that while on their way home, and when about one-half mile from Fort Scott, defendant overtook one Clark, driving a span of horses, and a wagon; that defendant challenged Clark for a race, and immediately whipped up his horse to pass Clark; that Clark whipped up his team to prevent defendant from passing him; that thereupon plaintiff, seeing a race imminent, and being in great fear of bodily injury, begged and insisted that defendant should stop and let him out, which defendant refused to do; that against the repeated protests and requests of plaintiff to defendant to stop and let him out, defendant continued to race recklessly, carelessly and negligently, driving his horse at full speed, when, without the fault of the plaintiff, the defendant in trying to pass the team of Clark so carelessly, willfully and negligently drove his horse and buggy that the buggy struck a stone fence which overturned the buggy and threw plaintiff violently out upon the ground and fence, whereby plaintiff was severely bruised and wounded, and was by reason of the wounds and bruises caused by the negligence of the defendant confined to his house and bed for six weeks, suffering intense pain of body and mind. Upon the trial in the court below the jury returned a verdict for Sivey for \$400, and judgment was rendered accordingly. The defendant brings the case here for review.

I. The plaintiff in error claims that the action cannot be

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maintained upon the averments of the petition, and the evidence given by the defendant in error. We think otherwise. The petition sufficiently set forth a good cause of action against Mayberry, and the evidence of Sivey supports all the allegations of the petition, except it does not appear therefrom that Mayberry willfully drove his horse and buggy so as to throw Sivey out. That Mayberry acted in a careless and negligent manner, is apparent; and the law requires from all persons, including those who render gratuitous services, reasonable care for the safety of life and person. Such care Mayberry did not exercise. His conduct was the more reprehensible, from the fact that he refused to permit Sivey to get out of the buggy, when he was anxious so to do for fear of impending danger; and in answer to the entreaties of Sivey to let him out, he exhibited his recklessness and rashness in saying, "Never mind, old man, old Bill (meaning his horse) will bring us through all right; if he don't, old Mayberry will pay the damages." Mayberry is not excused from liability in the case, because Sivey was not to pay anything for his ride. "A person who undertakes to do service for another is liable to such other person for want of due care and attention in the performance of the service, even though there is no consideration for such undertaking. The confidence accepted is an adequate consideration to support the duty." (Whar. on Neg. 855.)

II. Upon the trial, the plaintiff below introduced one William Hayes, who, when placed upon the stand, declined to be sworn or affirmed, on the ground that he had conscientious scruples against taking an oath or affirmation. Witness also said that he regarded the scriptural injunction, to "let your communications be yea, yea, and nay, nay, and whatsoever is more than this cometh of evil," as binding upon his conscience, and that to take the oath or affirmation, as prescribed by the statute, would be a violation of his conscience and religious convictions. The court then directed the clerk to repeat the following words to the witness: "You do solemnly state that the evidence you shall give in the case wherein

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A. Sivey is plaintiff, and H. M. Mayberry is defendant, shall be the truth, the whole truth, and nothing but the truth." Which was done, and the witness signified his assent thereto by saying, "*I do.*" To all of which the defendant objected. The court overruled his objection, and defendant excepted. The plaintiff then proceeded to examine Hayes as a witness, and the defendant objected to Hayes giving in any testimony until he was either sworn or affirmed in the manner required by statute. The court overruled the objection, and permitted Hayes to make statements to the jury, (without being affirmed or sworn except as above stated,) to the following effect:

"I am a physician and surgeon; have been practicing about fourteen years; was called to see plaintiff when he was hurt; his shoulder was dislocated; the head of the humerus was out, and his arm bruised externally. Gave him chloroform, and reduced the luxation of the shoulder joint; applied cold-water dressings. Was not called in but once after, though I saw him several times. He now has paralysis of the extensor muscles of the hand. I think the nerve was damaged, and this injury to the muscles, which prevents the flexing of his arm, is permanent."

The facts attempted to be proven by Hayes were material in the case, and the action of the court in permitting the statements of this witness to go to the jury, without the solemnity of an oath, or affirmation, was manifest error. "Before testifying, the witness shall be sworn to testify the truth, the whole truth, and nothing but the truth. The mode of administering an oath shall be such as is most binding on the conscience of the witness." (Gen. Stat. 1868, p. 695, sec. 339.) "Any person having conscientious scruples against taking an oath, may affirm with like effect." (*Id.* 598, sec. 3.) Section 4, Gen. Stat. 1868, p. 598, provides, that, "All oaths shall commence and conclude as follows: 'You do solemnly swear,' etc., 'so help you God.' Affirmations shall commence and conclude as follows: 'You do solemnly, sincerely, and truly declare and affirm,' etc, 'and this you do under the pains and penalties of perjury.'" This section is supplemented with the provision,

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that all oaths and affirmations alike subject the party who shall falsify them to the pains and penalties of perjury.

The witness was permitted to make his statements to the jury on his declaration to tell the truth, without either an oath or an affirmation being administered. The statute was thus disregarded. The conscience and religious convictions of the party were placed by the court above the law, and superior to the mandatory clauses of our statutes. Such procedure cannot be tolerated. If the witness was unwilling, on account of conscientious scruples, to solemnly invoke the vengeance of the deity upon himself, if he did not declare the whole truth, as far as he knew it, then he had the right to testify under the form of a solemn affirmation. He could go no further, and do no less; and the court, in the fullness of its authority in the premises, should have compelled the recusant witness to act in obedience to the requirements of the statute. Its refusal to do so was error.

The judgment must therefore be reversed, and the cause remanded for a new trial.

All the Justices concurring.

MATTHEW ILES V. JOHN B. ELLEDGE.

1. **FOREIGN JUDGMENTS *In Rem*; Service by Publication Only; Recitals.** The recitals of a judgment *in rem*, obtained without personal service in a sister state, and by publication only, where none of the defendants to the suit make any appearance in the court rendering the judgment, are no evidence of debt, nor evidence of tender of a deed, in a separate action pending in this state between the same parties to recover upon a promissory note.
2. **PURCHASE-MONEY OF LAND; Tender of Deed Necessary to a Recovery.** Where a note is given for the price of land, under a contract that if the note is paid at maturity the payee will convey the land to the maker, the law requires a tender of a conveyance of the land in order to maintain a suit upon the note given for the price of the land. [*State v. Thompson*, 22-221; *Close v. Dunn*, 24-373; *Morrison v. Terrell*, 27-327; *McMurray v. Fletcher*, 24-574.]

Error from Brown District Court.

ACTION by *Elledge*, who had judgment against *Iles* for \$5,348.80, and costs, at the October Term 1875. *Iles* brings the case here. All the facts appear in the opinion.

Albert Perry, and *C. W. Johnson*, for plaintiff in error, that the contract was mutual, and that neither party can sue, *Elledge* on the note, nor *Iles* for specific performance, without having tendered performance, cited 2 *Hilliard on Vendors*, 71 to 92, 312, 316, 448; *Layden on Vendors*, 162, 245; 18 *N. Y.* 108; 17 *Wis.* 105; 21 *Barb.* 324; 84 *Mo.* 277; 8 *Ohio*, 49; 19 *Ohio*, 354; 20 *Iowa*, 195; 5 *Ind.* 117, 518.

Price & Healley, for defendant in error, argued, that the laws of the place where the land is situated govern the contract regarding the sale of it: 2 *Pars. Contr.* 83, 571; *Story on Confl. of Laws*, §§ 363, 364. It is never necessary for a party to follow another out of the state to make a delivery or tender. 2 *Pars. Contr.* 162, 649, 650; 80 *Mo.* 248.

The opinion of the court was delivered by

HORTON, C. J.: This was an action upon a promissory note. The defense was, that the note sued on was executed in con-

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sideration of a sale of lands made by Elledge to William A. and Matthew Iles; that on such sale Elledge executed and delivered to the said Ileses a bond for a deed of the lands therein named, which recited among other things, that on the payment of the note, Elledge would execute a deed to said W. A. and M. Iles to the said real estate. The case was submitted to the court, a jury being waived, and the court at the instance of the parties, stated in writing the conclusions of fact found, separately from the conclusions of law. They were as follows:

Conclusions of Fact: 1st.—On the 15th of January 1865, the defendant Matthew Iles (served with summons in this case) with William A. Iles and William H. Dooley, not served, and who do not answer, made and delivered to the plaintiff, John B. Elledge, his promissory note for \$3,393, payable on the first day of January 1871, with ten per cent. interest per annum.

2d.—On said day, and as a consideration therefor, the plaintiff made and delivered his bond to the said Matthew Iles, in the sum of \$5,000, to be void if on payment of said sum of \$3,393, being said note, the said John B. Elledge shall make to the said Matthew Iles a deed to the following described lands situate in Cass county, state of Missouri, to-wit: the N.E. $\frac{1}{4}$ of section 16, and S.W. $\frac{1}{4}$ of N.W. $\frac{1}{4}$ of section 36, all in township 45, of range 83, containing 210.90 acres, at \$15 per acre, making \$3,043.50, and the further consideration of \$249.50 remaining due for other lands sold by plaintiff at the time said note and bond were executed to the said Matthew Iles, and for which said Elledge at that time executed deeds, all of which was one transaction.

3d.—Said deed, bond, and note, were executed in Doniphan county, Kansas, where said Iles and other makers of said note, as well as the plaintiff, resided.

4th.—Said Matthew Iles in 1866 paid on said note the sum of \$240, and also in the same year, the further sum of \$131.25.

5th.—Ever since the making of said note and bond, Matthew Iles has resided in said Cass county, Missouri, and in Brown county, Kansas; and it does not appear that the residence of said Iles was at any time unknown to plaintiff.

6th.—In 1871, the plaintiff commenced an action for the specific performance of said contract, and to recover the amount of said note. Such action was commenced in the circuit court

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of Cass county, Missouri, against Matthew Iles and William H. Dooley. At the October term 1871 of said circuit court said plaintiff recovered judgment against Matthew Iles and William H. Dooley on said note, and an order for the sale of the foregoing-described land.

7th.—In said action neither Matthew Iles nor William H. Dooley, nor William A. Iles, were personally served, nor did either of them appear in said action, by attorney or otherwise, but the service therein was by publication.

8th.—Said land was sold at sheriff sale, and plaintiff became the purchaser thereof, and gave credit on the note for the sum of \$502.48, the proceeds arising from said sale.

9th.—On the 16th of March 1875, the sheriff of said Cass county executed a sheriff's deed to said lands to said plaintiff.

10th.—No deed of said lands has been tendered said Matthew Iles nor said William A. Iles, by said Elledge.

11th.—The recital of said record of said suit in said Cass county circuit court, shows that a deed had been tendered Matthew Iles.

12th.—Said Matthew Iles never went into the possession of said lands.

13th.—William A. Iles cut and sold timber off the forty-acre tract, and some of the timber so cut by said William A. Iles was used by defendant Matthew in improving other lands owned by said Matthew in Cass county, Missouri.

14th.—Since said sale and sheriff's deed, John B. Elledge took possession of said lands, and has improved the same, and now occupies them.

15th.—Since the making of said sheriff's deed to said Elledge, he has not made tender of any deed to William A. Iles, nor to Matthew Iles.

16th.—There is now due on the said note from the defendant Matthew Iles the sum of \$——, drawing ten per cent. interest.

17th.—The note mentioned in plaintiff's petition was executed for the said sum of \$3,398 mentioned in the bond of John B. Elledge.

Conclusions of Law: 1st.—The recitals of said record of said action in the circuit court of Cass county, Missouri, are conclusive, that a deed had been tendered Matthew Iles.

2d.—It is not necessary that a tender of a deed should be made by plaintiff before a right of recovery on the note accrued to the plaintiff against Matthew Iles in this action now pending here.

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Thereon judgment was rendered against said Matthew Iles for \$5,348.80, and costs. The proper exceptions were taken, and the case is here for review.

The conclusions of law found by the court below are erroneous, and upon the findings of fact, the judgment itself was wrongfully given for the defendant in error. The recitals contained in the record of the action of John B. Elledge against Matthew Iles, and others, tried in the circuit court of Cass county, state of Missouri, were neither conclusive that a deed had been tendered to Matthew Iles, nor even *prima facie* evidence of such fact. The suit in that state was only a proceeding *in rem*; and while such judgment is good in regard to the property therein appropriated, it is not evidence of debt in Kansas, nor of the matters therein stated. No personal service was had upon the defendants, or either of them, in that court; and none of them ever made any appearance in the case; the judgment was obtained upon service by publication, and only binds the property converted. The judgment is only good in the state where rendered, not here.

The defense made to the note was a good one, and when it was shown that no deed had been tendered, judgment should not have been rendered in favor of Elledge. The balance due on the note was the consideration of the land agreed to be conveyed by the defendant in error to Matthew and Wm. A. Iles. The note and bond are to be construed as dependent stipulations. All the parties to the papers must perform at the same time, neither being under any obligation to trust the other. As it appears that Elledge has neither delivered nor tendered a deed, he cannot maintain an action for the purchase-money embraced in the note sued on. *Winton v. Sherman*, 20 Iowa, 295; 2 Hilliard on Vendors, 71; *Huffman v. Ackley*, 34 Mo. 277; *Campbell v. Gittings*, 19 Ohio, 847; *Davis v. McVickers*, 11 Ill., 327; *Bucher v. Consadt*, 13 N. Y. 103.

The judgment of the court below must be reversed.

All the Justices concurring.

NEW YORK LIFE INSURANCE COMPANY V. MARGARET MCGOWAN.

1. **INSURANCE CONTRACT; Waiver of Agent; Liability of Company.** Where the agent of an insurance company, whose business it is to solicit applications for insurance and receive the first premiums, accepts a written application of a person, duly signed, waives the payment in money of the first semi-annual premium, and in lieu thereof takes a promissory note, and thereupon executes and delivers to the assured a receipt for such note, and agreeing in such receipt, that (provided the application should be approved at the home office,) to furnish him a policy upon his life within fifteen days from date, or if his application should be declined, to return the amount to him or his order on demand, (it being agreed that no liability was assumed by the company unless the said risk should be approved and a policy issued at the home office;) and within the said fifteen days the application is approved at the home office and a policy is issued thereon, and sent to the general agent of the company where the application was taken, for the applicant, and after the death of the assured the company has proofs of death made out under the policy, accepts them, sends a draft payable to the beneficiary of the policy, delivers such policy to such beneficiary and obtains the same receipted and satisfied, and such beneficiary named in the policy does not obtain such draft on account of the fraud of the agent, *held*, that notwithstanding a recital in the policy that it should not be binding until the premium is actually paid in money, and the note is not paid, nor the policy otherwise delivered prior to the death of the assured, the insurance company is liable. [*Ins. Co. v. Twining*, 19-381; *Sav. Bank v. R. R.*, 20-526.]
2. **PRINCIPAL, Liable for Fraud of Agent.** An insurance company is liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, and omissions of duty of a general agent in the course of his employment, although the company did not authorize or justify such misconduct.
3. ——— An insurance company is liable to a third person in a civil action for the frauds, deceits and misrepresentations of its general agent, when the acts so committed are apparently within the general scope of his authority, although not so in fact, on the grounds that such general agent was employed in that character of business, and held out by the company as a person authorized by it as fully to be trusted.

Error from Leavenworth District Court.

MRS. MARGARET MCGOWAN brought suit against *The N. Y. Life Insurance Company*, and Reuben Partridge and George H.

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English, to recover an alleged balance due her on a policy issued by said insurance company on the life of her former husband. Partridge was the general agent for said insurance company, having his office in Leavenworth. As such agent he was authorized to appoint and did appoint local and soliciting agents, who reported to him. One of such soliciting agents, G. M. Pinkham, solicited and received an application from George Roberts (then the husband of plaintiff) for an insurance on his life. Roberts resided at Fort Leavenworth. The premiums were to be paid semi-annually in advance, each premium being \$42.96. No part of this premium was paid in money. Pinkham allowed Roberts \$5 on account of the premium, for which Roberts agreed to assist Pinkham in obtaining other applications for insurance at the Fort. For the balance of said first premium, Pinkham took Roberts' note and gave the following receipt:

\$37.96. FORT LEAVENWORTH, KAS., SEPT. 17th, 1872.

I have received from George Roberts, note for thirty-seven 96-100 dollars, for which (provided the application is approved at the home office) I agree to furnish him a policy upon his life for \$2,000, from the New York Life Insurance Company, within fifteen days from date; or, if this application shall be declined, to return the amount to him or his order on demand, it being expressly understood and agreed, that no liability is assumed by the company unless the said risk shall be approved and a policy issued at the home office in New York.

G. M. PINKHAM.

One of Partridge's letters to the *Insurance Company*, given in evidence on the trial, is as follows:

LEAVENWORTH, KAS., OCT. 18th, 1872.

WM. H. BEERS, *Vice Pres.*.—*Dear Sir*: I am notified of the sudden death of George Roberts, insured under policy No. 92,315. *Items*: Application was made Sept. 17th. Five dollars paid when application was made, a note taken for \$37.96, balance of first premium, payable on presentation of the policy. The insured called for the policy the day before it arrived, and said he was ready for it. The writer of this saw the insured some two days after the arrival of the policy, and notified him of the fact. The same evening, but after eight o'clock, he called at the office with the agent, Mr. Pinkham, to get the

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policy. Neither myself nor clerk were in, and he left soon after—I think the next day—for Fort Dodge, with government horses, he being an employé, where he was taken suddenly ill, and died. His family and home are at Fort Leavenworth. I believe he was a man of good habits, robust constitution. Am not informed of what disease he died. Neither do I know whether agent Pinkham gave him a binding receipt, as he is in the extreme southern part of the state, working in our interest. Under the circumstances, shall I construe the note as payment on the policy? Please answer by telegram, that we may satisfy anxious, inquiring friends, who press us for an answer.

Truly yours, R. PARTRIDGE.

In another letter, under date of 22d December 1872, from Partridge to M. Franklin, the president of the *Insurance Company*, Partridge transmitted the “proofs of the death of George Roberts;” and after making reference to his letter of 18th October, he says:

“You will notice, a note was given for the most of the premium. The money, after the death of Mr. Roberts, was promptly tendered to me, but not knowing the facts (only by report) as to the death of Mr. Roberts, I thought it prudent to decline taking it. The money however is deposited, awaiting my order; and unless you advise me to the contrary, I will send it in our report of the 1st of January.”

On the 3d of January 1873, Partridge sent to the company his monthly report, (for month of December 1872.) This report covered remittances amounting to \$1,802.60, and included “42.96,” “in payment (of premium on) No. 92,315, George Roberts”—of which premium his report shows that Partridge retained \$16.11 as commission. On the 7th of March 1873, the plaintiff received \$500 only, on account of said policy, and executed therefor on the back of the policy, the following receipt:

\$2,000.

FORT LEAVENWORTH, MARCH 7th, 1873.

Received of the New York Life Insurance Company, two thousand dollars, in full of all claims and demands due me on the within policy upon the life of my late husband, George Roberts.

MARGARET ROBERTS.

Other facts are stated in the opinion, *infra*. This action was

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commenced in March 1876, to recover the balance of \$1,500 due on the policy, with interest, (less \$42.96, amount of the second semi-annual premium, which the company, by the terms of the policy, had the right to deduct.) The answers of Partridge and English were general denials. The *Insurance Company* answered, first, a special denial of any indebtedness; second, that the policy sued on was void; third, that the whole amount of the policy, \$2,000, had been paid. Trial at the May Term 1876 of the district court, B. S., judge *pro tem.*, presiding. (During the trial the action was dismissed as to English.) The findings of fact are voluminous. The conclusions of law based thereon are as follows:

"1st.—The contract made and entered into by and between said English and plaintiff, [of date 20th February 1873, by which English agreed to undertake to collect of the insurance company the amount of insurance money due on the policy, and providing that "if he should be able to collect or compromise said claim without suit he was to have and retain all he could collect over and above \$500,"] and the power-of-attorney from plaintiff to said English, [of same date, authorizing English to compromise plaintiff's claim, and to indorse any draft payable to her received in payment thereof,] are, and were at the time of the execution of the same, void and of no force or effect whatever.

"2d.—The release of said plaintiff upon said policy of insurance was, at its execution, and is, void, and said policy should be considered as though the said receipt or release had never been written thereon.

"3d.—The receipt to said English from said plaintiff, [of date 10th March 1873, for \$500, in full for all claims and demands against the insurance company,] was and is of no force or effect, and is void.

"4th.—There is due to plaintiff from the defendants the New York Life Insurance Company and Reuben Partridge, the sum of \$1,457.04, with interest from the 28th of February 1873, the same being \$322.97, which together amount to the sum of \$1,780.01, for which the plaintiff is entitled to judgment against said New York Life Insurance Company and Reuben Partridge, defendants, and costs of suit."

Judgment accordingly. New trial refused. The *New York Life Insurance Company* brings the case here on error.

Stillings & Fenlon, for plaintiff in error:

1. The facts found by the court were not sustained by sufficient evidence; but if sustained by competent evidence, they were not sufficient to require the insurance company to pay a second time the money already paid by it and receipted for by defendant in error, and now either in her hands, or in the hands of her lawfully-authorized attorney. Plaintiff had no right to go to the known agent of the company for advice as to the measures she should take, and as to what lawyer she should employ, to enforce her claim. Where an individual or corporation employs an agent in a distant place to transact its business, such person or corporation is not responsible for any fraudulent recommendations which may be given by such agent, especially when such recommendations are given as to matters such as the employment of an attorney to act against the principal. The declarations of the agent made *within the scope of his authority*, bind the principal; but it was never before supposed that it was within the scope of the authority of an agent to select the attorney for an adverse party pressing a claim against his principal. If the findings of fact and law in this case are correct, it comes to this, that if a person's agent should tell his creditor that such person could not or would not pay some claim held against his principal, and the creditor under the delusion caused by such representations should sell the claim at a ruinous sacrifice, or make a contract with a lawyer by which he would obligate himself to pay a heavy fee, the agent would thereby make the principal liable for the loss sustained thereby. Such cannot be the law. 3 Kernan, 365; 2 Hilliard on Torts, 322; 12 East, 632; 11 Eng. Law & Eq. 424 Walker, 149; 7 Wis. 419; Ware, 175; 10 Mass. 397, 403; 15 Johns. 44; 6 Vermont, 384; 8 Wend. 494; 4 J. J. Marsh. 456; 18 Johns. 363; 1 Hill, (S. C.) 204.

2. But the findings themselves are against the evidence. The finding that Partridge knew that the claim would be paid, is not only not sustained by the evidence, but is against the reason of the transaction, and against the positive evidence of

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Partridge, corroborated by that of English. We objected to the introduction of the evidence of the conversations of plaintiff with English and Partridge, to bind the company, but the evidence was admitted and acted on. It seems to us clearly not competent to bind the company. But, taking all that was said in all the conversations between plaintiff and her attorney, English, and between her and Partridge, and who can say that Partridge's statements to her that she had no legal claim against the company, were not true, and his opinion that the company might consider it an equitable claim, was not the true state of the case? There was no proof that Pinkham had power to make a contract to insure on credit; and it was not pretended that anybody had paid the first premium, or that the policy had been delivered at the time of the death of Roberts, unless on the Indian's theory, that the *giving of a note* was *payment*.

Taylor & Gillpatrick, and Joseph McDonald, for defendant in error:

1. It is claimed that the insurance company was not liable on the policy written on the life of Roberts. But this can scarcely be regarded as a serious objection to the judgment below. The court will hardly declare void a policy which was by the company admitted to be valid and binding. The contract was complete upon the delivery of the "binding receipt." The receipt given was on a blank furnished by the company. The note was delivered for the premium, less five dollars which was taken as paid, and all the circumstances show a complete contract. 1 Washington's Ct. Ct. Rep. 93; 20 Wal. 569. But even if the note is not regarded as prepayment—though the court so finds, and though such was unquestionably the fact—still it must be taken as a credit for the premium, which the agent by general usage had a right to give. 20 Wal. 568; 25 Conn. 207; 7 Nevada, 116; 5 L. & A. Ins. Rep. 152; 101 Mass. 558; 26 Iowa, 52, 72; Sharpstein's Dig. Life Ins. 168; Bliss on Insurance, §§ 150, 191. We ask

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the court to note well the letter of Partridge, the general agent, of date 18th Oct. 1872.

2. The court below finds that, "Partridge, by further false and fraudulent representations, acting as such general agent, and through George H. English, an attorney-at-law, at Leavenworth, induced said plaintiff to employ said English, and this with intent to cheat and defraud the plaintiff out of all of said policy except \$500." The court finds that he did this to cheat and defraud; and this presupposes a collusion with the attorney for the purpose, as the evidence clearly enough shows was the case. The idea of counsel for plaintiff in error seems to be, that, conceding the liability of the company if Partridge had taken the money directly, yet because he does it through another the principal is relieved from all responsibility. Why, he might have removed the receiver of the stolen swag still further from himself, by taking in another, or still another, into the game; and still the fraud would be his, and theirs, and that of the principal. It were a reproach indeed, if so simple a subterfuge could defeat the ends of justice. The findings of fact bring the responsibility of plaintiff in error fully within the rule as laid down by the authorities. Story on Agency, § 452; Story on Contracts, § 134; Dunlap's Paley on Agency, 803; 1 Met. 202, 562; 2 Hill, 465; 41 Ind. 288; 23 Wend. 264; Kerr on Fraud and Mistake, 115; 61 Penn. 881.

8. But it is claimed that Partridge was not acting within the scope of his authority. Exactly what his authority was, the company would not show. This however is certain, the company made him its agent specially to pay or pass over to plaintiff the draft drawn in payment of the amount due. If they did not confide in him the whole matter, why did they not send it to *her*? Had they never heard of dishonest agents? Did they not know it was possible for cunning to devise, and dishonesty to practice, a fraud upon the payee, even then? What does he do? He hands the draft to a third person, through whom in part he has misled and deceived defendant in error, and who holds a power of attorney known by Partridge to be executed because of falsehoods and misrepre-

Brief of Defendant in Error.

sentations from himself and the attorney. It was a conspiracy to rob the widow under the forms of law, and the court finds that defendant in error is not bound by the receipt, the release, or the supposed payment. Partridge first acted fraudulently, as the general agent, in matters at least apparently within the scope of his duties. And beyond all question, he in the second place fraudulently passed the draft to English, as if indeed he had passed it from his right hand to his left; and except the \$500, it was as if no payment had been made at all. "One who pays with knowledge of a fraud, is in no better position than if he had not paid at all." Am. L. Reg., April 1877, p. 251. The company placed Partridge in a position to impose upon plaintiff, and now seeks to evade responsibility by denying his authority. 13 Wal. 234. The testimony of Partridge shows conclusively that the company knew all the facts concerning the death of Roberts, the payment of the premium, and the delivery of the policy; that with this knowledge, it had decided that the policy was a valid claim against it, and promised to pay it; that Partridge was notified by it of its conclusion, and that he deliberately used his position, intrusted to him by the company as its agent, to defraud the defendant in error out of a large portion of the amount due on said policy, and that he did so defraud her, and convert the money to his own use. And as to English's testimony, we simply ask a careful survey of the circumstances in that connection. It is not necessary to prove fraud directly. It may, and from the nature of the case, must, in most cases, be inferred from the circumstances and facts proved. (Kerr on Fraud and Mistake, 384; 19 Mich. 57.) Taking the testimony of these two men together, the findings of the court are more than sustained. A clearer case of collusion and conspiracy to defraud the defendant in error could not possibly be made out. The implication of English in the fraud, though palpable, is not at all necessary to the right of recovery here. 51 Illinois, 380. The court below, in the trial of this case, saw the witnesses, their bearing, etc., upon the stand, and through a long trial carefully weighed the evidence offered, and the corroborating cir-

cumstances, and reached its conclusions of law and fact naturally enough; and to urge a reversal of the judgment in this case is to do violence to every rule for the weighing of testimony, and every principle for the relief of the victims of fraud and imposition. Instead of *opinions* having been expressed by Partridge to plaintiff, the court will see that he made positive statements, and of a character fatal to her claim. She even wished to write to the company, and note his responses when she spoke of so doing. Observe with what sly deception the web is woven, and the net is spread. Scan her statement of the meeting with Partridge at the Fort; his pretense that he had, after having seen her, *accidentally* met English, when in fact the two rode together to the Fort, and for the purpose of fixing up a job on her. The draft was expected within a few days—the sixty days were nearly up—and the power-of-attorney should, to look all right, be of an earlier date than the draft. When lawyers expect to fairly fight a case, do they usually take such steps as were used here? The contract, and the power-of-attorney, are part of the plan. In eight days after, the draft for the full amount is forwarded by mail from New York. The whole performance was an impotent effort to hedge against possible consequences in the future. We ask a careful examination of the whole testimony, if the second proposition of plaintiff in error receives any consideration. The books are sprinkled thickly with decisions on questions of fraud. In *Bryant v. Simoneau*, 51 Ill. 327, the rule as to proof of fraud is clearly laid down.

A humorous writer says: "There never was a time when the insurance business was so safe as it is now. All that a man wants to do after he gets insured is to die right quick, before the company does; but he doesn't want to be fooling around, living and having a good time." But the most fruitful subject for the satirist, is the insurance agent, and his adjustment of losses. A man takes a chance in this game of life insurance—where to win, he must pay the penalty of his life—and dies. Then the trouble just begins. The company, that is, the *insurance agent*—for it can do nothing ex-

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cept by an agent—the president and secretary are at last but agents—with faculties sharpened by long experience, and aided by the multiplied conditions and covenants contained in the policy, commences the work of evasion, or compromise; and arts to this end are practiced, rivaling those of the devil himself. That many agents are honest and conscientious, is true; but that all should be such, is equally true. And assuming the innocence of the company—not safe to do in many cases—it should be taught the salutary lesson that, in the management of its sacred trusts, honest men, and honest men only, must be employed, or the principal will be held responsible for all knavery and deceit.

The opinion of the court was delivered by

HORTON, C. J.: This action concerned litigation of the most deplorable character, and comprised transactions so disreputable that one could wish they had never occurred. The dishonest insurance agent, who figured in the proceedings in despoiling a woman of the greater part of \$2,000 due her on an insurance-policy on the life of her dead husband, deserves lasting disgrace.

The case arose out of the following circumstances: On the 17th of September 1872, the defendant in error, then the wife of George Roberts, applied to the New York Life Insurance Company for a policy of \$2,000 on the life of her husband. The first semi-annual premium on the policy was paid with a note for \$37.96, and the agent of the company executed therefor a receipt by which the policy was to issue within fifteen days, provided the application was approved at the home office. On the 23d of the same month, the insurance company issued to said defendant in error the policy applied for, and transmitted the same from the home office to their agent, Reuben Partridge, at Leavenworth, and the same was received by the agent a few days after the 23d, and during the life of the assured. On the 17th of October 1872, George Roberts died. Proof of his death were forwarded by the

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agent Partridge to the home office for the company, upon blank proofs furnished from the office for that purpose. Sometime after the death of Roberts, the defendant intermarried with Mr. Theo. L. McGowan. On September 17th 1872, and for a long period before that time, the said Reuben Partridge was and had been the general agent of the insurance company for the states of Kansas and Nebraska, and the territory of Colorado, and other portions of the west. He was in charge of the general western agency of the company, with his general office at Leavenworth city, in this state, and he continued to be such agent until after the 7th of March 1878. On 28th February 1878, within the sixty days after the reception of the proofs of loss, a draft for the sum of \$1,957.04, (that sum being the amount due on the policy less the second semi-annual premium,) was executed by the insurance company, payable to the order of the defendant in error, to settle and pay the amount of the policy; and the insurance company sent the draft forthwith to its agent Partridge, at Leavenworth, which was duly received by him. Partridge induced the defendant in error to believe that the policy of insurance was void, by his fraudulent and false representations to her that the company declined to pay anything, and that she had no valid or legal claim under the policy against the insurance company. About eight days prior to the sending of the draft of \$1,957.04 from the home office to him to pay the policy, he induced the woman to employ one George H. English, an attorney-at-law, then living at Leavenworth, to attend to her demand against the company, and thereupon a contract was entered into between said attorney and defendant in error, by which she was to allow the attorney all that he could recover, or that the company would pay on the policy, over \$500. Upon the receipt of the draft for \$1,957.04, the agent Partridge delivered the same to English. The latter indorsed it, under a power of attorney which he held, and paid the defendant in error \$500, and retained \$1,457.04. Through the statements of Partridge and English, the defendant in error was then induced to ac-

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knowledge in writing the receipt of the full amount of the policy, although she only received \$500. The fact that the company had sent the draft to pay the policy was concealed from her by both English and Partridge. English commenced no suit for the money, wrote no letters to the company, gave really no services in the matter. The company never objected to the payment of the policy prior to sending the draft, and Partridge in all of his correspondence with the company assumed the policy was valid and binding. About a year after the death of her husband, the defendant in error received an insurance almanac, in which she saw that the insurance company printed her name as having received \$2,000, the full amount of the policy, and thereupon she wrote to the company, and began to investigate the matter, as to what amount of money had been sent to their agent Partridge to pay to her. Having ascertained the deceit and fraud practiced upon her by the agent of the company, she commenced this action in the district court of Leavenworth county, on 10th March 1876, to recover the balance of the money, which she claimed due on the insurance policy, to-wit, \$1,457.04, with interest thereon. The case was tried to the court, a jury being waived. Judgment was rendered in favor of the defendant in error for \$1,780.01, and costs.

The insurance company object to the judgment, and claim that it should be reversed, and the company released from all liability, because, *first*, there was no proof that the agent of the company, who took the application for the policy of insurance, and issued the receipt to George Roberts for the note received in payment of the first premium, had power to make a contract to insure on credit, and the giving the note was no payment of any premium; *second*, that the findings of the court were against the evidence, and do not sustain the judgment; *third*, that the insurance company was not responsible for any of the fraudulent recommendations of its agent Partridge, nor liable for his deceits, concealments, or false representations in the premises.

As to the first objection, it is sufficient to say that the application was made to and accepted by an authorized agent of the company. The note was given and accepted as payment. An agent of an insurance company whose business it is to solicit applications for insurance, and receive the first premiums, has the right to waive the condition requiring the payment in money, and to accept the promissory note of the applicant, or of a third party in lieu thereof. *May on Ins. 845, 846; Mississippi Valley Life Insurance Co. v. Neyland, 9 Bush. (Ky.) 480*, and authorities there cited. In this case however, there can be no question raised as to the authority of the agent to give the receipt, as the company issued the policy, sent it to their general agent Partridge, and when proofs of the death of Roberts were received, the company calculated the amount due on the policy after deducting the amount of the second semi-annual premium (stipulated for in the policy), and sent the sum in a draft to their agent, payable to the order of the defendant in error, to whom the policy was delivered to be receipted and satisfied. The company thus fully ratified the action of its agent in accepting the note and executing the receipt for the policy, and in treating the policy as valid, and as if actually delivered before the death of the assured.

In regard to the second objection, after a careful perusal of all the evidence, we do not see that the district court could have intelligently arrived at any different conclusions of fact than those stated in the findings. The company never resisted the legality of the policy, promptly adjusted the demand, and Partridge had no valid reason to represent the policy void. The attorney recommended was an intimate friend of the agent—so much so that Partridge himself stated in his evidence that he frequently loaned him money, and when he had any legal business, English generally attended to it. Partridge in his communications to the company treated the policy as a valid one, and had no reason to think otherwise. English does not seem to have done anything in the case, other than to draw up a contract by which he was to have all of the

money coming from the company except \$500, and a power-of-attorney by which he could indorse the draft when received. When the draft came to Partridge, he retained it till Mr. English who was then temporarily absent from Leavenworth, returned, and then he delivered it personally to him. The defendant in error, as a witness, gave the following account of the manner in which she was inveigled into the web spread by Partridge to entrap her, and of the mode adopted to keep her silent as to the money she was paid, while she was systematically robbed of the fruits of the policy under pretense of conferring great favors on her:

“About a week after the death of my husband, Mr. Roberts, I waited on Mr. Partridge, the old man, at his office in Laing's building. I had never seen him, and I introduced myself to him. He said he was glad I had called; that he had often thought about me. Finally I asked him if he thought the company would pay the policy. He said no, he did not think they would. He said my claim was not a legal one. He said he would write to the company and see what they would do. He said in a week or so I could call at his office. A week or ten days after I called at his office, and he said he had not heard from the company. I said to him, ‘since I have been here I have thought that I had better write to the company.’ He said it was not necessary for me to write to the company; that he was here representing the company, and he said if I wrote to the company the letter would be sent back to him, and it would not benefit me any whatever. He said, ‘I assure you I will do what I can for you. Since I saw you I have made a thorough investigation, and I find that your husband was a popular man, and a highly-respected citizen. If I had known it, I could have withheld the policy, and paid the premium for you; but I was true to the company, and sent it to New York.’ He said if I would call any time I was in town he might hear from the company. When he said it was no use for me to write to the company myself, I never gave it any more consideration. I called in a week or so, and he said he had heard from the company, and they refused to pay me; that my claim was not a legal one. He said that if Mr. Roberts had only paid the small amount of twenty-five cents, it would have been legal, but as he had not it was not, and I had

no claim on the company. I never called at Mr. Partridge's office after that. About two months, or probably a little more, after I was in Mr. Partridge's office, Mr. Partridge called on me at the Fort. He came up he said to see if I had taken any steps in that matter towards trying to get my money from the company. I said I had not. He said if I intended to take any steps in the matter I had better do so soon. He said after a certain length of time I could not do so. He did not say how long that time was. He asked me if there was any person I was acquainted with, any lawyer I wished to consult about it. I said, none in particular, that I knew no lawyers. He said such being the case, he would recommend George H. English; that he was an honest, trustworthy man, and could be relied on. I asked where his office was, and he told me. I said, if it would not be too much trouble I wished he would speak to Mr. English for me. He said he would. He then went away.

"In about a week or so he came again, and said he had not seen Mr. English yet, but said that any time I would come down, if I would call at his office, he would take me to Mr. English's office and introduce me to him. I said I would, and he went away. In about half an hour after, he came back and said that as he was going home he had met Mr. English on the road, and he had come to the house with him. He said, 'I want you to speak to Mr. English yourself; I will go out and ride round the fort in his buggy, and you can speak to him on the subject.' He said, 'I want you to promise me before I go not to say anything to Mr. English, that I have spoken to you about him. Speak to him as though speaking your own mind. Another thing I want you to promise me: whatever the company gives you, you will have to acknowledge the full amount of it; if you don't, they will not pay you anything; you will have to acknowledge the receipt of the full amount, and if any friend asks you what they gave you, don't tell them; tell them that the company satisfied you, but don't say in what way, but you will have to acknowledge the full amount, whatever you get.' I said, if that was a fact, I would have to acknowledge a lie, if I acknowledged the receipt of \$2,000, and did not get it. He smiled, and said, 'we have to do many things; half a loaf is better than no bread.' He then went out, and Mr. English came in. I did not know what to say to him, but finally I said, 'I suppose Mr. Partridge has mentioned my case to you, that I wished to see you.' He

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said, yes, he knew something of it; that Mr. Partridge and him were speaking of it as they were coming up together from the city to the fort. I said if that was the case, it was not necessary for me to say anything more. He said no. I asked him if he was willing to take the case. He said yes, but it was seldom he ever made anything out of such cases. He wanted to know how much I wished to make the claim. I said I thought I was entitled to the whole amount. He said I was not, because no money was paid, as Mr. Partridge said. I asked him if he thought the company would be willing to pay me half. He said he thought not, he did not know but they would give me \$500. He said he would try his best to have them give me \$1,000. He said if they gave me \$1,000, he would keep \$200 of it for his fees; if they gave me only \$500, he would keep only \$100 for his fees. A few days after that he came to my house and said the company would give me \$500, but I would have to acknowledge the receipt of the full amount, otherwise they would not give me anything; that they were giving me that as a gift; that I was not entitled to anything. Of course I signed the papers, receipted for the full amount, and he paid me the \$500 down. While I was signing my name to the receipt for the \$2,000, I said to Mr. English I thought it was a strange way to transact business; I was signing my name to a receipt for \$2,000, and getting only \$500. He said he knew, but business was business. That was all I said to Mr. English.

“Ques.—How did you come to sign the receipt on the back of the policy? Was it for the reasons you have stated? Ans.—Certainly; they said they would not give me anything unless I acknowledged the full amount.

“Q.—When you signed it, it was under the representation, as you say, that the company would pay you \$500? Ans.—He said the company would not give me any more than \$500; that they were under no obligations to give me anything, because the claim was not a legal one. Mr. Partridge said all the time that the claim was not a legal claim.

“Q.—Had Mr. English told you the same thing? Ans.—Mr. English told me, and Mr. Partridge also.

“Q.—State whether it was by reason of your relying on the statements of Partridge and English, that you signed these papers? Ans.—Certainly, I relied on what Mr. Partridge said. I supposed he spoke the truth. He said the claim was not a legal one, and it would be better for me to employ an agent.

“Q.—Mr. English paid you \$500? Ans.—Yes sir.”

Mr. English admitted that he only paid defendant in error \$500; and all the incidents of the transaction fully supported the statements of Mrs. McGowan. That English and Partridge would deny any collusion between themselves in the matter, is to have been expected in view of their conduct. Parties guilty of such practices as herein set forth, are not accustomed usually to confess as to their own bad acts. "Like all other facts, fraud may be proved by circumstances. We should seldom, if ever, hope to prove fraud by the admissions of a party; nor should we expect to find direct and positive evidence of the fact. Whatever circumstances, when proven, convince the mind that the fraud charged has been perpetrated, is all that is required. While fraud cannot be established by circumstances that merely raise a suspicion, yet, when they are so strong as to produce conviction of the truth of the charge, although there may remain some doubt, then it is fraud." *Bryant v. Simoneau*, 51 Ill. 324. Tested by this rule, the findings are strongly sustained. But it is not necessary to go thus far. The findings of a trial court are conclusive, if there is any evidence to sustain them; and we cannot disturb them, where the findings are upon conflicting evidence. We hold therefore, that the findings of the court upon the questions of fact cannot be reversed by this court, as there was testimony clearly tending to establish the facts found. *Hobson v. Ogden's Executors*, 16 Kas. 388.

In conclusion, we are called to pass upon the third objection presented, and which has been so ably and forcibly urged in the argument of the learned counsel for plaintiff in error. This is really the main question in the case: Is the insurance company liable under the circumstances for the balance of the draft, that is, for the \$1,957.04 originally due on the policy, less the \$500 paid to defendant in error? or, must the owner of the policy be remitted for her remedy to a worthless insurance agent, and an insolvent attorney? If the latter be the conclusion, then certainly the terse remark of the old English vicar, that "Law and equity are two things which God hath joined, but which man hath put asunder," would have some

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foundation in truth. Fortunately, no such reproach can, in this case, be brought against our jurisprudence. Nor need we seek any new principle of the law to enforce the liability of the insurance company. It is our comfort to stand *super antiquas vias*. Nearly two hundred years ago it was decided by Holt, C. J., in the case of *Hern v. Nichols*, 1 Salkeld, 289, that the merchant was responsible for the deceit of his factor, though not *criminaliter*, yet *civiliter*; "for seeing somebody must be a loser by this deceit, it is more reason, that he that employs and puts a confidence in the deceiver, should be a loser, than a stranger." Mr. Waite states the law as follows: "It is a universal rule, based upon principles of policy, propriety, and justice, that if a principal puts his agent in a condition to impose upon innocent third persons, by apparently pursuing his authority, the principal will be bound by his acts, and he must lose, in preference to such third persons." Story says: "It is a general doctrine of law, that, although the principal is not ordinarily liable (for he sometimes is) in a criminal suit for the acts or misdeeds of his agent (unless indeed he has authorized or coöperated in those acts or misdeeds,) yet he is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligence, and other malfeasances, or misfeasances, and omissions of duty, of his agent, in the course of his employment, although the principal did not authorize or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them."

In the case at bar, Partridge was the general agent of the insurance company. He had charge of the business in two states, and several territories. He collected money for premiums, solicited insurance, by his own efforts, and through sub-agents, transmitted the premiums to the company in New York city, appointed sub-agents, kept a record of the policies issued in the agency, received the drafts or checks for losses within his territory, secured the policies receipted, when paid, and forwarded them to the company, and generally had the

management of all the business of the company within the states and territories under his control. He was the person to whom the defendant in error had the right to apply for the payment of her policy. He was the person who received the draft with which to pay it. He was the person who should have informed her of the action of the company, and of its recognition of her rights, and made the payment of the sum due. He was acting within the general scope of his authority. If the company had sent to their agent the \$1,957.04 in currency, with which to pay the policy, and this agent had himself retained all but \$500, upon the plea to the beneficiary thereof that this sum only had been transmitted him, and the company would pay no more, would it be contended that if such beneficiary accepted the \$500 and receipted the policy, relying solely on the false representations and fraud of the agent, she could not recover the balance of the sum of the company? If the agent had forged the name of the payee to the draft, and having collected the amount thereof, and appropriated all of it but \$500 to his own use, and had delivered the \$500 to the defendant as the proceeds of such draft, would it be claimed by counsel that the policy had been paid, and the company relieved from all responsibility? We think in the reason of things, both of these questions would be answered in the negative. The company did not pay the loss by merely sending its draft or check of \$1,957.04 to its agent. The company had to pay the money to the party. If the agent retained any part of it, the part thus retained was still unpaid—still remained due. The fact that, by collusion between Partridge and English, the woman was induced to permit the money to go into the hands of English, does not materially change the principle contended for. The denial of the validity of the policy, the introduction to the attorney, the recommendation of his honesty and ability, the making of the contract, the power of attorney, and the delivery of the draft to English, instead of the woman, were all means adopted for the sole purpose of cheating the policyholder out of the money retained from

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her. This roundabout way was evidently artistically planned by Partridge, to lull the suspicions of his victim, and to obtain the policy receipted, to return to the company. It is also likely that he thought that the measures adopted by him in the transaction would conceal his own criminality, and relieve himself and the company from further payment. The company is as much responsible for the action of Partridge, as if he had himself drawn the money on the draft, and used it for his own benefit. For his conduct under these circumstances, the company must suffer the loss—not the person, who trusted the authorized agent empowered to pay the claim. “It is more reason, that he that employs and puts a trust and confidence in the deceiver, should be a loser, than a stranger.” It is not necessary that the company, or even Partridge, should have received any of the money from English, or any benefit therefrom. If the agent deemed it best to place in other hands than his own, the proceeds of his imposition, the company, for whom he is acting, is not thereby relieved of liability. The company is not bettered by such action, and the conduct of the agent is the more censurable, as he has neither the excuse of his necessities, nor the motive of cupidity. If the action of the agent is to be attributed to his general viciousness, rather than sudden temptation, the reason is stronger for the accountability of the company, because the company has no legal or moral right to give influence, position, and power to men, as its agents, to deal with others in its behalf, who are generally depraved and untrustworthy. If however it be conceded, that the agent Partridge in doing the acts complained of, was not in fact directly the agent of the insurance company, still, the company would be held liable, not however upon the rule that the agent acted for the company in that particular transaction, but because he was employed by the company in that character of business, and was so held out as a person authorized and fully to be trusted. “When the agent in such a case does an act which is apparently within the general scope of his authority, although not so in fact, if the principal were not

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held liable for the act, a third person, who had reason to believe that the agent was reliable, and possessed authority in the particular matter from the general character of his employment, might suffer loss; hence the law holds the principal liable upon the ground that he, rather than a third person equally innocent, should suffer." *Dougherty v. Wells, Fargo & Co.*, 7 Nev. 368; *Clark v. Metropolitan Bank*, 8 Duer, 248.

We do not think that the other exceptions taken in the proceedings demand any consideration, and hence, upon well-settled principles, and the stronger equity, we hold that the defendant in error can recover. The judgment must therefore be affirmed.

All the Justices concurring.

HENRY A. GREEN V. WM. W. EMBRY.

ATTACHMENT; *Alleged Fraud; Motion to Dissolve.* Where an attachment is obtained upon the affidavit of a plaintiff, that the defendant fraudulently contracted the debt for which the action is brought, and the defendant fully denies the charge under oath, and the plaintiff states in a deposition taken at the instance of the defendant, that the fraud referred to in his affidavit was the attempt of the defendant to defraud him by neglecting to take such measures for the preservation of his business as is usually taken by ordinary business men, and that the suit was a friendly one, and thereafter the plaintiff files an additional affidavit stating that the money sued for was obtained by the fraud of the defendant in inducing the plaintiff to deposit the same in a bank, from whence it was at once drawn by the defendant, under a promise of a partnership to be formed by plaintiff and defendant, the district court does not err in sustaining a motion to dissolve the attachment and release the attached property.

Error from Leavenworth District Court.

An attachment against property was sued out by Green, and the district court, at the March Term 1876, on motion of

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Embry dissolved and set aside the attachment. *Green* brings the case here.

Taylor & Gillpatrick, for plaintiff, that the testimony upon the whole case sustained the attachment, cited 2 U. S. Dig. p. 225, § 2476; 4 Abb. 349; 24 La. An. 128.

Byron Sherry, for defendant, contended that plaintiff's own testimony disproved the allegation of fraud.

The opinion of the court was delivered by

HORTON, C. J.: The plaintiff seeks in this proceeding to reverse the order of the court below discharging an attachment sued out at his instance against the property of the defendant. The only ground of attachment relied on is, "that the defendant fraudulently contracted the debt for which the action was brought." The affidavit for the attachment was sworn to January 15th 1876, by the plaintiff, H. A. Green. The case comes here upon evidence in the way of affidavits and depositions, as no oral testimony was offered or admitted on the hearing of the motion to discharge the attached property. Under these circumstances, if the order of the district court clearly appeared to be against the weight and preponderance of the evidence, this court would reverse the order for that reason alone; but an examination of the affidavits and depositions convinces us that there can be no reasonable doubts as to the correctness of the ruling of the court below. The only evidence necessary to be commented upon is contained in the affidavits and depositions of the plaintiff in error, and the affidavit of the defendant. In the original affidavit for the attachment, Green swore, in the words of the statute, that the defendant fraudulently contracted the debt. Afterward, his deposition was taken at the instance of the defendant, and on the hearing such deposition was read in support

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of the motion to discharge the property. Among other things Green testified in his deposition:

"I believe I may have said to Mr. Embry, in Couch's liquor-store, in February 1876, in the presence of Thomas Duniffe, that this (meaning the case at bar) was only a friendly suit. I then stated what I thought to be true.

"*Question.*—If this was a friendly suit, why did you charge him with fraud in your affidavit? *Answer.*—Because it was represented to me, that if the money was not accounted for, it was naturally fraud. I did not see at that time, why the fraud should be pursued.

"*Q.*—What do you mean by the language, 'the fraud pursued?' *Ans.*—Following it up.

"*Q.*—What fraud do you refer to? *Ans.*—The whole case at will.

"*Q.*—Fraud by whom? *Ans.*—The defendant in this case.

"*Q.*—Do you now claim that Embry at any time attempted to defraud you? *Ans.*—Yes, not willfully though, but by neglect. I mean by neglecting to take such measures for the preservation of his business, as are usually taken by ordinary business men.

"*Q.*—This then is what you mean by the fraud you refer to in your affidavit? *Ans.*—I never accused Mr. Embry of fraud in any other way. I do not think he would do it. I do not know now who informed me Mr. Embry was going to make a chattel mortgage to one Byron Sherry.

"*Q.*—Have not others besides your attorneys advised you to commence proceedings against Mr. Embry? *Ans.*—They had not advised me when I began it, because as I said before, when I began it, it was a friendly suit. A good many have since indirectly advised me to press the suit."

The affidavit of the plaintiff denied the charge of having fraudulently contracted any debt to plaintiff; denied that he was indebted to the plaintiff in any sum; admitted having had business transactions with him, and that arrangements had been partially effected for a partnership between them, but that it was brought to an end by plaintiff failing to comply with his part of the contract. The plaintiff filed a subsequent affidavit, of the date of February 12th 1876, which made no explanation of the statements in his deposition taken

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by defendant, but did state that he was led to place \$1,290 to the credit of Embry & Green, under a promise of a partnership; that Embry received the money sued for, viz., \$550, from the deposit, on a check drawn by Embry, but signed by him, "Embry & Green."

In our view, the statements of Green are so conflicting and contradictory as to be undeserving of any consideration. His testimony was undoubtedly treated by the district court as wholly unreliable, and we must entirely disregard it. A person who so recklessly, if not criminally, trifles with the solemnity of an oath as to vary his evidence upon every different occasion when it is taken, ought not to merit the attention of the court with a claim that he is worthy of belief. When the golden thread of truth is once dropped, it is impossible to tell where it can be taken up again.

An attempt was made in the court below to prove by affidavits that the plaintiff was too much intoxicated to give coherent statements of fact, when his deposition was taken, and that he was also then laboring under fear of personal violence. The affidavits on this point are very indefinite, and do not seem to have been made from the personal knowledge of the parties. But the attempted exculpation of the plaintiff in this way, does not commend his conduct greatly to us, nor add any weight to his credibility at our hands. We are charitable enough to hope that there was some mistake in the evidence as written; but as presented to us, we can give it no value, and the plaintiff no credence.

The order of the court dissolving the attachment and releasing the attached property, will be affirmed.

All the Justices concurring.

SUPREME COURT,
STATE OF KANSAS.

JULY TERM, 1877.

PRESENT:

HON. ALBERT H. HORTON, CHIEF JUSTICE.
HON. DANIEL M. VALENTINE, } ASSOCIATE JUSTICES.
HON. DAVID J. BREWER, }

J. H. TENNENT *et al.* v. RICHMOND T. BATTEY *et al.*

ASSIGNMENTS; DEBTOR AND CREDITOR; *When Attaching-Creditor Cannot Attack Debtor's Assignment, as Fraudulent.* L. made a general assignment for the benefit of his creditors. T. commenced an action against L., and caused an attachment to be issued and levied upon the property of L. covered by the assignment. Immediately thereafter, and before judgment in the attachment-suit, he commenced an action against L. and his assignee to have the assignment declared void: *Held*, That such action could not be maintained; that an attaching-creditor had not, before judgment in the attachment-suit, such a *certain* claim upon the property of the defendant as would entitle him to maintain an action to set aside an alleged fraudulent conveyance of the defendant. [*Ferguson v. Bank*, 25-339; *Simpson v. Voss*, 31-230; *Daggett v. Bell*, 32-301].

Error from Marion District Court.

ACTION by Tennent, Walker & Co., against Battey, and one Lucas and wife, to set aside an alleged fraudulent conveyance of property made by Lucas and wife to Battey. The material facts are stated in the opinion, *infra*. The district court, at the April Term 1875, held that this action could not be maintained, and gave judgment in favor of the defendants for costs. The plaintiffs bring the case here for review.

Brief of Plaintiffs.

Frank Doster, for plaintiffs:

The petition is not a "creditor's bill." A creditor's bill is filed to reach the equitable assets of a debtor, upon which the creditor has no lien, and which are not the subject of levy and sale on execution; and we concede that to maintain such an action, a judgment, and return of "no goods," are necessary. *Newman v. Willetts*, 52 Ill. 198. But a bill to set aside a fraudulent conveyance, can be maintained where there is property subject to execution, and the creditor has acquired a specific lien upon it, whether by attachment, warrant of distress, judgment or execution: *Drake on Attachment*, § 225; 4 Minn. 13, 17; 11 N. H. 311, 327; 6 Foster (N. H.) 506, 516; 40 N. H. 516, 518; 1 Stockton (N. J.) 36; 33 Texas, 297, 315; 27 N. Y. 596, 601; 28 N. Y. 45; 9 Abb. Prac. Rep. 1st series, 325; 34 N. Y. 256; 47 Ala. 685; 80 Ala. 319; 6 Cal. 376; 13 Cal. 76; 62 Ill. 218; 19 Abb. Prac. Rep. 469. And see *Reese River Mining Company v. Atwell*, L. R., 7 Eq., 347—a late English case, in which a bill to set aside a fraudulent conveyance was sustained, though no judgment or lien had been obtained. These authorities are all in point, and show that an attachment-lien is sufficient to enable the creditor to maintain the action, and it is believed that in those states where a precedent judgment has been required, their legislatures had not provided for the obtainment of an attachment-lien by mesne process, or if such provision was made, the creditor has failed to avail himself of it. *Stone v. Anderson*, 6 Foster (N. H.) 518. Possibly an exception or two has occurred since that decision. The theory upon which these cases proceed is, that property fraudulently conveyed, as to creditors, is still the property of the debtor, and that when a creditor, in the effort to provide a fund for the satisfaction of his anticipated judgment, has obtained a specific lien upon it, with the right in certain cases, to sell before judgment, he has acquired such a standing in court as will enable him to maintain an action to avoid the fraudulent incumbrance, the same as though he had prosecuted his legal remedies to the ultimate. It is no answer to say that if the con-

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veyance is *void* the creditor can treat it as such, and sell under his attachment. True, he can; but who would be the purchaser, with the evidence of an adverse title standing upon the records, or known to exist? It requires a judicial determination of the fact, and to clear away the fraudulent obstruction, so as to permit a sale at a fair price. In some of the New York cases the question arose in actions of trespass against the sheriff; but it is submitted, that in that form it is substantially the same, because there can be no difference between the assignee suing, in trespass or replevin, because the creditor has not reduced his demand to judgment, and defending on the same grounds against a suit of the creditor. Drake on Att., § 225.

L. F. Keller, and *A. E. Case*, for defendants, as to alleged frauds and fraudulent assignments, and plaintiff's supposed rights, cited, 13 Ohio, 30; 8 Kas. 270. As to creditor's bill, and when maintainable; and generally upon the right of plaintiffs to maintain the action, 50 N. Y. 80; 17 Wis. 470; 8 Gilm. 522; Walker's Ch. (Mich.) 28; 1 Manning, 321; 4 Minn. 14; 12 Minn. 145; 17 Ala. 685; 11 Ark. 411; 4 Fla. 344; 4 Ga. 322; 47 Ga. 530; 13 Ill. 324; 31 Ill. 322; 39 Ind. 225; 17 Iowa, 495; 3 Littell, 10; 5 J. J. Marsh. 87; 3 Rob. 457; 25 Me. 313; 28 Me. 232; 6 Gill & Johns. 424; 10 Md. 500; 14 Smedes & Marsh. 11; 27 Miss. 509; 23 Mo. 56; 44 Mo. 520; 2 Johns. Ch. 144; 20 Johns. Ch. 296; 13 N. Y. 488.

The opinion of the court was delivered by

BREWER, J.: Plaintiffs commenced an action against defendant Lucas, on notes and an account, and caused an attachment to be issued and levied on property alleged to be his. Before prosecuting such action to judgment they commenced this action to set aside, as fraudulent and void as against creditors, an assignment made by defendant Lucas and wife, to their co-defendant Battey, all of their property, including the property taken on the attachment. A demurrer to the petition filed in this action was sustained, and the case is here for review.

The principal question is, whether the plaintiffs, by the mere suing out of an attachment, and causing it to be levied upon the property conveyed by the assignment, and before the fact that they *are* creditors has been established by a judgment, have acquired the right to litigate the validity of the assignment. Upon this question elaborate briefs have been filed by counsel on both sides, and authorities cited and commented on from nearly every state in the union. The case has been before us for some time, and we have examined carefully the principal authorities cited by either counsel. On the mere matter of authorities, a decision well fortified could be rendered either way. In *Drake on Attachments*, § 225, we find this summary of the question:

"In connection with the lien acquired by an attaching-creditor, has come up in different forms the question of his right to secure the benefit of his lien, as against fraudulent conveyances of and incumbrances upon the attached property. The first shape this question assumed, was as to the right of the attaching-creditor to maintain a creditor's bill in equity to set aside such a conveyance or incumbrance. The doctrine that a creditor at large, before he obtains judgment, is not entitled to such a remedy, is familiar to the legal mind. 'The reason of the rule,' said Chancellor Kent, 'seems to be, that until the creditor has established his title he has no right to interfere, and it would lead to an unnecessary and perhaps fruitless and oppressive interruption to the exercise of the debtor's rights. Unless he has a *certain* claim upon the property of the debtor, he has no concern with his frauds.' Such doubtless is the general rule. * * * In different states the attempt has been made to establish another exception in favor of attaching-creditors. In New York, a bill in favor of such a creditor was once sustained by the court of chancery; but this was contrary to the uniform course of decision in that state, before and since. In Illinois, and Missouri, the right to maintain such a bill was denied. On the other hand, New Hampshire and New Jersey have held that an attachment confers a lien, in virtue of which the bill may be maintained. In New York, too, it was decided that an attaching-creditor is not, before he obtains judgment, entitled to impeach the *bona fides* of a judgment confessed by a debtor to a third person before the attachment was levied."

A question, upon which courts have ruled so differently, cannot be perfectly plain and easy of settlement. Many considerations of weight can be urged on either side, and it is not easy for either to answer fully the arguments of the other. For a full review of the authorities and arguments, we refer to the briefs of counsel, and shall content ourselves with a statement of that which has influenced our decision. While an attachment is doubtless a specific lien, it is a lien of very uncertain tenure. It is subject to defeat by the dissolution of the attachment, on motion, or a judgment in favor of the defendants on the merits of the claim. The grounds for attachment given by our statute, are many. Some of them imply no wrong on the part of the defendant. Suits in attachment are common. Motions to dissolve come, in almost every case; and the experience of every practitioner will testify that a large per cent. of the attachments issued and levied finally fail. Attachment-liens do not, with us, as in some states, require a judicial order for their creation. The mere affidavit of the creditor is sufficient, and that affidavit too, alleging only in general terms the existence of one of the statutory grounds for attachment. Hence, while it is a specific lien, it is a lien for a very uncertain claim.

Again, it would seem that no advantage would inure to the creditor, except in the mere matter of time, by sustaining such an action before the attachment and the claim are established by final judgment. So far as the creditor's security is concerned, the seizure by the officer preserves the lien as against all changes and transfers, and everything that the debtor or his assignee could do subsequent thereto. Except as to perishable property, and property whose keeping is expensive, no sale can be ordered until after the judgment; and for such property it would be of no advantage to sustain an action like this. Perishable property and property whose keeping is expensive, demands an immediate sale; and no action can be immediately forced to trial and judgment.

Still again, it would seem that often the time and attention

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of the court would be occupied with useless litigation. At any time before judgment the defendant may move to vacate and dissolve the attachment, inquiring, if need be, into the truth of the grounds alleged therefor. The judgment on the trial may be for the defendant, and that will end the attachment-lien. And whenever the attachment ceases, the suit brought to set aside any alleged fraudulent conveyance or incumbrance of the defendant fails also, and the whole time and labor of the court given thereto will be wasted time and labor. Why should a court be subjected to this?

Is not the language above quoted from Chancellor Kent, most apt? Ought not a party to have a *certain* claim upon the property of the defendant before he attempts to inquire into the *bona fides* of the defendant's transactions, and invokes the processes of the law, and appropriates the time and labor of courts in the prosecution of such inquiry? and can a party who has simply *asserted* a claim, (and that is all an attachment amounts to, the mere *assertion* by the plaintiff of a claim,) be said in any just sense to have a *certain* claim upon the defendant's property? We of course concede the right of the officer to defend the possession of the attached property, and in such a proceeding doubtless the *bona fides* of the defendant's acts may oftentimes be inquired into; but it does not seem to follow that, because the officer may defend his possession, the plaintiff may prosecute an independent action, not to preserve the possession, but to clear up the title. Until his claim has become certain, he has no right to inquire into the title. Possession must be preserved, to preserve the attachment-lien. But nothing more is necessary until the claim has been made certain. As counsel for defendant well say, (we quote from their brief,) "the plaintiffs' lien can be of no avail to them unless they obtain judgment. Their right to enforce the lien is derived from the judgment, and yet the judgment might not be available if the lien of the attachment was lost before the recovery. Therefore in order to preserve their lien as a security for the satisfaction of any judgment they may recover, they have the right to defend that lien against third parties

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claiming the goods, and in that defense they have the right to show any fact that will defeat the claimant's title. If this were not so they might, though their claim against the debtor be never so meritorious, be compelled to relinquish their security to one claiming under a title fraudulent as to them. But there can be no reason or necessity for them, in order to maintain their lien, to institute independent actions against third parties who may have some kind of a claim on the property, yet who cannot (and are not attempting to) dispossess the plaintiff. The only right the plaintiffs have under the attachment is, to use such measures as may be necessary to preserve this security until they can reduce their claim to judgment. They have no right to harass other parties with litigation that may prove fruitless, in trying to remove obstructions to the sale of the property, until they have first obtained the right to have a sale of the property made. When that right has been definitely settled, their lien having been preserved intact, they can then commence actions to remove obstructions in the way of their execution. But until this is done, they have no right to interfere with the claims of third parties. There can be no reason or necessity for such a proceeding."

The judgment will be affirmed.

VALENTINE, J., concurring.

HORTON, C. J., not sitting in the case.

CITY OF KANSAS V. KANSAS PACIFIC RAILWAY COMPANY.

CONDEMNATION PROCEEDINGS; *Appeal by Land-Owner, Stays Proceedings.*

Where the official authorities of a city of the third class attempt to take private property for public use, and the compensation therefor has been determined by the assessment of five disinterested householders of the city, and the land-owner has availed himself of an appeal from the decision of such householders to the district court, he is entitled, in the absence of provisions of law to the contrary, to the possession of his land during the pendency of the appeal, and to an injunction, if necessary, to protect such possession. [*Blackshire v. R. R.*, 13-514; *R. R. v. Wilder*, 17-240; *R. R. v. Hammond*, 25-209; *State v. Curtis*, 29-386; *R. R. v. R. R.*, 28-453.]

Error from Wyandotte District Court.

INJUNCTION, brought by the *Railway Company*, to restrain the *City of Kansas* ("which is in the state of Kansas,") from taking and appropriating certain lands for a public street, pending an appeal taken from the proceedings on the part of the city to appropriate such lands. The district judge, at chambers, 30th April 1875, refused to dissolve the injunction, and the *City of Kansas* appeals, and brings the case here.

Scroggs & Bartlett, for plaintiff in error, contend that a municipal corporation has the right and power to condemn railroad property for a highway, and that a railroad company has no other or greater right of exemption in that behalf than an individual: Laws of 1871, ch. 60, § 65; Dillon Munic. Corp., § 538; 49 Mo. 480; 14 Gray, 155; 36 N. H. 420; 47 Ma. 189; 8 Ind. 464. The city council, by its delegated authority from the legislature, has the exclusive right to judge of the necessity for the taking of property for public use: Cooley Const. Lim. 538; 14 Wis. 616; 11 Allen, 530. That an appeal by the party aggrieved from the award of appraisers, does not stay all further proceedings pending the appeal, compare laws of 1868, p. 900, governing appeals from awards of appraisers of roads and highways, with laws of 1871, p. 135, governing appeals from such award in cities of the third class. The former says

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the appeal shall be taken within the same time, in the same manner, and with like effect as appeals from justices courts, while the law of 1871 provides that the appeal shall be taken within the same time and in the same manner as appeals from justices courts, omitting the words, "and with like effect." Also, see laws of 1870, p. 155; 14 Kas. 18; 2 Dillon C. C. Rep. 376; 18 Johns. 139; 7 Johns. Ch. 295; 8 Estes Pl. & Pr. 259; 8 Watts & Sarg. 459.

Wallace Pratt, for defendant in error, contended, that the law under which the city claimed the power to condemn private property, (§ 65, ch. 60, laws 1871,) is unconstitutional, because it does not provide for a proper and impartial tribunal to assess the amount of compensation, but authorizes the party interested in appropriating the lands to select five of its own citizens and property-holders to determine the amount the city shall pay the owner of the land sought to be acquired, (*Powers v. Bears*, 12 Wis. 213,) and because it does not provide for a notice to the owner of the land of the proceedings to deprive him of his property; 9 Kas. 647, 654; 16 Minn. 375. Admitting the constitutionality of § 65, the proceedings taken under it by the city are void. No ordinance of the city was in force at the time the condemnation proceedings were instituted, prescribing the selection of the appraisers; (44 Mo. 283;) no notice was ever given to the railway company of the resolution of the common council determining to extend the street in question. But if the law of 1871 was constitutional, and all the proceedings taken under it were regular, still the city acquired no right to take possession of the property in question. No payment or tender of compensation was ever made to the railway company. The notice served upon the company by the city, that the amount of the award was in the treasury of the city, subject to the order of the railway company, was no such tender as is required by the constitution. Prior to the attempt by the city to take possession of the property in question, the railway company had duly perfected an appeal from the award of the appraisers to the district court of Wyandotte

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county. Pending this appeal, no tender could give the city any right to enter upon and take possession of the land. There must be a *final ascertainment* of damages, and a tender or payment of the same, before any right accrues to take the property sought to be acquired by the condemnation proceeding. 8 Green's Ch. 47; 7 Iowa, 218; 2 Dill. Ct. Ct. Rep. 376; 18 Kas. 496; 18 Kas. 514. The attempt by the city to take forcible possession of the property in question, pending the appeal by the railway company, entitled the latter to the injunction.

The opinion of the court was delivered by

HORTON, C. J.: From the record in this case, it appears that steps were taken to condemn a right-of-way by the city authorities of the City of Kansas, over and across certain property of the Kansas Pacific Railway Company, at a point where its switching-yards were located, and where there were twenty-two railroad tracks to be crossed, for the extension of a street of said city, called James street. It is admitted by the pleadings, that prior to the attempt by the city to take possession of the property for the proposed extension of said James street as a public street and highway, the railway company had duly perfected an appeal to the district court of Wyandotte county, from the award of the appraisers selected to determine the compensation to be paid therefor. Pending the appeal, the railway company obtained an injunction restraining the city authorities of the City of Kansas from attempting by force to lay out a street across the said premises of the company. On the 21st of December 1874, the plaintiff in error filed its verified answer to said petition, and on 14th January 1875 made application to the judge of said district court, at chambers, for a dissolution of said injunction. The motion to dissolve was heard upon the petition and answer, and was overruled. To reverse this order this proceeding in error is prosecuted.

Section 65, laws of 1871, pp. 184, 185, relating to cities of the third class, provides:

"Private property may be taken for public use, or for the

purpose of giving the right-of-way or other privilege to any railroad company, or for the purpose of creating or establishing market-houses and market-places, or for any other necessary purpose; but in every case the city shall make the person or persons whose property shall be taken or injured thereby, adequate compensation therefor, to be determined by the assessment of five disinterested householders of the city, who shall be selected and compensated as may be prescribed by ordinance, and who shall, in the discharge of their duties, act under oath faithfully and impartially to make the assessment to them submitted. Appeals may be taken to the district court from the decision of such householders, in the same manner and within the same time as from judgments of a justice of the peace."

Under this provision, and the proceedings on appeal from final judgments of justices of the peace, we see no error in the action of the district court. This court decided in the case of *Blackshire v. A. T. & S. F. Rld. Co.*, 18 Kas. 514, that, "By the appeal of the land-owner the assessment of the commissioners is vacated, even as the appeal from the judgment of a justice of the peace vacates that judgment. There is then existing no determination as to the amount of compensation to which the land-owner is entitled. The parties still disagreeing, the company can get nothing until the amount of compensation is settled, and either paid or secured by a deposit of money. Until this question of compensation is settled, and payment made, the company can abandon the route selected, and select another. The fact that it has instituted condemnation proceedings, does not compel it to carry them to a close, and pay the amount awarded. If it finds the assessment of the commissioners, or the award of the jury, so large as to render it expedient to go round a farm, instead of through it, it can decline to pay, and leave the land-owner undisturbed in his possession." Substantially the same result follows in this case. The appeal here vacated the assessment of the five householders. The deposit of the amount of the award in the treasury of the city, subject to the order of the railway company, and the notice thereof to such company, gave no rights to the city to take possession of the premises

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in dispute, after the appeal was perfected, till such appeal was ended, and the amount of the judgment either paid or secured by a deposit of money. The householders determined in their assessment that \$201 was adequate compensation to the railway company for the property sought to be appropriated; yet from a report annexed to the reply to the answer of the city to the petition of the railway company, made and signed by the engineers of several railroad companies, and by the engineer of said city, it appears that the extension of the street as proposed, would be dangerous to the public, and so seriously interfere with the use of the tracks, and grounds of the railway company, that the railway company would eventually find it necessary to transfer its yards, tracks, and interests connected therewith, to some other point; and such report recommends that the only way to solve the difficulty would be to build a bridge over the tracks, and that this would cost at the lowest estimate \$21,620. Hence it might be, that upon a full hearing on the appeal, so large a sum may be awarded as compensation to the railway company, that the city would decline to carry forward its intended extension of James street, at the point sought to be condemned for a right-of-way. It might refuse to pay the new award. In such an event, the attempted extension would be abandoned, and certainly it would be very unjust to allow the premises in controversy to be temporarily used or occupied by the city during the litigation as to the damages to be awarded, when the city has the right to abandon the route selected, and withdraw all proceedings to extend the street in a southerly direction as at first contemplated.

The injunction was properly granted in the first instance, and the district court rightly overruled the motion to dissolve the same. *St. Jos. & D. C. Rld. Co. v. Callender*, 18 Kas. 496; *Blackshire v. A. T. & S. F. Rld. Co.*, supra; *Browning v. C. & W. R. R. & Tr. Co.*, 8 Green's Ch. Rep. 47; *Trustees, &c., v. Davenport*, 7 Iowa, 218.

The order of the district court will be affirmed.

All the Justices concurring.

NORTHERN KANSAS TOWN CO. v. ANDREW OSWALD *et al.*

1. **TITLE BOND; CONSIDERATION; *Presumption.*** Where a bond, which requires the obligor to convey to the obligee certain real estate, does not show upon its face that it was executed with or without any sufficient consideration, or what the consideration was, such bond nevertheless imports in law a sufficient consideration.
2. ——— ***Pleading.*** Where an action is commenced upon such a bond, it is not necessary for the plaintiff to allege in his petition that the execution of such bond was founded upon a sufficient consideration, nor to state what the consideration was. Presumptions of law are never required to be set forth in the pleadings.

Error from Washington District Court.

THE district court, at the December Term 1874, sustained a demurrer to the plaintiff's petition, and gave judgment in favor of defendants *Oswald* and wife, for costs. The plaintiff, the *Northern Kansas Land and Town Company*, appeals, and brings the case here on error.

J. D. Brumbaugh, for plaintiff, submitted, that all contracts in writing, in this state, signed by the party, import a consideration; (Gen. Stat., § 7, page 183;) that the bond sued upon is not void as against public policy, unless it appears that sinister and corrupting influences were brought to bear on the company to induce the location of the depot; and where labor has been performed, and money spent, to secure the location of a depot, it is a sufficient consideration to support the plaintiff's petition; 46 Mo. 305; *Pierce on Railways*, 70; 9 Watts, 458; 12 Wis. 512; 6 Ohio St. 119; 15 Ohio St. 225; 16 B. Monroe, 358, 364; 62 Ill. 310.

Park & Mann, and *J. W. Rector*, for defendant, contended that the title-bond sued on is void for the want of consideration. *Chitty Contr.* 26, 27; 2 Washb. Real Prop., page 364, § 102; page 393, § 86; 4 Kent Com. 493; *Para. Contr.* 428. The bond must be so complete as to give the defendant as well as the plaintiff an action on it: 1 Bouv. Law Dict., title

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"Contract," 17. That the bond sued on is void, as being against public policy, see 11 Kas. 602; 45 Mo. 212; 18 Pick. 472; 4 Comst. 456; 1 Bosw. 87; 60 Ill. 138; 62 Ill. 309; 21 Barb. 361, 372.

The opinion of the court was delivered by

VALENTINE, J.: This was an action on a certain title-bond, executed by the defendant Andrew Oswald to the plaintiff, requiring the defendants to convey to the plaintiff certain real estate upon certain conditions. The bond was in the usual and ordinary form in which such instruments are usually executed. The plaintiff alleged in its petition that all the conditions of such bond had been fulfilled, and prayed that the defendants be compelled to convey to the plaintiff said real estate, or, that if they had disabled themselves from so doing, that they be compelled to pay to the plaintiff the value thereof in money, in lieu of such conveyance. Pauline Oswald, one of the defendants, is the wife of Andrew Oswald, the other defendant. The defendants demurred to the plaintiff's petition on the ground that it does not state facts sufficient to constitute a cause of action. The court below sustained the demurrer, and this ruling is the error complained of.

It would seem from the brief of counsel for defendants, that the only ground upon which they claim that the petition does not state facts sufficient to constitute a cause of action, is, that the petition does not show that any legal or valid consideration for said bond ever moved from the plaintiff to the defendants, or to either of them. The petition gives a copy of the bond, and makes the same a part of the petition; but neither the bond nor the petition shows what the consideration was. Indeed, neither of them states in terms that there was any consideration for the land. There was a stipulation in the bond, that Oswald was to convey said land to the plaintiff when the St. Joseph & Denver City railroad was completed to the town of Hanover, in Washington county, Kansas, and a depot was erected at or near said town. And the petition states, "that the plaintiff expended labor by its officers, and money

??—18 Kas.

in traveling, to secure the location of the railroad by the way of Hanover in said county, and to secure the erection of a depot or station near said town of Hanover; that plaintiff never paid any money or any other thing to the St. Joseph & Denver City Rld. Co. or its officers to influence their action in locating said railroad by the way of Hanover aforesaid, nor did the plaintiff pay or give any money or valuable thing whatever to influence the St. Joseph & Denver City Railroad Company or its officers to influence their action in locating the depot at Hanover aforesaid, nor was any corrupting influence brought to bear upon the officers of the said railroad company to induce the location of the depot at or near the town of Hanover aforesaid." These are the only allegations or statements in the petition or bond from which any inference might be drawn as to what the consideration for the bond was. And these do not show it. They simply show that the defendant was to convey said land upon the contingencies of said road being built to Hanover, and of a depot being built at or near that place; that the plaintiff used some means to bring about these contingencies, but that it did not use any illegal or immoral means to bring about that purpose. But still, nothing is disclosed as to what the real consideration for the land was. Now we suppose it will not be claimed, that the contract to convey was void because the conveyance depended upon the contingencies of a railroad and a depot being built. It is not illegal or immoral to build railroads, or depots; nor was it illegal or immoral to build a railroad to Hanover, or to build a depot at or near that place; and no contract to build or cause to be built such a railroad, or such a depot, would be illegal, immoral, or wrong in the slightest particular, unless the illegality, the immorality, or the wrong consisted of something aside from the mere building of such depot, or such railroad. And the mere contingency or condition upon which such conveyance was to be executed would not render the bond void. No contract made in good faith, and for a sufficient consideration, will be void merely because the performance of its stipulations may depend upon some condition or contingency where

it does not require the commission of some illegal, immoral, indecent, or unjust act to bring about such contingency, or condition.

But, returning to the main question in the case, it was not necessary for the plaintiff to allege or show any consideration for the execution of said bond. *Townshy v. Olds*, 6 Iowa, 526, 528; *Caples v. Brandham*, 20 Mo. 244, 248; *Bush v. Stevens*, 24 Wendell, 256; *McCarty v. Beach*, 10 Cal. 461; *Wills v. Kempf*, 17 Cal. 98. The bond itself, without showing any consideration upon its face, imports in legal contemplation a sufficient consideration. (Gen. Stat. 183, sec. 7.) That is, the law always presumes, in the absence of anything to the contrary, that a bond apparently executed in good faith was executed in consequence of a sufficient consideration. This was always so at common law with reference to sealed instruments, and it is always so now under our statutes, with reference to all written contracts. Now as the law implies or presumes a consideration for said bond, it was not necessary to allege or set forth any consideration therefor in the plaintiff's petition. Presumptions of law are never required to be set forth in the pleadings. (Gen. Stat. 653, 654, §130.) If there was in fact no sufficient consideration for the execution of said bond, the defendants should have set forth the want of consideration in their answer. They cannot raise the question by demurrer, where the petition does not show upon its face, and affirmatively, that there was no such want of consideration. From anything appearing in the petition in this case, the plaintiff may have paid the defendants in money the full value of the property which the defendants agreed to convey. Upon the face of the title-bond, the law presumes that there was a sufficient consideration for defendants' agreement. And generally men do not agree to do a thing without a sufficient consideration therefor.

The judgment of the court below will be reversed, and cause remanded for further proceedings.

All the Justices concurring.

DAVID RASURE V. H. L. HART.

EXEMPTION; "*Household Goods*." Where the household goods of a debtor, who is the head of a family, do not exceed in value \$500, they are all exempt under the exemption-law from attachment; and it will make no difference that some of them may not be necessary for the personal use of the debtor or his family, or that they be kept merely for the use of paying guests, or boarders.

Error from Harvey District Court.

RASURE appeals from an order of the district judge, at chambers, made 29th July 1875, refusing to discharge certain personal property seized in attachment at the suit of *Hart*. The facts are fully stated in the opinion.

C. S. Bowman, and *J. G. Waters*, for plaintiff in error, claimed that the statute exempts \$500 worth of "household furniture," without regard to the kind, or the purpose for which it is used. Gen. Stat. 473, § 3, subdiv. 4; 11 Allen, 582. The true construction of our exemption-law is, that the head of the family is entitled to hold as exempt, certain specific and enumerated articles of household goods, without regard to their value, and in addition thereto, other household furniture not exceeding in value five hundred dollars. In this case the household property sought to be discharged was of the value of \$836.80 only, and therefore clearly within the amount exempted.

Nichols & Greene, for defendant in error, submitted, that the motion to discharge the attachment was a summary proceeding before a judge at chambers, and in all such cases the discretion of the trial judge is properly more extensive than in other proceedings, and his discretion is almost unlimited. All presumptions must be construed in favor of the decision of the court below. 11 Kas. 594; 15 Kas. 323. The evidence being affidavits only, the decision of the court below should have weight here, and where such evidence is conflicting and contradictory, such decision should be sustained; 10 Kas. 250;

14 Kas. 487. The attachment as to the real property was discharged; but the evidence in the affidavits concerning the real property does not cut any figure in the argument concerning the non-discharge of the personal property. But plaintiff in error insists that because the house was exempt, (as a homestead,) that it necessarily follows that all the furniture and household goods therein contained were also exempt. The claim is, that furniture and household goods, procured by the debtor, *not* for the use of himself and family, (for guests and boarders constitute no part of his family,) but procured solely for the use, comfort and accommodation of his guests and boarders, are exempt, because the debtor and his family live in the same house. He might upon the same theory be keeping a furniture store, and his residing in it would exempt from seizure his entire stock. This claim is a self-evident absurdity. Plaintiff in error fails to point out and affirmatively show that any part of the property attached is exempt, except it be upon the theory that his guests were his family, and for their comfort the property was required. The schedule of property set apart by the officer for the use of the debtor and his family, and the inventory of the property attached, reveal the fact that the officer recognized ample exemptions of household goods and furniture, giving him in every instance the full allowance for the use of himself, his wife, and child. This is the first time we have heard a debtor complain that the law of Kansas did not allow him enough, when by virtue of its great and unconscionable liberality he is permitted to be worth millions, all of which is secure from the ruthless hands of his greedy creditors, who have no rights that a debtor is bound to respect. To complain of a law, the liberality of which suggests that the members of the legislature which passed it were all insolvent, or expected to be, is unkind indeed. But what means the clause, "and all other household furniture not herein enumerated?" and what means the clause, "not exceeding in value five hundred dollars?" The first of these clauses, we contend, is a general one, and under the rules of construction it is to be construed as applying to the particular things par-

ticularly mentioned in the particular clauses preceding the general clause; (Sedg. on Const. of Stat. 861.) The second applies unquestionably to all of the 4th subdiv. of said § 8, and limits the value of *all property* covered by said subdivision, enumerated and unenumerated. Surely it does not mean, that the debtor is entitled to all the enumerated articles, and \$500 worth of household goods in addition, as argued by plaintiff in error.

The opinion of the court was delivered by

VALENTINE, J.: The defendant in error brought this action in the court below against the plaintiff in error on a promissory note, and procured an order of attachment upon the sixth, seventh, and eighth statutory grounds, which order of attachment was levied on lot 10, in block 48, in the city of Newton, and also upon certain personal property. Afterward, the plaintiff in error moved to dissolve and discharge the attachment, first, because the facts stated in the affidavit upon which the attachment was issued were not true, and second, because all of said property was, under the law, exempt. Said motion was based upon the affidavit of the plaintiff in error, and the papers in the case. Other affidavits were also filed by both parties. The motion was heard by the judge below at chambers, and he, after taking the matter under advisement, discharged said attachment as to said real estate, and sustained it as to the personal property. The plaintiff in error now complains that the court below erred in refusing to discharge the attachment as to the personal property. And whether the court below did so err or not, is the only question now presented in the case.

The evidence upon which the motion was heard was all in writing, and we now have it all before us; and hence we have the same means of determining whether the motion should be sustained, or overruled, as the judge of the district court had, and we can therefore act as intelligently upon the question as he could. Of course we think the district court or the judge thereof should in all cases be allowed some discretion in sus-

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taining or overruling a motion to dissolve or discharge an attachment; and this court should not overrule an order of the district court or judge in such case, unless this court should feel clear that the district court or judge has erred upon some material question of law. Now whether the defendant below, plaintiff in error, was disposing or about to dispose of his property with the intention of defrauding his creditors, we are not clear, and therefore upon that point we should sustain the ruling of the judge below, refusing to dissolve the attachment. Indeed, we are inclined to think that the preponderance of the evidence sustains such ruling, and therefore clearly upon this point we should sustain such ruling.

But there was another question in the case. Was the property exempt from said attachment? This question depends upon the following facts: The defendant below was the head of a family, which consisted of himself, his wife, and one child. He with his family kept a hotel, or public boarding-house, at Newton, and all resided in said hotel. They had \$432.15 worth of household goods, which they used in said hotel for their own accommodation and for the accommodation of their guests and boarders. This was more of such goods than they actually needed for their own accommodation, but not more than they needed in their business. Of this property \$336.80 worth was attached in this action, and the remainder thereof, to-wit, \$95.85 worth, was left with the defendant by the officer, as being exempt. The defendant did not own or have any other household goods, or household furniture. Our statute provides among other things, that—

“Every person residing in this state, and being the head of a family, shall have, exempt from seizure and sale upon any attachment, execution, or other process issued from any court in this state, the following articles of personal property: * * * *fourth*, all the wearing apparel of the debtor and his family; all beds, bedsteads, and bedding used by the debtor and his family; one cooking-stove and appendages, and all other cooking utensils, and all other stoves and appendages necessary for the use of the debtor and his family; one sewing-machine, all spinning

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wheels and looms, and all other implements of industry, and all other household furniture not herein enumerated, not exceeding in value five hundred dollars." (Gen. Stat. 473, § 8.)

The words, "all other implements of industry," evidently mean in this connection, all other household implements of industry, or all other implements of industry pertaining to the house, such as sewing machines, spinning wheels, looms, etc. The words, "all other household furniture," explain themselves. The word "furniture" is a comprehensive term, embracing about everything with which a house or anything else is or can be furnished. In this connection it evidently means, everything with which the residence of the debtor is furnished. Now the defendant in this case had less than \$500 worth of household goods of every kind and description. Therefore, they must all have been exempt under the statute. While we think that it is necessary that goods, in order to be exempt under subdivision 4 of section 3 of the exemption law, must be so connected with the residence of the debtor that they may be denominated his household goods, yet we do not think that it is necessary that they should all be in actual and personal use all the time by members of the debtor's family, or that they be actually necessary for such use. See *Mannan v. Merritt*, 11 Allen, (Mass.) 582. They may be pictures hung upon the walls, or other furniture, or mere ornaments, or bedroom furniture for visitors only, or bedroom furniture, table-ware, etc., for paying guests, or boarders, etc. In this state a man must not give credit to another on account of any supposed security furnished by his debtor's household goods, unless these household goods should be immensely valuable, or unless the creditor takes some specific lien thereon, such as a mortgage, pledge, etc. It would seem that the goods attached in this case ought to be worth more than \$386.80, but still that is just what the evidence showed they were worth. We think they were all exempt from said attachment, and therefore the the order of the judge of the court below refusing to discharge the attachment as to the personal property, must be reversed,

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and the cause remanded with the order that said goods be released from the attachment.

HORTON, C. J., concurring.

ISAAC SHELLABARGER *et al.* v. R. BINNS.

1. **NEW TRIAL; When Error Not to Grant.** Where the principal question in a case is, whether the plaintiff has a mechanic's lien on a certain building, and all the evidence in the case, and sufficient evidence, tends to show that the plaintiff had such mechanic's lien, and the jury on said question finds against said plaintiff, it is material error to overrule a proper motion to set aside the verdict and for a new trial.
 2. **APPLICATION OF PAYMENTS; Rights of Debtor, and Creditor; Debts, Secured, and Unsecured.** Where a debtor who owes to his creditor several distinct debts makes a payment to his creditor, the debtor may apply such payment to any one of such debts which he chooses. If he does not make the application, then the creditor may do so. If neither makes any such application, then the law will make the application in the manner which is most equitable; and in doing so, the law will generally apply the payment to the oldest debt, or to the earliest item of the same debt, or to a debt that is due in preference to one that is not due; and generally, where one debt is secured, and the other is not, the law will apply the payment to the debt which is not secured. [*For v. Bank*, 30-445.]
- [In connection with page 351, see *Simpson v. Mundez*, 3-172; *Brown v. Simpson*, 4-89; *Stevens v. Chadwick*, 10-411; *Ogden v. Walters*, 12-291; *Smith v. Rowland*, 13-250; *Clark v. Akers*, 16-174; *Greene v. Barnard*, 18-520.]

Error from Shawnee District Court.

ACTION by *Shellabarger & Leidigh*, to foreclose a mechanic's lien claimed by them on lots 98 and 100, on Spruce street, in the town of Rossville, and the building thereon, for an alleged indebtedness for building materials furnished by them for use in the construction of said building. The indebtedness was not disputed, but the defendant denied that plaintiffs had a valid lien therefor on said lots or building. The material facts are fully stated in the opinion, *infra*. The action was tried at the May Term 1875 of the district court, D. B., judge *pro tem.*,

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presiding. The general charge or instructions of the court contained ten propositions, to three of which the plaintiffs excepted. These three are as follows:

"7th.—If the jury find from the evidence, that the plaintiffs' and defendant's accounts and demands were so mingled or confused that they are unable to say from the evidence that the promissory note in suit was given for the materials furnished by plaintiffs for the erection of the defendant's building, then the lien of the plaintiffs fails; and the burden of proof is on the plaintiffs to show, by a preponderance of the evidence, that the promissory note in suit was given for such materials so furnished only.

"8th.—If you find from the evidence that the note in suit was given for a general balance of accounts, including the account for the materials furnished for the defendant's house, (if any were so furnished,) and for other lumber and real estate sold by plaintiffs to defendant, then the lien cannot be enforced, and you will find against it.

"9th.—But if you find that the note in suit was given for materials furnished by plaintiffs for the erection of the defendant's house, under contract with the defendant, and for no other consideration, then you will proceed to inquire whether the lien was filed within four months after the completion of the house."

Plaintiffs asked nine instructions, all of which were given except the third, and this was refused. This is the instruction refused:

"8d.—If plaintiffs did furnish the lumber aforesaid, (bought by defendant to be used by him in the construction of his dwelling on lots 98 and 100, on Spruce street, in the town of Rossville,) under such contract (between plaintiffs and defendant, for the purchase and sale of lumber for such purpose,) and the lumber is the same as set forth in the statement filed in the clerk's office, and offered in evidence to the jury, then the same constitutes a valid lien upon the lots and building aforesaid, if the other provisions of the mechanic's-lien law were complied with by plaintiffs."

The defendant, *Binns*, asked seven instructions, all of which were refused except the third and fifth, and these were given, as follows:

"3d.—If the plaintiffs and defendant had a current account

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running through the years 1871 and 1872, in which all lumber received by defendant was charged to him, in which all payments made by the defendant to plaintiffs were credited, and in which land-accounts were entered and mixed, and you find that this mixed account was finally settled on or about the 9th of December 1872 by the payment of \$350 and the execution of the note in suit, these are facts which tend to show that the plaintiffs had abandoned their mechanic's lien on the premises in question, if they ever had acquired such lien.

"5th.—To enable the plaintiffs to enforce a mechanic's lien, it was necessary for them to file in the office of the clerk of the district court of Shawnee county, a statement, verified by oath, within four months after the completion of the building in question. It therefore becomes a question of importance for you to find whether this has been done, and in order to do this you may consider the time when the building was erected, when occupied by the defendant and his family, and the date of filing this statement (if any was filed) by the plaintiffs; and if you find that the plaintiffs have failed to file such statement within four months from the completion of the building, then you must find for the defendant on this branch of the case."

The jury returned the following verdict:

(*Title.*) "We the jury find, in the above case, that there is due and unpaid from the defendant to the plaintiffs, on the promissory note in the plaintiffs' petition set forth, the sum of \$777.82; and we find that said sum of \$777.82, so due and unpaid, is not a lien upon the lots and building mentioned in the petition."

New trial refused. Judgment in accordance with the verdict. And because of the giving and refusing of instructions as aforesaid, and the refusal of the court to give judgment confirming and establishing their mechanic's lien, plaintiffs appeal, and bring the case here on error.

N. C. McFarland, for plaintiffs, contended, that in addition to the well-understood rule, that payments must be applied on the *earlier* items, there is another, that they will be applied on the more precarious items of the account. As to application on earlier items, see, 53 Ill. 419; 105 Mass. 255; 46 Vt. 448;

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6 Ohio St. 251. That when neither the debtor nor creditor has made any application of payments, the court will apply them to those debts for which the security is most precarious, see, 2 Eq. Dig. 410; 80 Ind. 429; 5 Bush. (Ky.) 11. So also the court will apply payments on debts due, as against those not due. 15 Conn. 437. Now upon the facts undisputed, applicable to the last two propositions, there seems to be no reason why plaintiffs should not have their lien for the balance claimed by them.

Guthrie & Brown, for defendant.

The opinion of the court was delivered by

VALENTINE, J: This was an action on a promissory note, and to foreclose a mechanic's lien. Judgment was rendered in the court below in favor of the plaintiffs on the promissory note, but against them on the mechanic's lien, and they now bring the case to this court, claiming that the judgment with regard to the mechanic's lien is erroneous. The facts with reference to the mechanic's lien, as the same appear from the evidence in the case, are substantially as follows: The plaintiffs were lumber and building-material merchants; the defendant was a carpenter and builder. The defendant, for some time prior to 28th May 1872, purchased building materials of the plaintiffs, and on that day owed them something therefor, not to exceed \$308.50. Also, prior to that time, to-wit, on 28th November 1871, the defendant bought a town lot with a carpenter shop on it from the plaintiffs, for which he was to pay them the sum of \$275, in installments, and the plaintiffs were to make and deliver to him a deed for the property when all the purchase-money therefor was paid. On said 28th of May, \$75 of said purchase-money had been paid, and \$200 thereof still remained unpaid. On that day, (28th May 1872,) the defendant made a contract with the plaintiffs, that they should furnish him with building materials for a house which he was about to build for himself. The materials were afterward, and in May and June, so furnished, the bill therefor

amounting in the aggregate to \$818.96. The defendant also purchased other building materials from the plaintiffs during the months of May, June, and July, amounting in the aggregate to a sum not exceeding \$203.70. The items however of this extra building material were kept separate, in the plaintiffs' account, from those for the defendant's house. None of this building material was paid for at the time it was delivered. The defendant however paid the plaintiffs during the months of June and July the sum of \$450. And it may be possible that more than that sum was paid during the summer and fall of 1872, not however to exceed the sum of \$140.65 in addition to said \$450. That is, if the defendant owed the plaintiffs, on May 28th 1872, \$308.50, and afterward purchased \$818.96 worth of building materials for his house, and \$203.70 worth of extra building material, aggregating \$1,331.16, then there must have been not only the said \$450 paid, but also the said \$140.65, aggregating the \$590.65; for on 9th December 1872 the defendant was owing the plaintiffs, for building materials, only \$740.51. On 9th December 1872, the plaintiffs, by Mr. Leidigh, furnished the defendant with a statement which showed that the defendant owed the plaintiffs for building materials \$740.51, and for said lot and shop \$200, with \$8.97 interest, making a total of \$949.48. Two days later, 11th December, the parties settled in accordance with this statement, and the defendant paid the plaintiffs \$350, and gave his promissory note (the one sued on) for the balance, \$599.48. There was nothing said by either of the parties, at the time said payments were made, as to how any part of the sum paid should be appropriated. That is, nothing was said as to whether they should be applied in payment for materials for the defendant's house, or for some other portion of the defendant's indebtedness to plaintiffs. The evidence however shows that the defendant was unable to pay for any of said building materials at the time the same should have been paid for, and that the plaintiffs thereupon agreed to be lenient with regard to the payment for such of said materials as were put into the defendant's house, but never consented to extend the

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time for payment for any of the other materials. This would seem to indicate that the parties intended that any payment that might be made should first be applied in payment of such of said materials as were not put into the defendant's house, before any part of such payment should be applied to any of the other indebtedness. And this was reasonable and equitable. For the most of the indebtedness which accrued for the materials which were not put into the defendant's house was contracted prior to contracting the indebtedness for any of the other materials. And even where both classes of materials were received at the same time, those which were not to be put into the defendant's house were to be paid for first according to contract. Besides, the plaintiffs had no security, and could get none except with the consent of the defendant, for payment for any of the materials which were not put into the defendant's house, but they had security for all the other indebtedness. That is, the plaintiffs could at any time after furnishing the materials for the defendant's house, and within four months after the completion thereof, perfect their mechanic's lien on said house to secure payment for the materials which were put into the house; and the plaintiffs retained and held the legal title to the shop and lot to secure payment for such shop and lot. Also, at the very time that the parties made their said final settlement, and on the same day that the defendant paid said \$850, the plaintiffs (by Mr. Leidigh, to whom the same was paid,) appropriated \$208.97 thereof to the payment of the indebtedness for said shop and lot; and the balance thereof, to-wit, \$141.08, in partial payment for said building material. And probably this is just what the defendant expected would be done; for it would seem from the evidence that at this time, and also sometime in February or March 1873, Mr. Leidigh told the defendant that they (the plaintiffs) would execute and deliver to the defendant a deed for said shop and lot, and plaintiffs afterward did so execute and deliver said deed, and the defendant accepted the same and said it was all right. Before this deed was so executed and delivered, the defendant himself mentioned the matter to

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Mr. Leidigh, as though he (the defendant) was expecting the deed. Now according to the original contract for the shop and lot, the defendant was not entitled to a deed for the same until such shop and lot were paid for. All this would seem to indicate that both parties thought that the shop and lot were paid for. At the time said sum of \$350 was paid, and even up to and after the time when this suit was commenced, it would have made but little difference to the plaintiffs whether any part of said \$350 should be considered as applied in payment for said shop and lot or not. For up to and after the time when this suit was commenced, the plaintiffs had not executed or delivered the deed for said shop and lot, and therefore up to and after the time when this suit was commenced they would have had their vendor's lien on said shop and lot for the full amount of the purchase-money therefor, if such purchase-money had not yet been paid. (*Sievens v. Chadwick*, 10 Kas. 406.) But it is now different. The plaintiffs have now executed said deed for said shop and lot, and if the purchase-money therefor is still unpaid, then the plaintiffs have no security for its payment. They have lost their vendor's lien by the execution and delivery of said deed. (*Simpson v. Mundee*, 8 Kas. 172.)

On 11th March 1873, the plaintiffs filed with the clerk of the district court a statement for a mechanic's lien for the amount of their claim on said house of the defendant. At that time said house was not finished, and indeed it has not yet been finished. Said statement seems to be formal and sufficient in every respect. Said statement shows that the original amount of the claim for materials furnished for said house was \$818.96; that \$219.48 thereof had been paid; that \$599.48 thereof was still due, and that a promissory note for this last-mentioned amount had been given. Upon the foregoing facts the jury found that the plaintiffs had no mechanic's lien. This finding we think was wholly against the evidence, and should have been set aside. The plaintiffs were in all probability entitled to their mechanic's lien for the full amount of their claim. But they were certainly entitled to their me-

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chanic's lien for some portion thereof. In our opinion, all of said payments except \$219.48 thereof should be applied to the payment of other indebtedness than that created for materials for the defendant's house. And if so, then the plaintiffs should have their mechanic's lien for the full amount of their claim. The court below probably misled the jury by the instructions given and refused. The objectionable instructions given are, the 7th, 8th, and 9th, given on the court's own motion, and the 3d and 5th given at the request of the defendant. And the instruction refused, which should have been given, is the 3d asked for by the plaintiffs. It would have been proper for the court to instruct the jury to find in favor of the plaintiffs' mechanic's lien for some amount, and we think it would have been proper for the court to have designated the amount as \$599.48, with interest. Where a debtor owes his creditor several debts, we think the rule for the appropriation of payments is about as follows: when the debtor makes a payment, he may apply it to any one of the debts he chooses; but if he does not make the application, then the creditor may do so; but if neither makes any such application, then the law will make the application in the manner which is most equitable; and in doing so, the law will generally apply the payment to the oldest debt, or to the earliest items of the same debt, or to a debt which is due in preference to one which is not due; and generally, where one debt is secured and the other is not, the law will apply the payment to the debt which is not secured. (See Phillips on Mechanics' Liens, ch. 25, §287, *et seq.*, and cases there cited; and also, see cases cited in brief of counsel for plaintiffs in error.)

As we have before stated, we think the verdict with reference to the mechanic's lien, is clearly against the evidence in the case and the law of the case; and therefore we think the court below erred materially in refusing to set aside the verdict, and in refusing to grant to the plaintiffs a new trial. A proper motion was made to the court for that purpose, and the court overruled the motion. Taking the most unfavorable view of the evidence for the plaintiffs—supposing that every-

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thing in the evidence unfavorable to them is true, and every thing favorable to the defendant is true—and still the verdict is against the evidence. There was no necessity in this case for weighing and reconciling contradictory and conflicting evidence, for there was no such evidence of a material character in the case. All the evidence, so far as it went, and the evidence was sufficient, showed that the plaintiffs had a good mechanic's lien.

The judgment of the court below will be reversed, and the cause remanded for further proceedings.

All the Justices concurring.

ALEX. MARCY V. JOHN FRIES.

MILLS, AND MILL-DAMS; Overflowing Lands; Damages, and Benefits. F. builds a dam and mill on his own land. The dam raising the water in the stream, caused it to overflow the land of M., an upper riparian owner. The mill was of no special benefit to M., or to his lands, and the only benefit that M. received therefrom was that general benefit which accrued to all in the vicinity from the building a mill in their midst. *Held*, in an action by M. to recover damages for the overflow of his land, that F. could not offset or reduce those damages by the general benefits resulting to M. from the building and proximity of the mill. [*Harding v. Funk*, 8-315; *Akin v. Davis*, 11-580; *Shamleffer v. Mill Co.*, 18-24.]

Error from Nemaha District Court.

THE subjoined opinion of the court states all necessary facts, and proceedings. Verdict and judgment in favor of *Fries*, defendant, at the October Term 1875, and *Marcy*, plaintiff, brings the case here.

C. W. Johnson, and *R. C. Bassett*, for the plaintiff, contended that the benefits of the mill, in which the plaintiff participates only in common with his neighbors generally, cannot be reckoned or deducted from his special injury by the overflowing of

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his land, caused by the dam. 1 Hil. on Torts, 648, §18; 24 Barb. 273; 8 Chand. 46; Sedgw. on Dam. 48, 137; 17 Me. 128; 48 Me. 163; 42 Penn. St. 58; 32 N. H. 90; 17 Conn. 288; 48 Md. 573.

J. E. Taylor, for defendant, maintained that in cases like this the rule of damages is, the difference in value between the farm before a mill had been erected, and its value after the mill was erected, and cited *Harding v. Funk*, 8 Kas. 315; hence there was no error in the instructions.

The opinion of the court was delivered by

BREWER, J.: This was an action to recover damages for the flooding of plaintiff's land by the erection of a dam by the defendant. We shall notice but a single question, for the error in the ruling of the district court upon this was not only material, but changed the entire scope and character of the inquiry. The defendant erected both a dam and mill, the former to furnish power for the latter. The dam backed the water up the stream so that it overflowed plaintiff's land. The mill was on defendant's land, and of no special benefit to plaintiff's farm, indeed of no benefit other than that general one which resulted to all lands within the same distance from the erection of that which tends to promote the comfort and convenience of the entire community. The district court ruled that the damages caused to the plaintiff's land by the overflow, could be off-set and reduced by the benefits resulting from the building of the mill. In reference to this, it will be noticed that in many respects at least the dam and mill may be considered as two independent structures. Either may be destroyed, and the other remain. True, the power furnished by the dam is used in running the mill; but there is no necessary and essential connection between the two. Steam may be introduced as a motive-power in the mill, and the dam be entirely ignored in connection therewith. The water-power now used in running the custom-mill may be entirely changed, and used

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in running a private factory. The dam may be the cause of direct specific injury to the property of others, while the mill may be of no direct injury or benefit to any property other than that upon which it stands. They may therefore in this sense be looked upon as separate structures, separate enterprises, and not parts of a single entity.

It is clear, we think, that the ruling of the district court as stated was wrong, and for at least two very satisfactory reasons. First, one whose improvements on his own land (made in pursuit of his own business) tend to the general enhancement in value of neighboring and adjacent property, and who is thereby in one sense conferring a benefit upon such property, does not by such improvements acquire any claim against the owners of such property for compensation. Every fine residence built, every business block, every hotel, factory, and mill, and generally, every improvement, tends to enhance the value of the neighboring property; but who ever heard of one making such an improvement, maintaining an action against his neighbors for such enhancement in the value of their property? The defendant has just as good a claim against all his neighbors for the benefits which his mill has done to their property, as he has against the plaintiff. If he can sue him, he can them. And if he cannot bring a direct action therefor, neither can he off-set or recoup those benefits against any damages he has done. And secondly, one who has done injury to his neighbor's property, and thereby become responsible therefor in damages, cannot compel such injured party to receive any other compensation than money. If A. trespasses upon B.'s land, either by digging ditches thereon, cutting down trees, or overflowing it with water, he cannot compel B. to receive in compensation a horse, or any other chattel, or merchandise, or labor. In other words, the wrongdoer has not the option of the manner or means of compensation. The injured party has the right to demand payment in money. Thus in the case at bar, if the defendant damaged plaintiff by overflowing his farm, he must pay therefor in money, and cannot

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compel him to receive compensation in any other way. *Gerrish v. New Market Mfg. Co.*, 10 Foster (N. H.) 478.

For this error the judgment must be reversed, and the cause remanded with instructions to grant a new trial.

All the Justices concurring.

D. J. JENKS v. SCHOOL DISTRICT.

1. **OFFICIAL BONDS; Principal, and Sureties; Several Liability.** All official bonds are joint and several, and a suit may be maintained on the bond of the treasurer of a school district against one, or all of the obligors, or against any of them. [*Hays v. Closon*, 20-122; *Swerdfeger v. State*, 21-477.]
2. ——— Where a suit is brought against joint and several obligors, in which process is not served on all the defendants, judgment may be taken against those served, and the judgment is no bar to subsequent proceedings against one not served at the rendition of the judgment.
3. **SCHOOL-DISTRICT TREASURER; Action on Official Bond; Demand.** Where the treasurer of a school district resigns his office, removes from the district and county in which he had lived, conceals his place of abode, and neglects to pay over to his successor in office the money in his hands as such treasurer belonging to the district, no demand therefor is necessary to maintain a suit on the official bond of such treasurer for the recovery of the money so wrongfully retained.
4. **ERROR, Not Reviewable, Unless Duly Saved by Bill, or Case.** Affidavits on a motion in the court below, to become a part of the record so as to be reviewable by the supreme court, must be included in the bill of exceptions, or the case made. [*Backus v. Clark*, 1-308; *R. R. v. Coldwell*, 5-84; *Zane v. Zane*, 5-138; *Gray v. Ulrich*, 8-123; *R. R. v. Mülken*, 8-652; *Altschiel v. Smith*, 9-91; *McIntosh v. Comm'rs*, 13-177; *Mugan v. Haley*, 16-69; *R. R. v. Kunkel*, 17-168, 169; *Pattee v. Parkinson*, 18-467.]

Error from Coffey District Court.

ACTION by *School District No. 38*, Coffey county, upon an official bond given by Walker, as treasurer. Service was made upon *Jenks* and *Fleming*, two of the defendants. *Flem-*

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ing made default, and judgment was taken against him for the full amount claimed. *Jenks* answered, and as to him, trial was had, and judgment rendered for plaintiff. *Jenks* brings the case here. The opinion of the court contains a sufficient statement of the facts and proceedings.

W. L. McConnell, for plaintiff in error. (No brief on file.)

The opinion of the court was delivered by

HORROX, C. J.: This was an action on a bond of a treasurer of a school district, brought by the district against R. S. Walker, principal, and D. J. Jenks and another as sureties. Service of the summons was made on Jenks, plaintiff in error, but as to Walker the summons was returned not served, as said defendant could not be found in Coffey county, and had no place of residence in such county. Jenks filed a general denial to the petition, and also set forth in his answer certain sums paid out by Walker as such treasurer, upon orders duly drawn upon him, and which Jenks claimed as a set-off to the cause of action stated. A reply was filed to the answer of Jenks, denying the claim or set-off therein contained. On 29th August 1874, by consent of plaintiff in error and defendant in error given in court, the court directed a reference to Enos Strawn, Esq., of the issues of fact to be tried in the case. The referee afterward, on 9th December 1874, filed in the office of the clerk of the court of said Coffey county his report and findings, and thereupon the court rendered judgment against plaintiff in error for \$1,085.05, and costs, which judgment Jenks now seeks to reverse.

I. The first errors complained of are, that the trial was proceeded with in the court below against the surety, without the service of a summons on the principal to the bond, and that the court overruled a motion of plaintiff in error for a continuance for service of summons on said principal. The reasons given in the court below against proceeding with the trial in the absence of service on Walker, were simply, that said Walker was principal on the bond, and he had not been served

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with process in the suit, and as Jenks was only a surety the case should be continued until such service had been obtained. The counsel for the plaintiff in error now suggest that the liability of the surety is so dependent upon that of the principal, that until the liability of the principal is fixed by a suit to which the principal is a party, the surety cannot be held liable. The district court committed no error in its action in overruling the motions for a stay of proceedings, and for a continuance. Under our statutes, the bond sued on was a joint and several obligation. The defendant in error could elect to bring a separate action against each obligor, or a joint action against all, or any. Where a suit is brought against joint and several obligors, in which process is not served on all the defendants, judgment may be taken against those served, and the judgment is no bar to subsequent proceedings against those not served at the rendition of such judgment. In this instance, the principal obligor had run away. The plaintiff in error was a proper defendant, and the court ruled rightly in ordering the case to proceed, and in refusing any continuance.

II. Error is also alleged, that the petition did not state facts sufficient to constitute a cause of action against said Jenks. Such is not the case, and the objection thereto was justly overruled. The petition set forth a copy of the official bond of the treasurer of the date of 18th April 1873, which was in due form; that the bond was approved by the director and clerk of the district, and filed with the clerk; that said Walker at the date of said bond had been duly elected to the said office of treasurer; that after the execution of the bond he filed his oath of office, and took upon himself the duties of the office, and from April 19th to November 3d 1873 he continued to act as such treasurer; that on the 8d of said November he resigned the office, and on the following day, Nov. 4th, removed from the school district; that one William J. Bazil was duly appointed his successor on Nov. 13th, and that on the same day he duly qualified as such treasurer and immediately entered upon the discharge of the duties of the office; that while Walker held the office he received \$1,875 of moneys be-

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longing to said school district, and that there remained in his hands all of said money; that his successor in office had been prevented from making any demand of Walker for the money belonging to the school district by reason of his continued absence from the school district, and from his usual place of residence; that said Bazil had not been able by diligent search and inquiry, to find his whereabouts; that said Walker had wholly neglected and failed to pay over to his successor in office the \$1,875 in his hands, the property of said school district, or any part thereof, as by the said writing obligatory he had bound himself to do, but had converted all of said money to his own use; that none of the defendants had paid over to said Bazil, successor of Walker as such treasurer, the \$1,875, or any part thereof, and that thereby the said school district was damaged in the sum of \$1,875, for which judgment was demanded. After Walker had resigned his office as treasurer, had left the school district and his usual place of residence, and concealed himself so that he could not be found, no demand for the moneys in his hands belonging to the school district was necessary before instituting suit. Upon the qualification of his successor in office, it was the duty of the ex-treasurer to pay over any and all money in his hands belonging to the district, which he had collected as such treasurer. Failing to perform his duty, a liability accrued upon his official bond, and his sureties were liable for all money so collected by him, and which he neglected or refused to pay over in accordance with the provisions of the statute.

III. Error is further alleged, because the court refused to set aside the report of the referee. No sufficient grounds are shown for such allegation. The report embodies findings sustaining the averments of the petition, and showing that on April 19th 1873, and afterward, there was in the hands of Walker as such treasurer, of the money belonging to the district, \$1,010.25; that between said date and November 1st he received as such treasurer, \$122.05, and during all said time he only paid out \$125.25, leaving \$1,008.05 unaccounted for. For this sum, with interest from the date of the qualification

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of his successor, the plaintiff in error is liable, and there was no error in rendering judgment therefor. The claim that the report consists of mixed conclusions of law and fact is not sustained so far as any material finding is concerned. Ample facts were reported to support the conclusions of law of the court and the judgment rendered. The execution of the bond was admitted by the pleadings, and the referee need not have made any finding thereon. After finding that Walker had resigned his office as treasurer, had removed from the district and from Coffey county on or about Nov. 1st 1878, and that his successor had been unable to find him, nothing further was required to show a demand, or any diligence on the part of his said successor in hunting him up to make a demand.

IV. Complaint is made concerning alleged misconduct of the referee, and in regard to the action of the judge in considering the motion of the plaintiff in error to set aside the referee's report, and the motion of the defendant in error for judgment, in vacation, and outside of Coffey county. No bill of exceptions was taken upon the trial; and as no "case-made" has been brought to this court, we cannot consider the questions attempted to be raised in the brief, as to the alleged misconduct of the referee, or the action of the judge of the court below. There are copies of affidavits in the transcript; but to become a part of the record, so as to be reviewable by this court, they should have been included in a bill of exceptions, or preserved in a case-made. We are not informed upon what proof or evidence the district court acted upon the motion challenging the report of the referee for prejudice and misconduct on the part of the person to whom the reference was made; and this conclusion also applies to the charge that the referee allowed one William B. Parsons to prepare the report. *Backus v. Clark*, 1 Kas. 303; *Altschiel v. Smith*, 9 Kas. 90. The record shows that the proceedings were all had in term time, and in Coffey county; and we cannot presume irregularities by the district court, or the judge thereof, on mere suggestion of counsel.

The judgment of the court below must be affirmed.

All the Justices concurring.

JULIA J. REYNOLDS *et al.* v. ADAH B. QUAE LY, *as Adm'r, &c*

1. **PARTY; ASSIGNMENT OF CAUSE OF ACTION; Death of Plaintiff; Successor in Interest.** Where the plaintiff, in an action on a note and mortgage, assigns the same to a third person, and afterward dies, it is error to allow such action to be prosecuted to a final judgment in the name of the administrator of said plaintiff.
2. ——— And in such a case, where such assignee is not a party to the action, it is error to render judgment in favor of the administrator, even though expressed as being "to the use of" such assignee.
3. ——— In such case the action should be revived and prosecuted in the name of said assignee.
4. **WAIVER OF APPRAISEMENT; Stay of Execution.** Where appraisement is waived, the defendant is entitled to a stay of execution for six months, and a judgment which authorizes the sale of real estate without appraisement, and gives a stay of execution for only twenty days, is erroneous. [*Bashor v. Nordyke Co.*, 25-226; *Pierce v. Butters*, 21-125.]

Error from Labette District Court.

THE subjoined opinion contains a sufficient statement of all necessary facts and proceedings. *Reynolds* and *Reynolds*, defendants, bring the case here on error.

A. H. Ayres, for plaintiffs in error.

Cory & Kimball, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action on certain promissory notes and a real-estate mortgage, executed by Julia J. Reynolds and Geo. A. Reynolds, to R. S. Stevens, and by him transferred to J. J. A. Quaely. In January 1875, Quaely commenced this action against said Julia J. and Geo. A. Reynolds, on said notes and mortgage. Two of the notes were then past due; the third note had four months yet to run before maturity. On 12th July 1875, Quaely assigned said notes and mortgage to his mother, Catherine Quaely, and four days later,

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on July 16th, judgment was rendered on said notes and mortgage in favor of said J. J. A. Quaely, and against said defendants. On July 19th, the defendants filed a motion for a new trial. On Sept. 4th, the court still being in session, said motion was heard and sustained. The new trial was granted for the purpose of permitting the defendants to introduce additional evidence in proof of the third defense set forth in their answer. On Nov. 15th 1875, the death of the plaintiff J. J. A. Quaely was suggested, and the action was revived in the name of Adah B. Quaely, administratrix of the estate of said J. J. A. Quaely deceased. When J. J. A. Quaely died, is not shown by the record. In December 1875, another trial was had. On this trial the court made the following findings, and rendered the following judgment, to-wit:

The court finds, as conclusions of fact—1st, That J. J. A. Quaely, deceased, formerly plaintiff in this action, was the owner and holder of the notes and mortgage sued upon herein at the time this action was commenced.

2d, That the judgment heretofore rendered herein, and all rights and benefits accruing therefrom, or to the proceeds of said notes and mortgage, had been on the 12th of July 1875, assigned and transferred to Catherine Quaely, who is now the owner and holder thereof.

3d, That on the 11th of Nov. 1875, the plaintiff Adah B. Quaely was duly appointed administratrix of the estate, chattels and credits of J. J. A. Quaely, deceased.

4th, That the remaining facts, besides the above, are as found and decided in favor of J. J. A. Quaely on the former trial of this cause.

And the court finds as conclusions of law—1st, That the plaintiff, under the amended petition herein, is entitled to recover upon the notes and mortgage declared upon, of and from the defendants; 2d, That such recovery should be for and to the use of Catherine Quaely, now the real owner of the notes and mortgage.

And thereupon, (the plaintiff by her attorneys consenting,) it is by the court considered, ordered, and adjudged, that the plaintiff have and recover of and from said defendants, for the use and benefit of said Catherine Quaely, assignee, \$5,458.33, together with the costs of this action taxed at \$——. And it

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is further considered, ordered, and decreed, that unless said judgment, interest, and costs, be paid within twenty days from this date, the sheriff of this county shall proceed to advertise and sell, without appraisement, the mortgaged premises, and apply the proceeds thereof as hereinafter provided. [The details of how the property shall be advertised and sold, and how the proceeds thereof shall be disposed of are here stated, and then the judgment proceeds as follows:] And execution is awarded for any balance of the judgment remaining unpaid after the sale of the said premises and application of the proceeds, as hereinbefore provided.

The defendants below, who are now plaintiffs in error, claim that this judgment is erroneous and illegal. And first, they claim that the actual plaintiff in this action, Adah B. Quaely, administratrix of the estate of J. J. A. Quaely deceased, has no interest in the subject-matter of the action, and that the real party in interest, Catherine Quaely, is not a party to the suit, and therefore that no such judgment as was rendered in this case, could legally be rendered. They claim, secondly, that a judgment which authorizes a sale of real estate for the satisfaction of a debt, and provides that the proceedings for such sale may be commenced within *twenty days*, and that the real estate may be sold *without appraisement*, is not warranted by law. And thirdly, they claim that the court below also erred in rendering a judgment (as the court below did in this case) upon a note which was not due when this action was commenced.

We sustain the first and second claims of the plaintiffs in error, but express no opinion in regard to the third. Said notes and mortgage did not belong to J. J. A. Quaely at the time of his death. They do not now belong to his estate. They are not assets in the hands of the administratrix, and there is no law authorizing the administratrix to administer upon them. (See executor-and-administrator act, Gen. Stat. 439, §§ 39, 40; p. 440, §§ 46, 47, 48, p. 461, § 152.) It is probably true, under section 40 of the code, (Gen. Stat. 637,) that, if J. J. A. Quaely had lived, the action might have proceeded to its final determination in his name, notwithstanding

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his transfer of interest. But no authority is anywhere given for allowing such an action to proceed in the name of a personal representative of a deceased person. A person while living may take the risks and chances, and suffer the inconveniences and possible losses, of allowing an action to still proceed in his name after he has transferred all interest in the subject-matter thereof; but after his death, his administrator has no such right. The administrator has a right to attend only to the affairs of the estate. The estate is not to pay him for doing anything else, and the estate is not to take any risks for anything else. Nor does the administrator become the guardian for those persons for whom his intestate was guardian. Indeed, the administrator is not guardian for any person or for anything except for matters connected with the estate. When J. J. A. Quaely died, the action should have been revived and prosecuted in the name of Catherine Quaely, his successor in interest, and not in the name of his personal representative to whom his right did not pass. (Civil code, §§ 40, 425, 480.) There might be cases where it would be proper for both the administrator and the person claiming to be the successor in interest to be made parties, and to allow them to interplead for the purpose of determining which was entitled to the judgment that might be recovered.

In this state all land sold on execution must be appraised, (Gen. Stat. 716, § 453,) except where the words, "appraisement waived," or other equivalent words, are inserted in the contract upon which the judgment is rendered, (Laws of 1872, p. 105.) Where the lands are appraised they are not allowed to be sold for less than two-thirds of their appraised value. But where the appraisement is waived, the debtor is entitled to a stay of execution for six months, and then the property may be sold for what it will bring. In this case the appraisement was waived; and therefore the error of the court below, was not in ordering the property to be sold without appraisement, but in not granting the stay of execution for six months. The stay actually granted was for only twenty days.

Fields v. Sherrill.

The judgment of the court below will be reversed, and the cause remanded for further proceedings.

All the Justices concurring.

DRURY J. FIELDS v. WILLIAM B. SHERRILL.

MORTGAGE LIENS; Equity, Priority. In August 1872, F. and H. executed a joint note to G., payable in one year. On the face of the note, each appeared as principal. The note was in fact given for borrowed money, and the money was borrowed for F., and received and used by him. To secure this note H. gave a mortgage on certain real estate, which mortgage was duly recorded. In September 1873, F. handed to H. the amount of the loan, and took from him a receipt therefor, in which the latter promised to pay the note; but instead of then paying it, he obtained an extension of a year, by the payment of advance interest and a bonus. In January 1874, H. borrowed money of S., and gave a note secured by a mortgage on the same and other property. In September 1874, F. paid to G. the amount then due on the note, and took an assignment without recourse. *Held*, that at first F. was to be regarded as the principal debtor, and that a payment by him to the payee of the note, prior to September 1873, would have discharged both note and mortgage absolutely; but that by the payment in September 1873, from F. to H., the promise of the latter to pay the note, and the obtaining of a year's extension of the time of payment, H. became in equity the principal debtor; and that as all this took place before the note and mortgage to S., the latter's rights were in no way prejudiced, and that F. by his subsequent payment to G., and the assignment of the note, was entitled to hold that note and mortgage as a valid and prior lien upon the mortgaged premises.

Error from Bourbon District Court.

THE only question in this case is, whether *Fields*, or *Sherrill*, holds the prior lien on certain real property. The district court, at the September term 1875, found and determined this question in favor of *Sherrill*, and *Fields* brings the record here. The opinion contains a statement of the facts.

McComas & McKeighan, for plaintiff in error, contended that a surety who pays the debt of his principal is entitled to an assignment of the instrument paid, and the liens and securities held by the creditor are in equity kept alive for the benefit of the creditor; 1 Story's Equity, §§ 449, 522; 46 Mo. 557. That one of two or more joint obligors is surety, can be shown by parol; Gen. Stat. 720; 5 Kas. 483. The facts furnish much stronger reasons why Fields should be protected, and the Giles mortgage kept alive, than if he was a vendor to Hawkins with an agreement of Hawkins to pay off the mortgage; yet in such a case the mortgage would be kept alive. 1 Hilliard on Mortgages, 544, 546; 84 Me. 299; 9 Barr, 498; 51 N. Y. 333.

B. F. Buller, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This was a suit brought by William B. Sherrill, defendant in error, against A. Hawkins and one John Campbell, to recover judgment on a note of \$1,850, dated January 9th 1874, secured by mortgage on certain real estate in Bourbon county, executed by A. Hawkins and Martha E. Hawkins, and recorded the same day. The plaintiff in error was made a defendant on his own motion, and filed his answer and amended answer, as disclosed by the record, setting up a mortgage-lien for \$810.96 against Hawkins and his wife, which was allowed him by the court, and is not here for review; also, setting up a note of \$1,054.70, dated 31st August 1872, executed by plaintiff in error, Drury J. Fields, and A. Hawkins, and secured by mortgage recorded Sept. 7th 1872, on a part of the real estate described in Sherrill's mortgage, viz., sec. 1, township 25, range 25, Bourbon county. The payee of this note, a Mrs. M. C. Giles, received the full amount thereof on Sept. 8d 1874 from one of the makers, the plaintiff in error; and the question and the only question in the case was, whether

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such receipt operated as a payment of the note, and a discharge of the mortgaged premises from the lien thereof. The district court found that it was a payment, and that the mortgage-lien was gone, and gave Sherrill's mortgage priority. The facts in reference to this, as they appear from the testimony, are substantially these: The note was, on the face of it, the joint note of Fields and Hawkins. While Fields' name appears first, there is nothing to indicate that either was surety. The mortgage security was given alone by Hawkins. The note was given for borrowed money. The money was borrowed for the use of Fields. He first spoke to the payee's agent about the loan, and told him that Hawkins would not take the money. He (Fields) had no deed for his land, and that was the reason why he did not give the security himself. Hawkins agreed to furnish the security, and let Fields have the money. A check for the money was given to Hawkins, who turned it over to Fields, and the latter obtained the money thereon and used all except the sum of \$100, which a few days thereafter he returned to Hawkins. During the summer and fall of 1873 he also returned to him an amount equal to the amount he had retained out of the proceeds of the check, and took this receipt:

"FORT SCOTT, SEPT. 1, 1873.

"Received of D. J. Fields ten hundred and fifty-four dollars & seventy cents, (\$1,054.70,) for which I promise to pay a promissory note indorsed by D. J. Fields and myself, and given in favor of Mrs. M. C. Giles.

A. HAWKINS."

Hawkins did not pay said note, but by payment of interest in advance, and a bonus, obtained an extension of the loan for a year. In September 1874, the note still remaining unpaid, Fields paid it and took an assignment without recourse. Now while both the payee of this note, and her agent, testify that they regarded Hawkins as the principal, and Fields as only surety, yet we think that in the inception of this loan, and as between Fields and Hawkins, the finding of the court that Fields was the principal was unquestionably correct. Suppose, that after having received the proceeds of this loan, Fields had

paid the same over to Mrs. Giles, and taken an assignment of the note and mortgage: can it be claimed for a moment that he could have held them as valid securities against Hawkins, and enforce their collection from him? Yet if Hawkins was principal, and he merely security, he could. The reverse was actually the case. Hawkins could have paid the note, and claimed the benefit of it as against Fields—for Fields was in fact the party who desired the loan, for whom it was made, and who received the proceeds of the loan. Whatever form then the transaction took, and whatever might be the rights of the payee or others, as between Fields and Hawkins the former was the principal debtor, and his payment of the note canceled it and discharged the mortgage.

What effect had the return of the amount of the note by Fields to Hawkins, and its extension by the latter for another year, upon the subsequent payment by Fields? This is really the difficult part of the case. On the one hand it is claimed that upon the face of the papers each maker was equally and jointly liable as principal, and that *prima facie* a payment by either would discharge the note and mortgage; that if we look back of the face of the papers, we find that Fields was really the principal and Hawkins the surety, and that this relation, once established, must be held to remain; that the makers of the note, the debtors, cannot by simply passing money backward and forward between themselves, and without any knowledge or assent of the payee, the creditor, keep changing their relation to the debt, so that to-day one shall be the principal and the other the surety, and the next day the reverse. While on the other hand it is said, that the return of the money to Hawkins left him in the possession and enjoyment of the proceeds of the loan; that, by payment of advance interest and a bonus he obtained a year's continuance of such possession; that Fields had ceased to have any further benefit from the loan, while Hawkins was enjoying the full benefit of it; that as this took place before Sherrill made his loan, he suffered no wrong by the transaction; that the record disclosed the existence of this mortgage, and that it was apparently unsatisfied;

and that if Sherrill had made inquiries of the mortgages he would have been informed that she considered Hawkins as the principal debtor, and that the note was unpaid; and that if he had made like inquiries of Fields, or Hawkins, the exact facts would have been told him, so that it is perfectly fair to presume that if he was content to make his loan upon a second mortgage, he has no right to complain if it is now adjudged to be only a second mortgage, and that it would be unjust to Fields who has twice paid this note to deprive him of any recourse upon the mortgage security. The latter view seems to us to be the most just and equitable, and not to contravene any settled legal principle. It may be true, as counsel for defendant in error say, that it is very doubtful whether Fields in fact ever returned any such amount to Hawkins; but we must take it that he did, as the court so found. The matter can be inquired into further on the rehearing.

The judgment of the district court will therefore be reversed, and the case remanded with instructions to grant a new trial.

All the Justices concurring.

A. B. BARTLETT V. CHOUTEAU INSURANCE COMPANY.

INSURANCE CORPORATIONS; *Stock Subscriptions.* A statute prohibiting insurance corporations from "taking risks," or transacting any "business of insurance," except upon certain conditions, does not, even when such conditions are not complied with, invalidate subscriptions made to the capital stock of such corporations, or notes given in payment thereof.

Error from Wyandotte District Court.

THE Chouteau Insurance Company is a corporation organized under the laws of the state of Missouri, and has its principal office at the city of St. Louis, in said state. In 1870, and

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Bartlett v. Chouteau Ins. Co.

while §§103 to 118 of ch. 23 of Gen. Stat. 1868, relating to "insurance corporations not created under the laws of this state," were in force, *Bartlett*, a citizen of Wyandotte, subscribed to the capital stock of said corporation, and in part payment of such subscription gave what is called and known as a "capital-stock note." This action was brought to recover the amount due on such note. Trial at the September Term 1874, and judgment for plaintiff for \$278.65, and costs. *Bartlett* brings the case here.

E. L. Bartlett, for plaintiff in error.

W. T. Hills, and *Frame & Wells*, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: There is but one point involved in this case submitted to the court. Section 103 of ch. 23, relative to foreign insurance companies, provided, "that no insurance company created by or under the laws of any other state or territory shall directly or indirectly take risks, or transact any business of insurance, without first obtaining a certificate of authority from the auditor of state." Section 105 prescribed, in brief, that no insurance company should transact any business of insurance unless it was possessed of one hundred thousand dollars in paid-up capital. It is admitted that the Chouteau Insurance Company never had such certificate from the auditor of state, and that it is a foreign corporation.

The plaintiff in error subscribed for stock in this company, paid part cash, and gave his notes for the balance. The whole transaction took place in this state. Was the plaintiff in error liable on these notes? Clearly so. The only prohibition in the statute is on "risks," and "business of insurance." But "stock subscriptions" are neither. At least, not in legal parlance, though when taken in some corporations there is a sense in which they may well be called *risks*. But in legal phraseology, they are as distinct as any transactions known to the law. Stock subscriptions are for the building up of the cor-

Powell v. Powell.

poration, and antedate the business of insurance and the taking of risks for which it is chartered. They fall no more within the term "risks," and "business of insurance," than do contracts for rent of offices, purchase of paper and other stationery, advertisements, etc. If they were included within the prohibition, we should have the legislature gravely declaring that no insurance corporation could take a valid subscription of stock until it had a capital of one hundred thousand dollars. The comments of counsel upon the effects of §91 of said act upon the question, have no foundation in the case made, and need not be considered.

The judgment will be affirmed.

All the Justices concurring.

MARGARET POWELL V. JAMES L. POWELL.

1. **DIVORCE; *Insanity, after Marriage.*** Insanity, occurring after marriage, is not cause for divorce; and nothing which is a consequence of it can be. Neither is impotency caused by such insanity, nor extreme cruelty, while so insane, ground for divorce. [*Gribben v. Maxwell*, 34-8, 9, 12.]
2. ——— ***Impotency.*** The provision of the statute, that the district court may grant a divorce for impotency, is to be construed, that the impotence must have existed at the time of the marriage.
3. ——— ***Insanity at Time of Marriage.*** A marriage with an insane person, is absolutely void for want of sufficient mental capacity on the part of such insane person to consent to the marriage.
4. ——— ***Sentence of Nullity.*** If a marriage is void by reason of the insanity of either of the contracting parties, while no judgment annulling such marriage as void *ab initio* is necessary to restore the parties to their original rights, yet a sentence of nullity in such a case is conducive to good order and decorum, and to the peace and conscience of the party seeking it.
5. ——— ***Relief, where Party is Incapable to Contract Marriage; Jurisdiction of Court.*** Section 648 of the civil code makes provision only for incapables to bring action to have a marriage to which such person is a party, declared void; but independent of this statute, and the sections of the law relating to divorce, the district court, on the application of either party to such a marriage, has jurisdiction to hear the cause, investigate the charge, and to afford the requisite relief. [*Fuller v. Fuller*, 33-586.]

Error from Neosho District Court.

ACTION for divorce, commenced in October 1874. Defendant was then in the asylum for the insane. Service, copy of summons left with one T. F. T., guardian of defendant. Trial, as upon defendant's default, at January Term 1875, T. W. O., judge *pro tem.*, presiding, and decree of divorce entered. At the December Term 1875, the district court, P. B. presiding, the decree was vacated and set aside. From this order vacating said decree, the plaintiff appeals. The allegations of the petition, and the facts, will appear in the opinion, *infra*.

Hutchings & Denison, for plaintiff:

The writers of this brief first became connected with this case after the filing of the motion to vacate the judgment, and hence are not responsible for the pleadings. Both the petition and amended petition are, perhaps, subject to severe criticism, for indefiniteness, uncertainty, and surplusage; but as neither these infirmities of the petitions, nor mere errors in the proceedings, are sufficient to justify the court in holding a judgment void, (Freeman on Judgts., §§ 101-185,) and as the plaintiff acted under the advice of counsel, and in the utmost good faith, and as the sweeping away of the decree for divorce and alimony, upon the mere suggestion of the insufficiency of the petition, has left her in a most embarrassing position, we deem ourselves justified, and in duty required, to present the case to this court.

The only grounds of the motion to vacate the judgment were, first, that the petition did not state facts sufficient to constitute a cause of action; second, that the court had no jurisdiction of the person or subject-matter. Upon the hearing no evidence of any kind was produced, and the court sustained the motion solely upon the ground of the insufficiency of the petition. We contend that the court got jurisdiction of the person by the service of the summons and appearance of the guardian. (Gen. Stat. 554, § 18; p. 557, § 26.) That an

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insane person may sue and be sued in all ordinary actions, the same as a person not under disability, and for that purpose may appear by his committee or guardian, and be bound by judgments rendered, seems to be settled by all the authorities. (Freeman on Judgts., § 152; 28 Wend. 85; 1 Hill, 97; 14 Barb. 488; 8 Barb. 552; 2 Bishop Mar. & Div., § 808.) The action proceeds against, and the judgment is properly rendered against the lunatic, as in this case, and not against his guardian. (21 Ala. 797.) We cannot find that any discrimination is made against actions for divorce, or that in reason and public policy any such discrimination should be made. (6 How. Pr. 194; 18 Mass. 412; 7 Mass. 474.) This being settled, does the petition or amended petition state a cause of action? The pleadings on this motion will be judged by no stricter rules than those applicable upon a general demurrer to the same pleadings. We claim for the amended petition, that it sufficiently states a cause of action for extreme cruelty, (sub. 6, § 639, civil code,) and nothing more. The allegations concerning impotency should be treated as surplusage. But it will be claimed that, inasmuch as the petition alleges that defendant was insane before the marriage, and has continued to be so, that this must be construed to mean total, absolute, and habitual insanity; and that extreme cruelty cannot be predicated of an act done by a person in a state of insanity. We are not called upon to dispute this latter proposition, but we deny that any such construction is to be given to the petition. It is perhaps true, that the appointment of a guardian is conclusive proof of incapacity, and no subsequent act of the lunatic can form the basis of an action, civil or criminal; but the act of extreme cruelty in this case was committed on the 1st day of June 1872, and the defendant was not taken into any kind of custody until the 11th of said month. A person may be sane upon one subject, and at the same time insane upon another, and in such cases would be liable, civilly or criminally, for his acts not influenced by his infirmity. "A lunatic is indeed properly one that hath lucid intervals; sometimes enjoying his senses, sometimes not." Now in this case, according to the

allegations of the petitions, while the defendant was insane at the time and before the marriage, yet the plaintiff did not know it until a long time afterward, and it would be a very narrow and ungenerous construction of these allegations, to say that they exclude the idea of lucid intervals, and that under them proof could not be introduced to show that the defendant was sane and responsible for his acts on the 1st day of June. Of course, if such proof could have been introduced, the court will presume that it was, and that the decree was entered on sufficient evidence. But, we go further: If the same rules applicable on the hearing of general demurrers govern this case, then the allegation that the defendant was guilty of extreme cruelty, though perhaps the allegation of a conclusion of fact, is sufficient, (12 Kas. 124,) and is equivalent to alleging that the defendant committed the acts under such circumstances, and in such a state of mind, as to constitute extreme cruelty, and excludes the idea, that the defendant was influenced by insane impulses when he committed the acts. If the petition alleged in terms that the defendant on the first day of June, and at the time of committing the acts constituting extreme cruelty, was in a lucid interval, there would be no doubt of the sufficiency of the petition; and we think the petition does clearly, by implication, say this, and any other construction is forced and unreasonable. But, if this rigid construction is to prevail, then upon the same construction we insist, the defendant being insane before, at the time, and ever since the marriage, as alleged in both petitions, and the presumption and possibility of lucid intervals being excluded, the defendant must be held to have been incapable of contracting the marriage, or ratifying it afterward. If the defendant was *non compos mentis*, the contract could not have been mutual, there was no contract, and the marriage was void. 1 Pars. Contr. 310; 1 Foster, 52; 12 Mass. 363; 1 Bishop Mar. & Div., § 124. Insanity occurring after the marriage, is not, and ought not to be ground for divorce; and our divorce statute does not in terms provide for declaring marriages entered into by persons *non compos mentis*, void. Yet such con-

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tracts, like all other contracts entered into by persons not possessed of a consenting mind, are void, and courts of equity will pronounce decrees of nullity, independent of the statute; and we submit that actions for this purpose are not technically actions for divorce, (2 Ira. Eq. 470; 3 id. 91, 192,) and courts having full equity powers are not limited or restricted by the divorce statutes, but under their ordinary powers will interfere and pronounce sentences of nullity against contracts of marriage which are in law void *ab initio*. But the position of defendant's counsel is, that the court should construe the petition to mean that the defendant has been totally insane since before the time of the marriage, and consequently that no act or omission of his during this interval can furnish the ground for divorce. That while the court should adopt this construction of the petition, it should also hold that the defendant at the time of the marriage had a consenting mind and was capable of contracting, and that he may discard his guardian and appear by counsel to resist any action to have the marriage annulled—indeed that the divorce statute is a restriction upon the power of the court to pronounce a sentence of nullity on any ground except the *causes for divorce* therein specified, and the single exception provided for in § 648 of the code. If this contention shall prevail, then there is *no* relief for the plaintiff, nor is there any means of procuring a judicial declaration of nullity in any case where the marriage is void in law for reasons existing at its inception, as in cases of marriage within the prohibited degrees of consanguinity, etc.

John C. Carpenter, for defendant:

Counsel for plaintiff has truly said, "the petition and amended petition in this case are perhaps subject to severe criticism, for indefiniteness, uncertainty, and surplusage." It is doubtful if by strict search through the files of the various courts of this state a judgment was ever before rendered in favor of a party upon a document, called "petition," that would begin to compare in worthlessness with the one in this

case. Counsel also state that the district court "sustained the motion to vacate the judgment solely upon the ground of the insufficiency of the petition." This is also correct. The district court in effect declared the petition insufficient, and hence a nullity. The plaintiff bases her claim for relief upon the grounds, 1st, insanity; 2d, cruelty; 3d, impotency. Section 689 of the code gives the causes upon which a divorce may be granted. Insanity, whether existing at the time of the marriage, or accruing subsequent thereto, is not in terms by the code made ground for a divorce. The marriage relation or contract can only be dissolved on some one of the grounds named in the statute, and insanity is not one of these. But plaintiff's counsel think the allegation of "extreme cruelty," is good on general principles. The "extreme cruelty" upon which plaintiff relies occurred a few days only before defendant was taken to the insane asylum, while the defendant was insane and mentally incapable of knowing what he did. It is the accepted doctrine, that adultery committed while the party is insane, is not a ground of divorce; (Bishop on Marriage and Divorce, §612.) If this be true, why should consequences flow from acts of cruelty, which do not from the adultery of the party? There is a clear and well-defined distinction between cruelty committed while sane, and while insane. The former has the consent of the mind, the party knows the consequences, and accepts the possibility and contingency of the act. In the latter case, these are wanting. There is no evidence or allegation that the "lucid interval" was upon the mind of this unfortunate defendant at the time the "extreme cruelty" is alleged to have been committed. But on the contrary, plaintiff's petition says "the defendant was, at the time of their marriage, and has continued to be, and still remains insane, and that his insanity has continually grown worse." Hence the two or three pages of plaintiff's brief about "lucid intervals," are simply outside the case. "Insanity of the wife, is not cause for divorce, although such insanity may be permanent. Neither is impotency, caused by such insanity; nor cruel and inhuman treatment, while so

insane, any ground for divorce." *Wertz v. Wertz*, supreme court of Iowa, June term 1876, reported in 10 *Western Jurist*, 468.

The opinion of the court was delivered by

HORTON, C. J.: An action was commenced in January 1876 in the district court of Neosho county, by Margaret Powell to obtain a divorce from James L. Powell. The causes alleged in the petition were the impotency of the defendant, and extreme cruelty on his part toward the plaintiff. The petition also stated that the defendant was at the time of the marriage, and at the time that the plaintiff contracted to marry the defendant, afflicted with insanity, which then and long after the marriage was wholly unknown to the plaintiff; that the defendant had continued insane from the time of the marriage to the commencement of the action, and that his insanity had continually grown worse; that on or about June 11th 1872, he was committed to the insane asylum at Osawatomie, and had since that time been confined in the asylum. Service of the summons was made on the guardian of the defendant in pursuance of sec. 36 of ch. 60, Gen. Stat. 557. No answer was filed, and on proof offered, the court entered a decree of divorce releasing the parties from the obligations of the marriage, giving the custody of the children born in wedlock to the plaintiff, and adjudging that the plaintiff should have, enjoy, and possess as alimony, certain real estate with the right to sell the same at her pleasure. Eleven months afterward, a motion was made by James L. Powell, by his counsel John C. Carpenter, Esq., to vacate and set aside the judgment, as wholly void, because the petition did not state facts sufficient to constitute a cause of action. On 29th December 1876, the court sustained the motion, and ordered an entry to be made that the judgment should be set aside as void, and held for naught. To this action of the court the plaintiff excepted, and asks that it be reversed.

Under the allegations in the petition, we must assume that the defendant was insane at the time of the alleged acts of

cruelty, and, as a sequence, was mentally incapable of knowing what he did. Under such circumstances, on very familiar principles, he could not be held responsible for his acts, and we do not think the acts thus committed a sufficient cause of divorce. As insanity itself, after marriage, is no cause for a divorce, nothing which is a consequence of it can be. The counsel for plaintiff do not dispute this conclusion, but insist that the petition should be so construed that the defendant had lucid intervals, and that thereupon, proof was introduced that the defendant was sane at the commission of the acts complained of. Unfortunately for this theory, there is no room for this construction. The allegations in the petition are broad and sweeping. It is asserted "that the defendant was at the time of the marriage, and has continued to be and still remains insane, and that his insanity has continually grown worse." The extreme cruelty alleged, occurred June 1st 1872, and ten days afterward the defendant was taken to the insane asylum. If the defendant had lucid intervals, and committed any act for which he was responsible during such times, upon which a decree of divorce could be based, the petition should have so stated. In the absence of any such allegations, we cannot presume, against the averment to the contrary, that the defendant was sane at the commission of the alleged acts of cruelty. The petition excludes the idea.

Counsel for plaintiff admit that the statements concerning impotency set forth in the petition are insufficient, and should be treated as surplusage; hence, we need only say, as to that alleged cause for divorce, that our statute in that regard is to be interpreted in harmony with the common law; and when the legislature enacted that a divorce might be granted for impotency, it was intended that the impotence must have existed at the time of the marriage. If a person should become impotent *after* marriage, the marriage is good, and no ground of divorce exists therefor. Such is the universal doctrine.

The only serious question in this case is, the effect of the

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averments of the insanity of the defendant at the time plaintiff contracted to marry him, his insanity at the date of such marriage, and the continuance of such insanity.

3. Insanity at time of marriage.

The marriage of an insane person is absolutely void, by reason of the want of capacity of such a party to contract; and in this case, if the allegations in the petition are true, the marriage of the plaintiff and defendant was null and void, and has never since obtained any validity, because the defendant has never been in any mental condition to ratify or consummate it. Not only was there no marriage *de jure*, but it would also be a misnomer to call it a marriage *de facto*, although law-writers thus frequently designate it. It was a nullity, and the plaintiff is in no way bound to defendant by any marriage relation. The concurring assent of the two minds was wanting. The plaintiff is as free from the defendant as if the court below had pronounced a decree of nullity, as no judgment was necessary to restore the parties to their

4. Sentence of nullity.

original rights. The fitness and propriety of a judicial decision pronouncing the nullity of such a marriage, is supported, because conducive to good order and decorum, and to the peace and conscience of the party seeking it. *Weightman v. Weightman*, 4 Johns. Ch. 348; *Rawdon v. Rawdon*, 28 Ala. 565. Another reason why a judicial determination of such a marriage ought to be sanctioned, is, that an opportunity should be given, when the evidence is obtainable and the parties living, to have the proof of such marriage being void preserved in the form of a judicial record, so that it cannot be disputed or denied. But in the case at bar, the cause was prosecuted, tried, and decided, as a "divorce suit" under the provisions of the code. This is more apparent when we fully examine the record. Permission was obtained to amend the petition, and two statutory causes for which divorces are granted, were inserted; the maiden name of the plaintiff was omitted; the petition was verified; the children's names were set forth, with the surname of the defendant; the real estate of the defendant was specifically described, and in the prayer for relief the court was asked to grant a divorce, to

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divide the real estate, to give \$3,000 as alimony, and to award the custody of the children to plaintiff. The court in rendering judgment granted all the relief prayed for, but instead of dividing the real estate, decreed all of it as alimony to the plaintiff, who has assumed and retained the name of the defendant. Under the particular circumstances of this case, we cannot construe the action as one prosecuted to have the void marriage pronounced a nullity, and that therefore the action of the court below, in vacating and setting aside the judgment for being void, was not erroneous.

It is immaterial whether the defendant, or his attorney, had the right to appear and make such motion or not. If the judgment was void, no injury resulted to the plaintiff from

Status of parties,
when marriage is void
ab initio.

the order of the court; and holding the judgment void, we cannot interfere with the action of the district court. If the judgment in this case could be construed as a decree annulling a void marriage, so much of the judgment as awards alimony to the plaintiff would be nugatory. We view the case as the court below considered it, and treat it as that court treated it, simply as an action for divorce and alimony, under the provisions of the code. Any other construction by us would be grossly unjust to all the parties to the proceeding, and especially so to the plaintiff. It is doubtful whether the plaintiff would be willing to accept the original judgment attempted to be rendered, if she was fully acquainted with the consequences which would result if we were to hold the judgment valid so far as determining the marriage void *ab initio* by reason of the insanity of the defendant. A sentence of nullity like this would strip her of all alimony, deprive her of all interest in the property of defendant, and bastardize her children. We make these last remarks more freely, because the counsel for the plaintiff in this court state in their brief "that they first became connected with the case after the filing of the motion to vacate the judgment, and hence are not responsible for the pleadings."

If upon full consideration, the plaintiff still wishes to end the mesalliance between herself and the defendant by a sen-

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tence of nullity declaring void the marriage for want of sufficient mental capacity of the defendant, with consent of the court below she can amend her petition, and prosecute the suit to final judgment, or she may disregard the proceedings had and commence *de novo*. Sec. 648 of the code (Gen. Stat. p. 759,) does not in any manner restrict the plaintiff from prosecuting or instituting her action to annul a void marriage. Said section applies only to incapables, who are unable to contract marriage from want of age, or understanding. Independently of the provisions relating to divorce, the district court has full jurisdiction to afford the plaintiff requisite relief. If she wishes no judicial determination of the question, and the defendant was insane at the time of the marriage, and has had no lucid intervals since, she may treat such marriage as wholly void. So it is not correct, as the counsel for plaintiff suggest in their brief, that if this judgment is not upheld the unfortunate plaintiff has no relief.

The order of the district court in vacating the said judgment will be affirmed.

All the Justices concurring.

WM. ORT V. DAVID PATRICK.

PRACTICE; Saving and Preserving Alleged Errors. Where the ground of error is, that the verdict is against the evidence, the record must disclose not only what the evidence is, but also what the issues are; for no evidence is material which does not bear upon the issues, and none is to be regarded which contradicts the admitted facts. [*Martin v. Graham*, 20-305.]

Error from Harvey District Court.

ACTION by *Patrick*. Trial, and judgment against *Ort*, at the April Term 1874, of the district court. *Ort* brings the case here.

Ady & Reed, for plaintiff in error.

The opinion of the court was delivered by

BREWER, J.: Defendant in error recovered a judgment in the district court of Harvey county, for one dollar and fifty cents, to reverse which this proceeding in error has been brought. We think that for several reasons it must be affirmed. One only will be noticed. While the testimony is preserved in the record, the pleadings are not. They are neither copied in full, nor referred to, nor their substance given, nor any statement of the issues raised by them, or the admissions made in them. While the case was tried by a jury, no instructions were preserved, so that we can only infer the nature of the issues from the character and drift of the evidence. The complaint of counsel is, that the verdict was against the evidence, in this, that it showed that the cellar wall (for the building of which the action was in part brought,) was not completed according to contract. Now the pleadings may have admitted that the contract was fully completed; or, that the wall was accepted as completed, notwithstanding the defect; or, that the principal payments made were to be applied on the cellar wall, leaving the other matters about which there was no dispute unpaid for, in whole

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or in part. And the instructions may have properly directed the attention of the jury to these very matters of admission, and so avoided all inquiry upon the question presented by counsel. How then can we say that there was error in the proceedings? Indeed, it may be laid down as a general proposition, that where the ground of complaint is, that the verdict is against the evidence, the record must disclose not only what the evidence is, but also what the issues are; for no evidence is material which does not bear upon the issues, and none is to be regarded which contradicts the admitted facts.

The judgment will be affirmed.

All the Justices concurring.

L. W. MOHON v. JOHN HARKREADER.

TRIAL—*Outside the Court-Room; Irregularity.* Where a district judge, while holding a regular session of court designates a law-office in the neighborhood of the court-house for the trial of a civil action, and thereupon leaves the regular court-room and proceeds to such law-office, accompanied by the under-sheriff and the jurors, and there tries such cause, and all the parties thereto are present and participate in all the proceedings, and no exceptions are taken or objections made other than the defendant protests against leaving the court-room, and against having the trial in said law-office, *held*, that the proceedings had at the place thus designated are not void, and that no substantial error is thereby committed affecting materially the rights of such defendant.

Error from Crawford District Court.

HARKREADER had judgment at the April Term 1877, and Mohon brings the case here.

J. T. Bridgens, and M. A. Wood, for plaintiff in error.

John T. Voss, for defendant in error.

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The opinion of the court was delivered by

HORROR, C. J.: The plaintiff in error complains of certain alleged irregularities in the proceedings of the district judge, and asserts that his case was heard and determined outside the court-room, and that he has had in fact no trial by any court, as required by law. The record shows that the case was tried under the following circumstances: The district court of Crawford county was in session at the court-house in Girard, in that county, and the trial of the case of *The State of Kansas v. Noah T. Miles* had progressed until the evidence had all been submitted to the jury. Whereupon his honor, B. W. Perkins, presiding judge of the court, suspended said trial for a few moments, and thereupon called the case of *John Harkreader v. L. W. Mohon*, and asked if the parties were ready for the trial of that cause, when the plaintiff announced his readiness, and the defendant said he would be ready upon the regular call of the docket. The judge then placed D. B. Vansycle, Esq., on the bench to preside during the arguments of counsel in the criminal case, and ordered and directed the regular jury, the under-sheriff of the county, and the respective parties, together with their witnesses, to repair to the law-office of John T. Voss, Esq., in said city of Girard, which the defendant obeyed under protest. The court then directed the counsel in the state case to proceed with their arguments; and the presiding judge then proceeded, accompanied by the under-sheriff and jurors aforesaid, to the law-office of John T. Voss, almost one-fourth of a mile from the regular court-room, and did then and there, under protest of said defendant, proceed to try the cause of *Harkreader v. Mohon*, two sessions of the district court being held at the same time in the same county. Counsel for the defendant protested against a dual court, and asked that his exceptions be noted, which said presiding judge failed to do; and in such trial the presiding judge called and swore the jury, swore all the witnesses, received the verdict, and discharged the jury at the said law-office aforesaid, and delivered the proceedings to the clerk of said district court, who was not

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out of the regular court-house at any time during the trial of the cause. After reaching the regular court-room the presiding judge took the bench, vacated by the said D. B. Vansycle, and conducted the business of said court as usual.

The judgment rendered against said plaintiff in error was for \$65 debt, and \$13.20 costs. The evidence is not preserved in the record, and no other exceptions were taken on the trial than as above stated. The action of the judge was in some degree irregular, and his proceedings a subject of criticism; but no substantial error was committed to the prejudice of the plaintiff in error. He attended with his attorney at the place designated by the judge for the trial of the cause, and proceeded with and participated in the trial. It is true, he protested against leaving the court-room, and against the hearing being had in a law-office; but he afterward took part in all the proceedings, and thereby waived his objection to the place of trial. Under the facts in the case, and the conduct of the plaintiff in error, nothing was really done affecting the substantial rights of such party; nor does the complaining party show that a different judgment should have been rendered, or that he was prevented from having a fair trial, or even that he had any defense to the claim sued on. Under the circumstances, a judgment thus rendered is not void, and there is certainly no sufficient error apparent upon the record to require or even authorize a reversal of the judgment.

The judgment will be affirmed.

All the Justices concurring.

X—18 Kas.

W. J. OLIPHANT V. COMM'RS OF ATCHISON COUNTY.

1. *INJUNCTION, by Land-Owner; Road Overseers.* A party purchased a tract of land over which was a road used and traveled upon by the public as a public highway, but which he claimed was so used and traveled upon without ever having been in any manner legally appropriated to the public use. After his purchase he attempted to fence up his tract of land, and close up the road. The authorities resisted his attempt, and prevented him from closing up the road: *Held*, That injunction to restrain them from further interfering with his closing up the road was a proper remedy. [*Carbon C. & M. Co. v. Drake*, 28-248; *Poirier v. Feller*, 20-47.]
2. *HIGHWAY; Prescription; User; Limitation.* The public acquire no right to the possession of a highway by mere prescription, any sooner than an individual does to land he occupies. Use of a highway for five years vests no title to it in the public as against the prior owner; and if at the end of five years he attempts to take possession, and such attempt is resisted, an action of injunction is not barred by any statute of limitations. [*Comm'rs v. Beckwith*, 10-603; *Cemetery Ass'n v. Meninger*, 14-312, 313.]
3. ——— *Laying out Highways; Powers of County Commissioners.* Under the general grant of power in section 16 of the act concerning counties and county officers, "to lay out, alter or discontinue any road," and in disregard of the proceedings prescribed in the statute concerning roads and highways, the county commissioners have not power of their own motion, and without a previous petition, to cause a road to be laid out and opened by viewers by them appointed. [*Comm'rs v. Muhlenbacker*, 18-129.]
4. ——— *Qualifications of Petitioners for Highway.* Where neither upon the papers nor the proceedings of the county board does it affirmatively appear that at least twelve of the petitioners were householders, resident in the vicinity of the proposed road, and the proceedings are attacked directly by *petition in error*, the defect is fatal, and the proceedings must be set aside as void. When attacked collaterally, the fact that such petitioners are qualified householders may be shown by testimony *aliunde* the record; and when no such testimony is offered, the party who produces the record, and rests upon it alone, has made out a *prima facie* case that the proceedings were void, and is entitled to judgment accordingly. [*Comm'rs v. Muhlenbacker*, 18-129; *Welsford v. Weidlein*, 23-601, 606; *State v. Eggleston*, 34-721; *Willis v. Sproule*, 13-257; *R. R. v. Mossman*, 30-336.]
5. *FINDINGS OF FACT; What to Contain.* Findings of fact should not be recitals of testimony, but statements of the facts deemed by the court to have been proved by such testimony; and a recital in a finding, that such evidence was or was not given, may be entirely ignored.

Brief of Plaintiff.

Error from Atchison District Court.

INJUNCTION, brought by *Oliphant* against the *Board of County Commissioners* of the county of Atchison, and *John Moore*, as trustee of Walnut township, Atchison county, and *Henry Socks*, as overseer of road district No. 2 in said Walnut township, to restrain and enjoin them from exercising any further jurisdiction or control over plaintiff's land for the purpose of a public road, highway, or other public road use. The district court, at the June Term 1875, refused the injunction prayed for, and gave judgment against *Oliphant* for costs. Plaintiff now brings the case here for review. The facts will appear in the opinion.

W. W. Guthrie, for plaintiff, contended that injunction is proper remedy of land-owner to prevent appropriation of his land for a road; (80 Md. 436, 445;) that the same reason governs in preventing unauthorized use, as unauthorized opening. In no other action can the entire case be finally determined. In trespass for throwing open a fence, (as in *Willis v. Sproule*, 18 Kas. 257,) only between the parties, is the case *res adjudicata*; not in a prosecution for obstructing a road, under § 17, p. 904, Gen. Stat. Here the public, by its proper road authorities, and the land-owner, are before the court, and their respective rights adjudicated, and thereafter their privies are bound; (see §§ 6, 13, ch. 89, Gen. Stat.; Laws of 1871, p. 388.) No legal steps were taken to lay out this supposed road under § 1, ch. 89. Only a petition, by "persons liable to do road work," to "the commissioner of highways in Walnut township," was signed, and no bond was given. Under § 2, such petition, when presented, was for a road one mile long, one half-mile west of this location, and contained no description by natural objects. Under § 3, previous notice must have been given "by advertisement set up in the county clerk's office, and in Walnut township." No such notice was given. All such requirements were jurisdictional facts; (12 Kas. 815-822; 8 Kas. 248-256.) How, except from notice as required, could the land-owners know that their land was

to be taken for a road, or have an opportunity to contest such proceedings, or claim damages for land taken? (§ 4, art. 12, Const.) The road proceedings were in a court of limited jurisdiction, and defendants must affirmatively show valid proceedings; 19 Johns. 33; 5 Cranch, 173; 8 Cowen, 811; 2 Phil. on Ev. 906. While such jurisdictional facts may not appear by record, they must *in fact* exist, and be proven in a controversy where a claim of right is made thereunder. When plaintiff showed the record, which showed the proceedings void, and that a valid road was claimed thereunder, and actually kept open by defendants under claim of valid proceedings, his case was *prima facie* made out. Plaintiff bought of Henderson and Taylor, who owned the land in 1870, when the road proceedings were had. He now occupies their place. If they still held title, and could sustain this action, so can plaintiff. If such proceedings are valid, then the road exists, and no one can controvert; while if invalid, plaintiff is landowner, and entitled to his land. Neither does limitation apply. Easement, like title, is only acquired by purchase or prescription, and prescription requires fifteen years. If suing in trespass, limitation would cut off only damages back of two years.

D. Martin, for defendant, maintained that the authority of the county board "to lay out, alter or discontinue any road running through one or more townships in such county, and also to perform such other duties respecting roads as may be provided by law," is given in broad terms; Gen. Stat. 257, § 16. If no other statute restrained or qualified this power, the county board might act without any application, and without notice. The act in relation to roads and highways does not expressly limit, restrain, or qualify this power. When an application is made by twelve householders, and a bond entered into as provided in § 1, and the notice given as required by § 8, then it is the *duty* of the board to act; but the *right* of the board to act on its own motion, is not negatived. Our laws furnish many analogous cases; a reference to one will suffice to illustrate: It is the *duty* of a disqualified

Brief of Defendant.

judge to grant a change of venue under the act of 1870, when application is made by either party; while if no application be made, he may, *of his own motion*, either change the venue, or order the election of a judge *pro tem.*; (8 Kas. 628.) It may well be questioned whether any application, bond, or notice is necessary to authorize the county board to lay out and open a highway. This court has held that the notice to the land-owner required by section 4 is not jurisdictional; (12 Kas. 531.) This notice is intended to apprise the land-owner directly, if residing in the county, that his land or a portion thereof may be required for public purposes, so that he may appear at the proper time and place to protect his interest. Now neither the application nor the notice advertised in a newspaper, and posted in the township, seems to be intended for the benefit of the land-owner; for it is only required that the application and the notice shall state "the place of beginning, the intermediate points, *if any*, and the place of termination" of the road; (Gen. Stat. 898, §§ 2, 3.) We suppose a petition or application and notice for opening a road "from Lancaster to Atchison," or, "from Muscotah, via Effingham and Monrovia, to Atchison," would be sufficient; and yet no land-owner would know therefrom that the taking of any part of his land was contemplated. It has been repeatedly decided in New York, that commissioners of highways may, upon their own motion, and without any application therefor, lay out a highway. 20 N. Y. 252, 255; 28 N. Y. 297, 305; 19 Barb. 179, 187, 189.

The plaintiff rested his case upon proof that he bought twenty acres of land nearly a year-and-a-half after the opening of the road on the west line of the tract, well knowing of the actual existence of the road. He then assumed that it lay upon the defendants to show that every proper step was taken for a statutory appropriation of the land of his grantor to public use as a road. The exhibit attached to plaintiff's petition, shows that a written application, signed by more than twelve persons, was presented to the county board. The plaintiff does not attempt to show that they were not "householders of

the county, residing in the vicinity" of the proposed road, but assumes that it devolved upon the defendants to prove that the petitioners were such householders of the vicinity. This point has been expressly ruled against the plaintiff in *Willis v. Sproule*, 13 Kas. 257, 265. He does not even allege in his petition that no bond was entered into as required by § 1 of the road law; but he claims that it rested upon the defendants to prove that such a bond was given, with sufficient security. He does not allege that no notice was advertised or posted as required by § 3, yet it does come out in evidence that such notice was published. But he claims that it was fatal to the defense that we did not prove the posting of the notice in the township and in the county clerk's office. The plaintiff alleges that no legal highway exists upon these premises, and it devolves upon him to show this to the satisfaction of the court, as the first step toward the extraordinary remedy which he seeks. If the application, the bond, and the notice are jurisdictional, and want of jurisdiction is relied upon, then it devolves upon the plaintiff to show the absence of at least one of them. Here he is asserting a right as against the public—attempting to deprive the people of an easement which they have been enjoying for years past. If the public were plaintiffs, asserting against Oliphant as defendant a right not before claimed, and which had been previously enjoyed by him exclusively, the rule might be different. It rests upon the plaintiff to support the allegations of his petition, not upon the defendants to disprove them; (15 Ill. 543.) It is alleged in the petition and admitted by the answer, that the road in question was platted and recorded in the proper public office. It appears from the transcript that all the proceedings were recorded which the law requires to be recorded. And the statute makes this record *prima facie* evidence of the statements therein contained; (Gen. Stat. 264, § 49.) The record is regular, and shows that the viewers were required to and did lay out the road over the southeast quarter. Has the plaintiff disproved this *prima facie* case made against himself? He presents what he claims to be the original application.

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But for aught we know, an amended one may have been substituted, and afterward lost from the files. The misdescription was amendable, and as the record is correct and regular, this court should treat the application as amended. (53 Penn. St. 387, 390; 15 Iowa, 213, 216.) It is true that the original application presented describes the land as the *southwest* quarter. But it shows the initial point to be White Oak Grove, which was on the south line of the *southeast* quarter. It describes the course of the road as *northwest*, and the terminal point as the Atchison county road at Scruggs' land. This terminal point was in the middle of the north line of the *southeast* quarter. The initial point could not, therefore, be in the *southwest* quarter. It was an impossible description, and a mistake that could not mislead any person familiar with the location. Certain and fixed monuments ought to control, and any mistaken description of the quarter-section should be disregarded. When effect cannot be given to every part of a description of land, what is most certain and material should control: 3 Washb. on Real Prop. 350; 4 Mass. 196; 2 Cush. 392; 1 Cow. 605; 36 N. H. 91; 6 Gray, 467, 471, 472; 5 Met. 15. *Id certum est quod certum reddi potest.* And as a discretion is vested in the viewers in the selection of the route, the courts will not interfere unless to prevent its abuse. As to departures held not to vitiate: 64 Penn. St. 187; 5 Allen, 221; 14 Kas. 478.

The rights of the plaintiff can in no event be superior to those of his grantors, but may be inferior, as we think they are in this case. Henderson and Taylor, plaintiff's grantors, could not have maintained such an action as this. They resided in Leavenworth county, and it was therefore unnecessary to give them the notice required by § 4 of the road law. Henderson consented to the opening of a neighborhood road, without compensation, in the very place where the road is now located and used. And before the road was established, both Henderson and Taylor were notified of the action of the viewers and the proposed taking of their land, and they fully understood that they might claim damages; and yet they did

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not do so. The plaintiff claims that this finding is improper; but this is scarcely debatable; for, besides being without merit, this objection is not properly presented in the record, and the court should disregard it, because the objection to the evidence on which the finding is based is not specific, and because it is not presented either in a bill of exceptions, or case made; and its insertion in the journal entry was improper. Again, a verbal consent to the appropriation of land for public purposes is sufficient. "The owners of the land were not contesting, and by their claiming no damages were consenting to such location and use." The plaintiff is chargeable not only with his own knowledge of the proceedings, but also the acquiescence of his grantors, and the delay of himself and his grantors in commencing an adversary proceeding. The road was in actual use between four and five years previous to the commencement of this action, and the plaintiff knew all this time that it was established by the proper authorities of the county, and duly platted and recorded.

If the plaintiff ever had a cause of action, when did it accrue? We think it accrued to his grantors in August 1870, when the road was officially established and opened with their knowledge; and by the conveyance to the plaintiff, his right of action, if he obtained any under the purchase, would relate back to that period. But even if such right of action did not accrue to him until his purchase, still it is barred, for he obtained his deed December 7th 1871, and did not commence his action until February 5th 1875. (Gen. Stat. 683, §18, clause 8.) But waiving, for the present, the consideration of the statute of limitations, and granting that Henderson and Taylor had a cause of action of some kind, it does not follow that the plaintiff obtained it by procuring a deed for the land. The authorities establish the doctrine that he did not. He cannot maintain this action, nor any other kind of an action in the premises; 13 Barb. 646, 654; 82 Texas, 723; 5 Dutcher, 206, 213. He is not even entitled to the damages which Henderson and Taylor might have legally claimed at the time. Those damages are only recoverable (if at all,) by H. & T.; 11 Rich,

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Law, 91; 25 Wis. 641, 648; 26 Vt. 670; 72 Penn. St. 335. According to the plaintiff's own showing, it was the real estate of Henderson and Taylor that was injured. They might insist upon or waive any right or claim which they had against the public. Oliphant had no interest in the matter; he had no right to object to the proceedings to establish the road; he could not appeal from the action of the board in failing to award damages. The law does not permit him to get into a controversy with the public by a purchase of the land.

The opinion of the court was delivered by

BREWER, J.: This a road case, an action in which the present owner of a few acres attempts by injunction to close up a road opened and used by the public over said tract long before he acquired any title thereto. The facts are these: For several years past the plaintiff has resided, his wife being the owner, upon the N.W. $\frac{1}{4}$ of S.E. $\frac{1}{4}$ of section 24, township 7, range 21, in Atchison county. While thus residing, and in June 1870, a petition was presented to the county board for a road which was intended by the petitioners to cross the S.E. $\frac{1}{4}$ of section 24, but in fact named the S.W. $\frac{1}{4}$ of said section. The road was simply to cross the quarter-section. The description

Statement of
facts.

in the petition as it now appears reads, "a road commencing at about thirty rods west of the southeast corner of the S.W. $\frac{1}{4}$ section 24, T. 7, R. 21, and on the south line of said quarter, thence running in a northwesterly direction to the north line of said S.W. $\frac{1}{4}$, about eighty rods from the northeast corner of said quarter of section 24, township 7, range 21, and intersecting the Atchison county-road at S. Scruggs' land." In the petition as originally brought to the county clerk's office the initial point was described as, "White Oak Grove, on the Leavenworth county-road," but was at the time of filing changed by the clerk, with the consent of the principal petitioner. The mistake in the description was one that could not, as the court finds, have misled any one familiar with the locality. At this time the N.E. $\frac{1}{4}$ of the S.E. $\frac{1}{4}$ was owned by Henderson and Taylor, and the west sixty acres of

the S. $\frac{1}{4}$ of S.E. $\frac{1}{4}$ by one James Boton, and the east twenty acres by one Cook. "At the time," as the findings go on to read, "the viewers met to lay out a road under the order issued on such petition, the plaintiff met such viewers near the southeast corner of said southeast quarter, where they proceeded to begin the location of such road under such order, and demanded to see their authority for laying out such road. The surveyor exhibited the order of the county board requiring such road laid out as now described in such petition, and plaintiff then notified said viewers and surveyor that they were then half-a-mile east of the proposed location of such road; as called for in such order, and then denied their right to proceed to lay out a road anywhere on such southeast quarter, but under such order they must go half-a-mile west of where they then were, to locate such road.

"On further conversation, Oliphant offered to permit the road to run across the northwest quarter of said southeast quarter, on the line of the old Indian trail, for \$500, or to permit it to run on the east line, giving one-half the road, for \$200, which the viewers declined to give; and on the representation of a bystander, that Henderson and Taylor would give the right-of-way for such road over their land, the viewers informed said Oliphant that they would not take any of said northwest quarter of said southeast quarter, but would locate the road east of the east line of said northwest forty acres; and thereupon Oliphant said that he had nothing to say, if they did not disturb his forty acres. And the said Oliphant then went away, and said viewers then proceeded to lay out such road on the west side of the northeast quarter of said southeast quarter, taking forty feet off said west side, and allowed damages to Boton, but none to Cook, or Henderson and Taylor, over whose land the road was located; and no damages have ever been allowed or paid for the location of such road across the northeast quarter of said southeast quarter. The said Henderson and Taylor resided in Leavenworth county.

"Neither Henderson nor Taylor was present; and the entire

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road, forty feet wide, was located on the west side of their land, and from a point on the county-line about thirty rods west of the southeast corner of the southeast quarter of said section, thence northerly, to the center of said quarter, thence due north across said quarter, the initial point as actually located being at White Oak Grove, on the line of Leavenworth county, and the terminal point being at the intersection of the Atchison road at Scruggs' land.

"After the report of said viewers was confirmed, such road was cut out through the timber on said land, twenty feet wide, and the timber thrown to one side, and left there, and a road as so opened, has, ever since August 1870, been opened and traveled as a public highway, the same having been opened by the road overseer by order of the board of county commissioners, of which fact plaintiff had full knowledge."

Neither upon the face of the petition, nor upon the county records, does it appear affirmatively that the petitioners were householders. The language of the petition is, "the undersigned persons liable to be assessed for highway labor." And it is stated in one of the findings, that "no evidence was offered showing that any of the signers to such petition were householders of said county, or that any bond was entered into, or that any notice that such petition would be presented was given by any advertisement set up in the county clerk's office, and in the township of Walnut in which such proposed road was designed to be laid out; but the then county clerk was a witness, and testified that he filed all papers and proofs brought to his office in such matter, and had no knowledge of any notice whatever having been given, and he thought that the change in the description in such petition was in fact made at the time when the county board acted on same on July 8th. The above finding is made because true, and to avoid a formal bill of exceptions."

The report, survey, and plat seem to be regular, and duly recorded. In December 1871 plaintiff bought the W. $\frac{1}{4}$ of N.E. $\frac{1}{4}$ of S.E. $\frac{1}{4}$ of section 24 from Henderson and Taylor,

and received a warranty deed therefor. After plaintiff's purchase in 1871, he petitioned the county board for a vacation of this road, and appealed from the decision of the board to the district court, but thereafter dismissed the appeal, and in February 1875 commenced this action of injunction. It also appears that he cleared up a portion of this twenty acres, and made several attempts to fence up the cleared land, together with the road, but was each time prevented, so far as the road is concerned, by the defendants. The testimony taken on the trial was not preserved, so that we have only the pleadings and findings before us. To the petition was attached a transcript of the record and papers in the proceedings of the county board.

Upon these facts we remark—first, that injunction is a proper action in a case like this; that a party having the legal title to and right of possession of a tract of land, upon which the public, without any legal authority therefor, is claiming an easement in the shape of a highway, may, if his attempts to take possession of said apparent highway and close it up are resisted by the public authorities, maintain injunction to restrain them from further interference with his rights. We do not decide that is the only remedy he may pursue, but that it is an adequate and proper one.

II. The statute of limitations has not run against this action. While it might have run as against an action of trespass, for the first opening of the road, yet the public acquire no rights to the possession of property, by mere prescription, any sooner than individuals; and the mere occupancy of land by the public for a highway for a period of five years, vests no title thereto in them, and at the end of the five years the owner may attempt to take possession, and if resisted may maintain injunction to restrain such resistance.

III. Plaintiff was in no manner estopped by what took place at the time of the meeting of the viewers from now asserting his claims to the land occupied by the highway. All that he did then was to maintain his rights to the land he was

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interested in as occupant, and husband of the owner. And when they were secured, and the viewers agreed to locate the road over other lands, his right to make objection ceased, and a mere declaration that he had nothing further to say, did not estop him from thereafter asserting full title and right of possession to land subsequently purchased, even to the extent of disputing the validity of the road then attempted to be laid out over the land thus purchased. Scarcely a single element of estoppel is present. *Clark v. Coolidge*, 8 Kas. 196.

IV. The proceedings in this case for the laying out of the road cannot be sustained under the authority granted in section 16 of the act concerning counties and county officers, (Gen. Stat. 257,) to county commissioners "to lay out, alter, or discontinue any road running through one or more townships in such county, and also to perform such other duties respecting roads as may be provided by law," and independent of the provisions of the act concerning roads and highways. (Gen. Stat. ch. 89.) For if it were conceded that said section grants authority to the commissioners of their own motion, and without previous petition, to lay out a road, yet such grant of power would not carry with it authority to delegate the power to others, and the road in this case was not laid out by the commissioners, but by viewers appointed by them. *Qui facit per alium, facit per se*, may be true of individual action, but is not of official and quasi judicial action. The authority to appoint viewers is contained only in chapter 89, above cited; and for the proceedings prescribed in that chapter a petition is an essential prerequisite.

V. Whether the rule be, in cases of this kind, that the burden of proof is on the plaintiff to show that the road proceedings were void, or upon the defendant, after plaintiff's proof of title to the land, to show that they are valid, need not be decided; for conceding (though only for the purposes of this case) the former to be the correct rule, yet, if the papers and proceedings before the county board when offered in evidence by the plaintiff do not upon their face show jurisdiction, he

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has made out a *prima facie* case, and is not compelled to go outside the record and prove by parol the non-existence of jurisdictional facts. In other words, he may rest upon the record, if the record fails to show jurisdiction. There is no presumption in favor of tribunals of limited and special jurisdiction of the existence of facts outside of those named in the record. A party asserting their existence, must prove them, or the case will stand as though they did not exist.

VI. A petition signed by at least twelve householders, is a condition precedent to the exercise of any authority on the part of the commissioners under the roads-and-highways act. Its existence is a jurisdictional fact. (*Willis v. Sproule*, 13 Kas. 257; *Comm'rs Waubaunsee County v. Muhlenbacker*, ante, 129, 132.) If the record upon its face fails to show affirmatively the existence of this fact, the proceedings will, when attacked directly by petition in error, be held void; (ante, p. 132.) If attacked collaterally, as in this case, doubtless the fact that the petitioners were householders, and residing in the vicinity of the road, might be proved by evidence *aliunde* the record; (*Willis v. Sproule*, 13 Kas. 257, 264, and cases there cited;) but if not thus proved, and the record does not disclose the fact, the proceedings must be held void.

We have been not a little embarrassed by the effort of counsel to make a finding serve the purpose of both a finding, and a bill of exceptions. The purposes and scope of the two are entirely dissimilar. The one narrates the evidence as it is offered, the other states the facts the court finds to have been proved by such testimony. The one states what took place at the trial, the other what existed before suit was commenced. A statement therefore, in a finding, that such evidence was or was not given, may be entirely ignored. At first we were of the impression that this would compel an affirmance of the judgment, and are far from clear that such ought not to be the decision. But to the petition is attached the record of the proceedings before the county board, and this record is not denied in the answer. This record fails to show that the petitioners

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were householders. *Prima facie* it shows that the county board had no jurisdiction, and that the proceedings were void. This record was in evidence. There is no finding that the petitioners were householders, none that a sufficient petition was presented, and no fact stated anywhere in the findings from which it can be inferred that a sufficient petition existed. We therefore, though with grave doubts of the correctness of the ruling, order that the judgment be reversed, and the case remanded for a new trial.

All the Justices concurring.

GEORGE SCARBOROUGH *et al.* v. ALBERT G. SMITH.

1. **ACTIONS; REAL PROPERTY; *What Causes of Action May be United.*** The following causes of action may be united in the same action, to-wit—a cause of action for the recovery of real property; a cause of action for the value of the rents and profits of such real property; and a cause of action for the partition of such real property. [*Black v. Drake*, 28-484; *Scanlin v. Allison*, 32-379; *Auld v. Smith*, 23-66.]
2. ——— ***Words and Phrases, Defined.*** The meaning of the following words discussed, to-wit: “cause of action;” “arises out of;” “transactions;” “connected with;” “subject of action;” “subject-matter of the action,” and “object of the action.”
3. ——— ***Partition; Possession not Necessary.*** Where said above-mentioned causes of action are all united in one petition, it is not necessary that the plaintiff should allege in his petition that he is in the possession of said real property, in order to maintain his cause of action for partition. On the contrary, he may allege that he is not in possession, and that the property is held adversely to him by the defendant, provided that he also alleges that he is entitled to the immediate possession of the property. [In connection with pages 405, 407, and 408, 409, see *Curtis v. Parker*, 29-133; *Hiatt v. Parker*, 29-771.]

Error from Atchison District Court.

SMITH, defendant in error, filed his petition to effect a partition of certain real estate situated in the city of Atchison,

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alleging that the same was improved property, with storehouse thereon, and buildings of a permanent character. He claimed that he had been the fee-simple owner of the undivided-half of said real estate since 1856; that *Scarborough* claimed to be the owner of the other undivided-half of said real estate, and also alleging that *Scarborough* had been letting the premises and enjoying the rents and profits. In the same petition, *Auld* and *Stebbins* were joined as co-defendants, as claiming some interest in the premises under a tax-deed. Trial at the November Term 1874 of the district court. Judgment was rendered in favor of *Smith*, that *Auld* and *Stebbins* be barred from setting up any claim, title, interest, lien, or estate to the property in controversy, and that the property be partitioned between *Smith* and *Scarborough*. The defendants appeal, and bring the case here on error. The material facts are fully stated in the opinion.

Everest & Waggener, for plaintiffs in error.

W. W. Guthrie, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This case is badly mixed. Just what kind of action or actions the plaintiff intended to bring, we can hardly tell. But even if that problem were satisfactorily solved, still the case would not then be relieved from all difficulty. There are some inherent complications and intricacies equally difficult of solution. The petition below is drawn up in form as though it was intended to state only one cause of action; and yet the petition asks for several different kinds of relief, and such as are usually granted only in different kinds of action. It in substance asks that the plaintiff shall recover the undivided-half of certain real property of which he is not now in possession; that a certain tax deed on said real property be set aside and held for naught; that a certain supposed cloud upon the plaintiff's title be removed; that certain rents and profits received by the several defendants for the use of said property be accounted for by each of the defendants, ré-

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spectively; that the said real property be partitioned, and one-half thereof given to the plaintiff in severalty, "and that each of the defendants, their heirs and assigns, be barred from setting up any claim to, interest or estate in, or title to, or lien upon the same." Now whatever this action or any part thereof may be called, still it is all brought or intended to be brought under the code of civil procedure; and therefore under such code we suppose that "the court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." (Gen. Stat. 655, § 140.) "And all proceedings under it, (said code,) shall be liberally construed, with a view to promote its object, and to assist the parties in obtaining justice." (Gen. Stat. 681.) Said petition was not attacked in the court below in any manner except by demurrer. No motion was made to require that it be made more definite and certain; or that the several causes of action therein stated, be separately stated and numbered; or that any portion thereof be stricken out for immateriality, irrelevancy, or redundancy; and indeed, no motion was made attacking the petition in any manner whatever. The demurrer attacked the petition on the grounds, first, that several causes of action were improperly joined; second, that the petition did not state facts sufficient to constitute a cause of action. This demurrer was overruled by the court below, and this is one of the rulings now complained of by the defendants below, who are plaintiffs in error in this court. Whether the court below erred or not, in this ruling, is the principal question involved in this case, and we may as well consider the question now, and before passing to the other questions.

I. The principal question involved in this case is, whether there were in fact several causes of action improperly joined. If no cause of action was in fact stated in the petition, as the defendants below claim by the second ground of their demurrer, then of course several causes of action were not improperly joined. But supposing that there was a cause of action stated

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in the petition, and more than one: then were there several causes of action improperly joined? The question is not, whether the several causes of action actually stated in the petition were stated therein in an improper manner; for such a question cannot be raised on demurrer. But the real question is, whether the several causes of action actually stated in the petition can all be joined or united in one action. The petition in substance and effect, though not in these words, states we think about as follows: *First*, The plaintiff below, Albert G. Smith, is the owner and entitled to the immediate possession of the undivided-half of the west 55 feet of lots 8 and 9, in block 12, of the city of Atchison; but he is not in the possession thereof, and has not been in the possession thereof for several years; nor has he received any of the rents or profits thereof for several years. *Second*, George Scarborough, one of the defendants below, is the owner of the other undivided-half of said real property, (he having received his title thereto, by a deed for said undivided-half of said property from Thomas A. and Wm. L. Irvine, who were formerly tenants in common with the plaintiff. Scarborough was formerly in possession of said property, and received the entire rents and profits therefrom for several years, and has refused and still refuses to account to the plaintiff therefor, or for any part or portion thereof. But whether Scarborough is still in the possession of said real property, or of any part or portion thereof, is not very clear. If he is not in possession of any part or portion thereof, then Auld and Stebbins, the other defendants, are in the actual possession of the whole of it. *Third*, Auld and Stebbins are in the possession of at least an undivided-half of said property, and unless Scarborough is in possession of the other half they are in actual possession of the whole of it; and they have been receiving the rents and profits thereof for several years, but they refuse to account to the plaintiff for any part or portion thereof. They hold said property under a quitclaim deed from Wm. L. Irvine to themselves, and a tax deed from the county clerk of Atchison county to Wm. L. Irvine. Said quitclaim deed was executed subsequently, and

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said tax deed prior, to the execution of said deed for the undivided-half of said property from Thomas A. and Wm. L. Irvine to Scarborough. Said tax deed is void on its face, for reasons stated in the petition. Thomas A. and Wm. L. Irvine, the plaintiff's former co-tenants, are not parties to this action, but it would seem from the petition that even they had, long prior to their transferring any interest to Scarborough, ousted the plaintiff from the said premises, and thereafter received all the rents and profits therefrom, and have ever since refused to account to the plaintiff for any part or portion thereof, and Wm. L. Irvine (one of the plaintiff's co-tenants) took a tax deed to himself for the whole of said premises. The plaintiff closes his petition by asking for the relief heretofore stated.

We suppose the plaintiff sets forth in his petition three causes of action: first, an action in the nature of ejectment, under section 595 of the civil code, for the recovery of his undivided-half interest in said real property; second, an action to recover the value of his portion of the rents and profits of said real property; (see Gen. Stat. p. 541, § 22, p. 646, § 83, sub. 6;) and third, and an action for partition of said real property; (see Gen. Stat. 753 to 755, §§ 614 to 629.) We do not think

Ejectment; partition; quieting title; rents and profits.

that the plaintiff sets forth a cause of action to quiet title or possession, or to remove a cloud therefrom, for he does not show that he is in the possession of the property either actually or constructively—a necessary element in that kind of actions; but he does show that others are in the actual possession of the property, denying his right and title to the property, and enjoying the proceeds thereof. By the plaintiff's action of ejectment however, he can virtually quiet his title and possession, and remove said supposed cloud from his title, and have said tax deed declared void, provided that he recovers in the action; for such an action, where the plaintiff recovers, settles all questions between the plaintiff and defendant with respect to the property. The said causes of action for ejectment and for partition may virtually and in fact be only one cause of action. The plaintiff has

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a right in law to possess and enjoy some specific portion of said real property, and the defendants deprive him of this right. This would seem to constitute the elements of only one cause of action; and yet this includes both the causes of action, for ejectment, and for partition. That both of these causes of action in fact constitute only one enlarged cause of action, may be the view that the supreme court of Ohio took in the case of *Tabler v. Wiseman*, 2 Ohio St. 208, 211. In that case the court decided that, "In Ohio, a right of entry will entitle a party to the proceeding in partition, without the actual seisin required in some other states. If the tenant is not prevented by some intervening estate, from recovering the possession by an action at law, he will not be disabled to prosecute his writ of partition." Now if the two causes of action for ejectment and partition, when united, constitute only one enlarged cause of action, then it is entirely unnecessary to inquire in this case what causes of action may be united, or to inquire whether the cause of action for rents and profits may be united with this enlarged cause of action; for on the final determination of this action, in the court below, nothing was allowed the plaintiff for rents and profits. We shall however suppose, for the purposes of this action, that the two causes of action, for ejectment, and for partition, are two separate causes of action. Then can these two causes of action be united in one action? And can they both be united with another cause of action for rents and profits taken from the same real property? That the cause of action for ejectment, and that for the rents and profits, may be united in the same action, there can be no question. Section 83 of the code provides, that—

"The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal, or equitable, or both, where they all arise out of either one of the following classes: * * * *Sixth*, Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same." (Gen. Stat. 645, 646.)

The question however still remains, as to whether the cause

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of action for partition may be united with the other two causes of action. This depends upon another provision of said section 88 of the code. Said section provides, that—

“The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal, or equitable, or both, where they all arise out of either one of the following classes: *First*, The same transaction, or transactions connected with the same subject of action.”

Now whether these three causes of action may all be united in one action, or rather whether the cause of action for partition may be united with the other two causes of action, depends upon the meaning of the words, “causes of action,” “arise out of,” “transactions,” “connected with,” and “subject of action.” We shall not attempt to define

Elements of
actions.

these words any further than is necessary to apply them to this case. Now in this case we have three causes of action: *First*, for *ejectment*—the elements of which are as follows: the plaintiff has a right to the possession and enjoyment of said real property in common with his co-tenant or co-tenants—he one-half, and his co-tenant or co-tenants the other half—but the defendants deprive him of that right. *Second*, for *rents and profits*—the elements of which are as follows: the plaintiff has a right to the use and enjoyment of one-half of the rents and profits of said real property, but the defendants deprive him of that right. *Third*, for *partition*—the elements of which are as follows: the plaintiff has a right to the use and enjoyment, if he prefers it, to some specific moiety of said real property, the same to be set off to him in severalty, but the defendants deny and resist such right. These three causes of action are in fact all founded upon, or, in other words, “arise out of,” three classes of infringements upon one single right of the plaintiff. These infringements are the “transactions” out of which the plaintiff’s several causes of action arise, and are just such “transactions” as are contemplated in said section 88 of the code; and they consist merely

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of the acts of the defendants in contravention of the said right of the plaintiff. The word "transactions," Words and phrases defined. as used in said section, probably means, whatever may be done by one person which affects another's rights, and out of which a cause of action may arise. Said single right of the plaintiff in this action, consists in his right to use and enjoy, in the manner he chooses, his said interest in said real property, with all the proceeds and avails thereof. This right is the "subject of action" in this case. It is the basis and foundation of the whole action. Each of the several causes of action depends entirely for its support upon the soundness and validity of this right; and, unless such right can be maintained, this whole action must fail. The phrase, "subject of action," would probably ordinarily have a broader signification than we have given it. It would probably ordinarily mean, as to each cause of action, the entire "subject-matter of the action." But for the purposes of uniting various causes of action it cannot have a broader signification than we have given it. Of course, it does not include the several "transactions" "connected with" it, and out of which the several causes of action arise; for the "subject of action" (the "*same*" subject of action) must be common to all the several causes of action which are united, while the several "transactions" cannot be thus common. Each transaction or class of transactions must ordinarily belong to a different cause of action. And of course, the "*subject of action*" is not the "*cause of action*," or the cause of *any* action, or *any cause* of action. It is simply one of the elements of each of the several causes of action, uniting and binding them together in one action. The legislature did not commit the folly of enacting, that several "*causes of action*" may be united when they all arise out of transactions connected with the same "*cause of action*." But they enacted, that several "*causes of action*" may be united when they all arise out of transactions connected with the same "*subject of action*." Neither can the "subject of action" be the "object of the action." The "subject of action" must

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exist prior to the creation of the causes of action which are to be united; for the causes of action are such as "*arise out of*" transactions "*connected with*" the "subject of action." But the "object of action" is only brought into existence by the commencement of the action itself, long after both the "subject of action" and the "causes of action" have had an existence. The "object of the action" is the thing sought to be attained by the action. It is the remedy demanded, the relief prayed for, and is no part of the "subject of action," or the "cause of action." The "subject of action," then, not being the whole of the "subject-matter of the action," nor the "cause of action," nor the "object of the action," we think it is just what we have heretofore stated it to be. It is in this case, the original right of the plaintiff to enjoy his said property as he pleases. Now this right being the "subject of action," and the various infringements upon this right being the "transactions" out of which the plaintiff's several "causes of action" arose, it is clear that all of said "transactions" are "connected with the same subject of action;" and therefore, that all of the said several causes of action may be united in one action. This view of the law is also in accordance with the general policy of the code, which seems to be to have the whole subject-matter of any controversy settled in one action. (See *Page v. Webster*, 8 Mich. 273.) We would also refer to the following sections of the code as throwing some light upon the question now under consideration:

"Sec. 36. Any person may be made a defendant, who has, or claims, an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein."

"Sec. 41. The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of others, the court must order them to be brought in."

"Sec. 616. Creditors having a specific or general lien upon

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all or any portion of the property, [in an action for partition,] may be made parties."

"SEC. 617. The answers of the defendants [in an action for partition] must state, among other things, the amount and nature of their respective interests. They may also deny the interests of any of the plaintiffs, or any of the defendants."

"SEC. 629. The court shall have full power [in an action for partition] to make any order, not inconsistent with the provisions of this article, [relating to partition,] that may be necessary to make a just and equitable partition between the parties, and to secure their respective interests."

II. Does the petition state facts sufficient to constitute a cause of action for partition? It may be said, that, admitting that all the several causes of action set forth in the plaintiff's petition may be properly joined in one action, and that all the persons made parties to this action may properly be made parties thereto, still, can a plaintiff in partition, who is not in possession of the property sought to be divided, maintain the action? (This question does not properly arise here; but as it is in the case we shall consider it now.) Whether such action can be maintained, we think depends upon whether the plaintiff is entitled to the immediate possession of the property, or not, and whether his petition shows that he is so entitled to such immediate possession. If the plaintiff is entitled to the immediate possession of the property, we think he may maintain the action. (*Tabler v. Wiseman*, 2 Ohio St. 208, 211.) If the property were not held adversely to the plaintiff, we would think that there could scarcely be any doubt as to the plaintiff's right to maintain the action. But even where the property is held adversely to the plaintiff, we would still think that the plaintiff might maintain the action in connection with an action for the recovery of the property. And possibly both actions taken together, as heretofore suggested, are only one enlarged action, and that an action for partition. Our code of civil procedure authorizes the action for partition, but does not prescribe specifically who shall bring the action, or what kind of an estate

Partition, possession not necessary.

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or interest in the land the plaintiff shall have. It seems to leave the matter open for any person who has any interest in land in which others also have an interest, to commence the action. Up to 1868 the statute read, "that all joint tenants, tenants in common, and coparceners of any estate in lands, tenements, and hereditaments, within this state, may be compelled to make or suffer partition of such estate." (Comp. Laws, 740, §1.) But in 1868 this provision was repealed, and in lieu thereof it was enacted, that "when the object of the action is to effect a partition of *real property*, the petition must describe the property, and the respective interests of the owners thereof, if known." (Gen. Stat. 753, §614.) Now the words, "real property," as used in our statutes, "include lands, tenements, and hereditaments, and all rights thereto and interest therein, equitable as well as legal." (Gen. Stat. 999, §1, sub. 8.) Under our statutes the action of partition is legal as well as equitable, and the action of ejectment is equitable as well as legal. (As to ejectment being an equitable as well as legal action in this state, see *Simpson v. Boring*, 16 Kas. 248, 251.) The same court has jurisdiction of both actions, and the two actions may be united in the same proceeding, as we have heretofore seen. Therefore, whatever may have been the reason at one time for refusing to partition land where the plaintiff was not in the possession thereof, no such reason now exists; and when the reason for any particular rule ceases, so does the rule itself cease. This disposes of the material question in the case, and it is unnecessary to consider any of the other questions suggested by counsel.

The judgment of the court below will be affirmed.

BREWER, J., concurring.

HORTON, C. J., not sitting in the case.

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setting up five defenses, (and we here use the word "defense" in its broadest sense)—first, a general denial; second, a plea in abatement, that the plaintiff's claim had never been presented to the county board; third, a plea in bar, that the plaintiff's services were voluntary, and that no contract had ever been made therefor; fourth, a plea in abatement, that the plaintiff's claim had never been passed upon by the county board; fifth, a counter-claim for money paid to other counsel for services in the same cases in which plaintiff claims he was employed. The plaintiff filed a general denial in reply to this answer, and the case was tried upon the issues so joined.

The plaintiff made no objection to trying said defenses in abatement, nor to trying them at the same time with the other defenses. And probably no such objection would have been available even if made. (See civil code, §§ 94, and 265 to 267, Gen. Stat. 648, 680; but also, see *Rippstein v. St. L. Mu. Life Ins. Co.*, 57 Mo. 87.) The judgment, however, if it were rendered on the defenses in bar, would be a final determination of the subject-matter of the action; while if it were rendered on the defenses in abatement, it would not necessarily be final. The defendant objected to the introduction of any evidence under the plaintiff's bill of particulars, on the ground that the said bill did not state facts sufficient to constitute a cause of action. This objection was properly overruled. The bill of particulars not only stated one cause of action, but it in fact stated three causes of action—not very formally or elaborately, it is true, but still it stated them. It was not necessary that the bill of particulars should have stated that the several claims of the plaintiff had all been presented to the county board for allowance, and had been acted upon by them. Such a presentation of a claim constitutes no part of a plaintiff's cause of action. It is merely a part of the mode of procedure to enforce the causes of action already existing. And if the plaintiff fails to resort to this mode of procedure, the failure is merely matter

Bill of particulars; trial of issues.

Presenting claim to county board.

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for defense—merely matter for plea in abatement, to be set up by the defendant itself.

The defendant also objected to the introduction of any parol evidence tending to show any contract on the part of the county commissioners authorizing the plaintiff to attend to said suits. This objection was sustained, and in ^{1. Contract, proof; liability of counties.} this we think the court below erred. This evidence did not tend to contradict anything stated in the county commissioners' records, but simply to show facts which had actually occurred but had not been entered in the proper record-book of the commissioners' proceedings. Ordinarily, the records of the county commissioners furnish the best evidence of the acts and proceedings of such commissioners; but when such acts and proceedings amount in law to a contract, and this contract is for services, or property, or something of value to be furnished by the other party, and such contract has been executed by the other party, and the county has received the benefit of such services, or property, or thing of value, it would certainly not be proper to allow the county commissioners to then defeat an action for such services or property or thing of value, merely because the county commissioners and their clerk had failed to do their duty by making their records show all their acts and proceedings. This has virtually been so decided in the case of *Buller v. Comm'rs of Neosho Co.*, 15 Kas. 178. But we would now have to decide otherwise if we should now hold that the plaintiff in this action could not prove his said contract by any other evidence than ^{2. Evidence; commissioners' records.} by the county commissioners' records. We think he had a right to prove the same by parol evidence. While the statute (Gen Stat. 263, § 44,) requires that the county clerk shall record all the acts and proceedings of the county board, yet there is no statute that renders such acts or proceedings void if not recorded, and no statute that makes the records of the county board the only evidence of their acts and proceedings.

The defendant claims that the error, if error there was, in refusing to permit the plaintiff to prove his said contract by

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parol evidence, was wholly immaterial; and several reasons are urged for this claim, none of which however, are, in our opinion, sufficient. Even if a judgment should have been rendered in favor of the defendant on its pleas in abatement, still we think the error was material. For such a judgment would not be conclusive against the plaintiff's claim on its merits, while the judgment that was actually rendered would probably be conclusive. The judgment actually rendered was evidently rendered on the defendant's pleas in bar; and if allowed to stand would be conclusive and final against plaintiff's claims on their merits. We think however that the defendant was not entitled to a verdict even on its pleas in abatement. But we do not think it is necessary to discuss or decide this question now.

We suppose there can be no question as to the right of a person to sue a county on a claim for money where the county through its proper officers and agents refuses to pay such claim. *Leavenworth Co. v. Brewer*, 9 Kas. 307; *Armstrong v. Tama Co.*,

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county. 84 Iowa, 309. (But see *contra*, *Brown v. Otoe Co.*, 6 Neb., and 5 Cent. Law Jour. 5.) Our statutes make

counties *quasi* corporations, and provide that they may "sue and be sued." (Gen. Stat. 258, 254, §§ 1, 5, 6.) And there is no statute providing otherwise. When a county refuses to pay its debts, it may "be sued" like any other corporation, or person, and no statute can be found providing otherwise. The refusal of a county, through its agents, to pay a debt, is no more a judicial determination that the county does not owe the debt, than the refusal of any other corporation, or person, through its or his agents, to pay a debt is a judicial determination that it or he does not owe the debt. The doctrine that suits against counties for debts may be maintained, is almost everywhere upheld by the courts.

The judgment of the court below will be reversed, and the cause remanded for a new trial.

All the Justices concurring.

P. B. PLUMB v. JOHN BAY, as Sheriff, &c.

LIENS—JUDGMENT, AND MORTGAGE; Priority, how Determined; Injunction. B. obtained a judgment in the district court against S. Subsequently, S. being indebted to P. upon a promissory note, for which was deposited as collateral security a note and mortgage given by D. upon real estate, made an arrangement with P. and D. by which the note and mortgage of D. were to be surrendered, D. was to deed to S. certain other real estate, and S. was to execute a mortgage thereon to P. to secure whatever balance might be due P. This arrangement was carried into effect, though through some delay in executing papers, the mortgage to P. was not executed or recorded until five days after the deed from D. to S. had been recorded. After the record of the deed and mortgage, B. caused an execution to be issued on his judgment and levied on the property embraced in the deed and mortgage, and was proceeding to advertise and sell it as the unincumbered property of S., when P. brought this action to restrain such sale. S. had no property other than this real estate, and was insolvent. *Held*, That the mortgage to P. was given to secure the purchase-money of the property mortgaged; that such mortgage was a prior lien to the judgment; that such priority of lien was a fact not apparent on the record, but shown only by matters *dehors* the same; that B., as a judgment-creditor had a right to have the interest of the mortgagor in the real estate seized and sold to satisfy his judgment, and that the statute provided a mode for reaching and selling such interest, which mode was not the ordinary process of seizure and sale upon execution; that P., holding a lien, prior in fact, but whose priority was not apparent on the record, could maintain an action to restrain an attempted sale upon execution of the property as the absolute property of the judgment-debtor unincumbered by any lien.

Error from Lyon District Court.

ACTION by *Plumb*, against *Bay*, as sheriff, and *Strong* and *Burt*, to restrain a sale by the sheriff of certain real property. A temporary injunction was granted, and such order was afterward, on 30th December 1875, dissolved by the district judge. From the order dissolving the temporary injunction, plaintiff appeals.

Ruggles & Sterry, for plaintiff.

Randolph & Sedgwick, for defendants.

The opinion of the court was delivered by

BREWER, J.: In this case the defendants in error, defendants below, seem to concede the plaintiff's right to relief, but deny that he has pursued the proper remedy. The action was for an injunction, to restrain a sale upon execution. A temporary restraining order was granted, which upon motion was thereafter dissolved. The allegations of the petition were, in substance, that at the September term 1875 of the Lyon county district court, the defendants Strong and Burt recovered a money-judgment against one A. S. Smith for a large sum of money, which judgment is still unsatisfied; that thereafter, and on 18th October 1875, the said Smith was indebted to the Emporia National Bank, in about the sum of \$350, which was evidenced by Smith's note, and was secured by the pledge, as collateral security, of a note from R. P. Dixon, which last note was secured by a mortgage upon certain real estate in Lyon county; that on said 18th of October, an arrangement was entered into between the Emporia National Bank, (through its president, the plaintiff in error,) A. S. Smith, and R. P. Dixon, whereby in substance it was mutually agreed between the said several parties that Dixon should convey to the said Smith two lots in the city of Emporia, Lyon county, in consideration (principally) of the said Smith's procuring and surrendering up to the said Dixon the note and mortgage executed by Dixon, and assigned to the bank as collateral to Smith's note; that the bank, through its president, agreed to surrender up this Dixon note and mortgage to Smith, to enable him to procure the conveyance of these lots to himself, on condition that Smith should upon the conveyance of these lots to himself make a new note to the plaintiff in error for the use of the bank, and secure the same by a mortgage on the lots so to be conveyed to Smith; that this new note and mortgage were for the purpose of securing the indebtedness of Smith to the bank; that said agreement was carried out on said 18th of October, to the extent that the Dixon note and mortgage were surrendered to Dixon, and canceled on the records of the county, and Dixon conveyed the

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lots in Emporia to Smith; that on the 23d of said October the agreement was fully completed by Smith's making a new note for the balance due the bank, to plaintiff in error for the use of the bank, and securing the same by a mortgage on these two town lots conveyed by Dixon to Smith, which mortgage was on the same day properly recorded; that the surrender of the mortgage to Dixon by the bank, the conveyance of the lots to Smith by Dixon, and the mortgaging of the lots to plaintiff in error by Smith for the use of the bank, were all parts of one and the same transaction; that said Smith was and is insolvent; that on November 24th 1875, the defendants Strong and Burt caused an execution to be issued on their judgment against Smith, directed to the defendant, John Bay, as sheriff, who proceeded to levy the same upon the town lots so mortgaged to plaintiff for the use of the bank, and the said Bay threatened to sell and convey the same irrespective of plaintiff's mortgage, under and by virtue of said execution.

Upon these facts the order was made restraining the sale. That the mortgage to the plaintiff is to be deemed a mortgage for the purchase-money, seems to be settled by the case of *Nichols v. Overacker*, 16 Kas. 54; and that a mortgage for the purchase-money has preference over a prior judgment against the purchaser, is prescribed by statute. (Gen. Stat. 582, §4.) Such doubtless would be the rule independent of statute. *Curtis v. Root*, 20 Ill. 53; *Cake's Appeal*, 23 Penn. St. 186; *Freeman on Judgments*, 823. And we do not understand the learned counsel for defendant as disputing these propositions. But their claim is, that, conceding the priority of plaintiff's mortgage, his action should not have been to restrain the sale, but to determine the priority of liens, for the mortgagor's interest in the property was unquestionably subject to seizure and sale in satisfaction of the judgment, and that to restrain the sale absolutely, was to deprive Strong and Burt of their right to have this interest thus seized and sold. It is said, that parties might have been willing to give for the property the amount of Strong and Burt's judgment, over and above the mortgage; and what right has plaintiff to prevent them from thus obtain-

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ing satisfaction of their claim? In other words, if property is subject to two liens, and will sell for enough to pay both, what right has the holder of the prior lien to restrain absolutely a sale under the second lien? It seems to us, that this is a case which calls for the interference of a court of equity, and though the action suggested by defendants' counsel might have been entirely proper, we are inclined to hold the present also proper. Upon the face of the record, the judgment was the prior lien. Title passed to Smith on the 18th. At that time the judgment-lien attached. (*Babcock v. Jones*, 15 Kas. 296.) No mortgage was executed or recorded for five days thereafter, so that apparently the judgment was, by five days, a prior lien to the mortgage. The facts giving the mortgage priority existed only *dehors* the record. And if the property had been sold upon the judgment, and passed into the hands of *bona fide* purchasers, they would doubtless have taken the title discharged of the mortgage. It was necessary therefore for plaintiff to take some action to preserve his rights as a prior lien-holder. He applied for an order restraining an attempted sale upon execution. The judgment creditors were proceeding to sell the property as though there were no mortgage lien upon it, and as though the judgment-debtor had full title and interest. And if the record had disclosed the fact of the priority of the mortgage-lien, doubtless the mortgagee would have no right to interfere with such a sale, for the purchaser, if any one was willing to buy under those circumstances, would be chargeable with notice of the record, and would take the property subject to the mortgage. As the record did not disclose the priority of the mortgage, the mortgagee had a right to interfere and restrain an attempted sale of a full title and interest. The statute provides the manner of reaching and selling a mortgagor's interest in real property; Gen. Stat. p. 724, §481; p. 726, §§491, 492; *Kiser v. Sawyer*, 4 Kas. 503. Such a sale would preserve the mortgagee's rights, and at the same time give to the judgment-creditors the full benefit of the mortgagor's interest in the property in satisfaction of their judgment. Such a sale therefore the facts

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and the law would permit. Any other would work injustice and wrong.

We think therefore, that upon the showing made the plaintiff was entitled to a restraining order. While the order should be such as to restrain the sale as threatened, it should be so worded as to leave the judgment-creditors free to proceed under the sections cited to a sale of the mortgagor's interest in the property. The order of the district court will therefore be reversed, and the case remanded for further proceedings in accordance with the views herein expressed.

All the Justices concurring.

JOHN GIBBS V. ANNIE L. GIBBS.

1. TRIALS; WEIGHT OF EVIDENCE; *Reviewing Findings of Fact*. Where an action has been tried by a court without the intervention of a jury, and the court makes special findings, the findings of the court are as conclusive in the supreme court as the verdict of a jury; and where each finding of fact is sustained by some evidence, this court will not order the findings set aside, nor grant a new trial, although the evidence offered is of the most unsatisfactory character, and although thereon this court, if sitting as a *nisi prius* court, might reach different conclusions of fact. [*Wilson v. Fuller*, 9-176; *Hobson v. Ex'rs*, 16-388; *R. R. v. Kunkel*, 17-145, 146; *Sullenger v. Buck*, 22-28; *Humphrey v. Collins*, 23-549; *McCoy v. Whitehouse*, 30-433; *Hargrove v. Woolf*, 34-101, 107; *Winstead v. Standeford*, 21-272; *Greer v. Greer*, 24-106; *Wilson v. Lightbody*, 29-451; *Stout v. Townsend*, 32-425; *Buck v. Panabaker*, 32-469; *Marbourg v. Mfg. Co.*, 32-636.]
2. DIVORCE; "*Extreme Cruelty*;" *Conflicting Testimony*. Where the conduct of the husband is such, that the life or health of the wife may be endangered by his acts towards her, and upon the evidence in the case the district court has granted a decree of divorce, the supreme court will not, upon review of the proceedings, reverse such judgment because the evidence is contradictory and conflicting. [*Carpenter v. Carpenter*, 30-713, 744; *Avery v. Avery*, 33-1.]

Error from Wyandotte District Court.

ACTION for divorce, brought by *Annie L. Gibbs*. Trial, and judgment, at September Term 1874 of the district court. The findings and judgment are as follows:

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(*Title.*) * * * "The court doth find, from the plaintiff's petition, and from the evidence adduced, that said defendant John Gibbs and said plaintiff were duly married on the 3d of April 1871, as in said plaintiff's petition averred, and that said plaintiff is now, and has been for more than one year preceding the filing of her petition herein, a *bona fide* resident of the county of Wyandotte, and state of Kansas, and has in all respects demeaned herself toward said defendant as a true and loving wife should do—but that said defendant has been guilty of extreme cruelty toward the said plaintiff, as charged in her petition herein filed.

"It is thereupon adjudged and decreed by the court, that the marriage relation heretofore existing between the said parties be and the same is hereby set aside and wholly annulled, and the said parties wholly released from the obligations of the same. And it is further decreed that plaintiff be restored to her maiden name of Annie L. McCoy. And it is further ordered, adjudged, and decreed, that the said defendant do pay to the said plaintiff for her reasonable alimony, the sum of three thousand dollars, as follows, to-wit: one-fifth thereof, \$600, on or before the 25th of September 1875; and one-fifth, \$600, in one year from the date of the same; \$600 in two years; \$600 in three years, and \$600 in four years, from the date aforesaid, without interest; and that in case any of the said sums remain unpaid for ten days after the same becomes payable, an execution shall issue against said defendant in favor of said plaintiff to collect the same. It is further ordered and adjudged, that the defendant pay the costs of this suit, and that in default thereof execution issue therefor."

From this decree the defendant appeals, and brings the record here for review.

Cobb & Alden, for plaintiff in error.

Isaac B. Sharp, and *Stillings & Fenlon*, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: The error complained of in this case is, that the proofs do not sustain the finding of the district court. The writer of this opinion believes that the marriage contract is one that should be sundered only for causes that render its

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longer continuance destructive of social order, and never for reasons that merely make it an inconvenience to one of the parties. He agrees with the counsel for the plaintiff in error, that "marriage is a contract of so sacred a nature, so vital to our enlightened society, that parties once having entered into the relation, our courts ought not for light and transient reasons, for mere petulance and rudeness, allow the contract to be broken." If this case was here for trial *de novo*, instead of review, it may be that a decree of divorce upon all the evidence would be denied. But the many adjudications of this court, as to the effect of the findings of a trial court, and a judgment thereon, forbid any interference in the decision rendered in this cause. It is a well-established rule of this court, that the verdict of a jury will not be disturbed if there is any testimony to sustain it. It is also settled, that the findings of a court, upon the questions of fact in a case, are as conclusive in this court as the verdict of a jury. Where there is some testimony sustaining each finding, and the trial court has had the opportunity of hearing the testimony from the lips of the witnesses, and of seeing the persons who utter it, this court will not order the findings set aside, nor grant a new trial, although the evidence offered is unsatisfactory, and although thereon, this court, sitting as a trial court, might reach a different conclusion. We are certainly not in a condition to say, after a careful reading of all the testimony, that any finding is wholly unsupported by evidence; and we should be able so to do, to be justified in disturbing the findings or judgment of the court below. *Hobson v. Ogden's Executors*, 16 Kas. 388; *Carson v. Kerr*, 7 Kas. 268; *Ulrich v. Ulrich*, 8 Kas. 402; *Hyde v. Bledsoe*, 9 Kas. 399; *K. P. Rly. Co. v. Kunkel*, 17 Kas. 145. and the cases there cited.

It would occupy much space to review, or to incorporate herein all of the evidence produced upon the trial, and we will content ourselves with a brief mention of some of the facts testified to on the part of the defendant in error. Gibbs, the plaintiff in error, was a farmer in good circumstances, and was worth about \$20,000. His wife was a farmer's daughter,

of fair intelligence, and lived before the marriage in the same neighborhood, and near the residence and farm of plaintiff in error. At the time of the marriage, the wife was possessed of no property, and brought none to her husband from any source. They lived together as husband and wife, on the farm of plaintiff in error, in Wyandotte county, from 6th April 1871, to May 16th 1872, a little more than thirteen months. The house in which they lived was the home of Mr. Gibbs prior to the marriage. Plaintiff in error carried on an extensive farming and wood-chopping business, and employed from two to six men as help, making from four to eight or nine in the family, usually six or seven. The husband and wife had a quarrel about August 1871, and came near having a separation. The cause, as stated by Mrs. Gibbs, was, that he "worried her so." She called his conduct brutal. Her health was good when she married, but soon became very bad, from disease of the womb. One time, while thus diseased, Mrs. Gibbs refused to sleep with her husband, and he compelled her to do so, and used such language toward her at the time, that the witness hesitated to repeat it to the court. Mr. Gibbs accused his wife of being too intimate with hired men, and these accusations were sometimes made when they were alone, and sometimes in the presence of others. On one occasion Gibbs attempted to pull his wife out of bed, to dress, before a hired man in the room. He got her almost out, but she prevented him by catching hold of the bed-rail. Mrs. Gibbs did most of the work for the family in an open house full of cracks, and had to carry water for the house a long distance, about two hundred yards. A physician testified that if Mrs. Gibbs had continued to carry water, as she stated she had to do, it would have resulted in her death, considering the disease with which she was afflicted. When Mrs. Gibbs asked her husband to furnish a physician, he would argue the case, and would say he did not think she needed one, but would get better soon; and she had no physician to attend her while living with her husband. When any of the hired men helped around the house, Gibbs would say he did not hire men to

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fool around the house. On one occasion, when Mrs. Gibbs asked her husband to get wood for the house, he said, "Any old woman who could not pick up wood enough, ought to freeze to death." In the winter of 1871, Gibbs called his wife "a damned liar," and frequently used in her presence to others very obscene and indecent expressions. He said to her one day in the hearing of a witness, "that if she left him, he would follow her and boot her every step of the way back."

The above is a summary of the most important of the testimony; and we must hold it sufficient to sustain the finding of the trial court, that the plaintiff in error was guilty of extreme cruelty. All of the law-writers find it difficult to lay down any affirmative definition of legal cruelty. The courts have been equally cautious, considering it more safe not to travel much beyond negative descriptions. 1 Bishop on Mar. and Div. 715-717. In this class of cases, precedents do little more than inform the understanding, and assist the judgment. Perhaps more in this, than any other character of causes, the conclusion to be reached must largely depend upon its own peculiar circumstances, and the character, habits, and disposition of the parties. The authorities generally agree this far, that whatever may endanger the life or health of the party is legal cruelty. If therefore, the evidence in this case shows that the health of the wife was endangered by the acts and conduct of the husband, there was evidence sustaining the finding and judgment of the court. We have referred to the violent and indecent expressions of the plaintiff in error, to and in the presence of his wife, not for the purpose of intimating that these alone constitute cruelty, within any legal sense, but because the use of such language is important on the question of cruelty, and in determining the acts and habits of the husband. The frequent use of such expressions would induce any court more readily to believe evidence as to acts that might endanger the health of the wife. In view of her bad health, the accusations to his wife, in the presence of others, "that she was too intimate with the hired men," and the

act of personal violence committed upon her, in the attempt to pull her against her will, from the bed, to dress before a hired man, were acts in themselves of such character as to border strongly upon extreme cruelty. More serious however, were the acts and conduct of Gibbs in compelling his wife to sleep with him against her wishes, when she was diseased; in failing and refusing to furnish her suitable medical attendance, which he was amply able to provide; and in having her, at a sacrifice of her health, attend to so many household duties in a house of the character occupied by the family, and especially in rendering it necessary for her to bring water the long distance she was required. These various acts on the part of the husband might endanger the health of the wife. What would impair health, would endanger life. The acts would reasonably and fairly have this effect. Mrs. Gibbs stated that the conduct of her husband was such as to render her life intolerable. She continued to grow worse with her disease as long as she remained with her husband, and at the time she left, she was very severely afflicted with leucorrhœa, and ulceration of the womb, and also with displacement of that organ. She was so bad that the physician who examined her, and testified at the trial, stated that he did not think she ever would be well. During their cohabitation together, the husband well knew of the disease of his wife, and although he made for her some tea of herbs, got her some pills, and a bottle of medical discovery, yet he directly refused, as Mrs. Gibbs testified on her recall to the stand, to get a physician when she needed one and asked for one. It is cruelty in a husband, having the means, to withhold medical assistance in sickness, while he is able to provide it. *Evans v. Evans*, 1 Hag. Con. 35; 4 Eng. Eq. 810; *Dysart v. Dysart*, 1 Robertson, 106, 111; 1 Bishop on Mar. and Div. 735. Upon all the evidence of the defendant in error, and with our view of the law, we cannot now disturb the judgment. That the plaintiff in error denied fully all the allegations of the petition, both in his answer and upon the witness-stand, and

introduced numerous witnesses to sustain his side of the case, is unavailing here. "The due administration of the law demands, and in the long run the most satisfactory and the most complete justice will be secured by leaving, the settlement of questions of fact to the tribunals which see and hear the witnesses." *K. P. Rly. Co. v. Kunkel*, supra. The judgment will be affirmed.

All the Justices concurring.

W. T. WEEKS V. CHARLES MEDLER.

1. **CASE-MADE; Notice Required; Time for Settling; Duty of Judge.** Where the court below, after a case is disposed of in that court, gives three days to make a case for the supreme court, and the case is served on the opposite party on the day such order is allowed, and on the same day the case is presented to the judge for settlement, and is on that day (and on the very day on which it is served,) settled, certified, signed, attested, sealed, and filed with the papers in the case, without notice to or suggestion of amendments, or appearance by the opposite party, the pretended case-made is erroneously settled and signed, and the petition in error founded thereon presents no case for any review of the proceedings of the court below by the supreme court. [*R. R. v. Roach*, 18-592; *Russell v. Anthony*, 21-450; *Ingersoll v. Yates*, 21-90; *R. R. v. Wingfield*, 18-217; *Hunt v. Spencer*, 20-128; *Dodd v. Abram*, 27-69; *R. R. v. Fort Scott*, 15-435, 476; *Garvin v. Jennerson*, 20-371; *Shadwell v. Hamilton*, 24-267; *Ins. Co. v. Koons*, 26-215, 218; *R. R. v. Corser*, 31-705, 706.]
2. ——— The making and serving of a case, are the acts of the plaintiff in error; the suggestion of amendments, the act of the defendant in error; and the settling and signing of the case, the duty of the judge.
3. ——— The jurisdiction of the judge to settle the case is a special and limited jurisdiction, which only arises at the times, and under the circumstances, specified by law; and in the absence of any appearance of the opposite party, or a waiver of amendments, it should appear upon the face of the record, first, that the case had been duly served, and second, that amendments had been suggested, or waived, or, that the opposing party had notice of the time and place of the settling of the case.

Error from Neosho District Court.

MEDLER sued Weeks before a justice of the peace, counting on a promissory note given by Weeks to A. Sumner, and by

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Sumner indorsed to *Medler*. The case was appealed to the district court by *Weeks*, and was there tried at the December Term 1875. A verdict was returned for *Medler*. A motion for a new trial was overruled, and judgment given on the verdict, on the 4th of January 1876. From this date, the facts and proceedings will fully appear in the opinion, *infra*. *Weeks* brings the case here by petition in error. Defendant in error contends that there is no proper record attached to the petition in error.

L. Stillwell, for plaintiff in error.

C. F. Hutchings, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: This case is presented to this court on a petition in error, and what the clerk of the court below certifies as "a true and correct copy of a case-made." The counsel for defendant in error raises the question, that the case-made was not properly signed and settled as provided by law, as the defendant in error was deprived of opportunity to suggest amendments, and present the same as authorized by sec. 1, ch. 114, laws of 1871, page 274. The judgment in the case was rendered on January 4th 1876; and thereupon counsel for *Weeks* "asked for three days from said date to make a case for the supreme court, which for good cause shown, was by the court granted and allowed." On the same day, January 4th, the said counsel for *Weeks* presented to the court what purported to be a true and correct case-made, and asked the court to sign and allow the same; and the record shows the following action:

"Said case-made having been duly served on counsel for plaintiff (defendant in error in this court) for suggestion of amendments, and the court having carefully examined the same, and being satisfied that it is in all respects true and correct, does thereupon on the day last aforesaid, (January 4th 1876,) sign, settle, and allow the same, and orders that it be

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made a part of the record herein. Given under my hand in open court, at Erie, the day and year last above written.

"PETER BELL, *Judge*."

"Attest, JOHN D. COREY, *Clerk*."

And said "case-made" bears the indorsement, "Filed, Jan. 4th 1876." The record nowhere shows that the defendant in error was present in court when the case-made was presented, or signed, or that the defendant had examined the case, or offered or declined to suggest amendments thereto, or ever assented by himself or counsel to such case being settled or signed, or filed, or had any notice that such case-made would on that day be presented for settlement. Under these circumstances we cannot pass upon the questions presented in the brief of counsel for plaintiff in error, as the paper attached to the petition in error is no copy of the legal case-made, within the purview of the statute. In *M. K. & T. Rly. Co. v. City of Fort Scott*, 15 Kas. 485, it was held, that "the making and serving of a case, are the acts of the plaintiff in error; the suggestion of amendments, the act of the defendant in error; and the settling and signing of the case, the duty of the judge;" and that the statute relating to a case-made "may be read so as to mean that the three days in which to suggest amendments shall be three days after the actual service of the case, and not after the time given in which to serve;" but that the construction, "making the three days to commence upon the expiration of the time given for making and serving the case, while equally warranted by the language is more in harmony with the definitions and regularity of judicial proceedings, and therefore to be preferred." In this case, the defendant in error had neither the three days after the actual service of the case, nor three days after the time given in which to serve the same, to suggest amendments, as the case was asked for, allowed, served, settled, attested, sealed, signed, and filed, all on the same day. The defendant in error was thereby debarred of his rights provided in the section of law making provision for a case-made. The purpose of the plaintiff in error, asking and obtaining the leave of the court for three days' time in which to

make a case, in view of the facts presented, is to us inconceivable. But having attempted to make and serve a case, he had no right, without the consent or appearance of the defendant in error, and without notice to him, to so hasten the proceedings as to have the case settled, signed, and filed on the day of its service on the opposite party. This was in violation of all rules of construction of said section 1, ch. 114, laws of 1871. The case-made has no validity; and as a conclusion, the result is reached, that there is nothing before this court upon which it can properly act to review the alleged errors of the district court.

The fact that the record shows that the case-made was signed in open court, does not aid the legality of the paper filed, as the settling and signing of a case-made is an act of *the judge*, and not a part of the proceedings in a suit of *the court*, technically speaking; and in this case the paper was signed by the *judge*. It is true, as the less is included in the greater, the court has like power to settle a case-made; but as it may be settled by the *judge*, in court, or out of court, we cannot hold that a party is bound to be in attendance upon the court all the time from the service of a case-made till it is settled; nor can we presume that the settling and signing of a "case-made" by a judge, is with the consent or appearance of the opposite party, where there is nothing in the record affirmatively showing this fact. The mere signature of the district judge to the paper, a copy of which is presented to this court, as a case-made, is not a sufficient showing that the prerequisites to make the case a valid one, were complied with. The jurisdiction of the judge to settle the case, is a special and limited jurisdiction, which only arises at the times, and under the circumstances, specified by law; and in the absence of any appearance of the opposite party, or a waiver of amendments, it should appear from the record, that the case had been duly served, and that amendments had been suggested, or waived, or, that such opposing party had notice of the time and place of the settling of the case. In other words, the record should show affirmatively, the previous steps necessary to the settle-

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ment of the case, in the absence of the appearance, or waiver thereof, by the opposing party.

The counsel for plaintiff in error has sought to complete and perfect the case-made by filing in this court a certified copy of the amended bill of particulars, and also a certified copy of the judgment in the case; but these papers in no way cure the fatal defects in the original case-made, and give it no new vitality.

Counsel for plaintiff in error suggests, that if the case-made was improperly settled and signed, that the pleadings and bills of exceptions present a full record of the proceedings of the district court, and thereon, that this court can review such proceedings. Unfortunately for the suggestion, the only paper filed with the petition in error is what purports to be a certified copy of a case-made. There is not attached to any paper in the case in this court any certificate of the clerk of the district court showing that a transcript of the proceedings of the court below is here, and there is no certificate of the clerk stating that any copy of any bill of exceptions is filed in the case. The clerk certifies that we have a true and correct copy of the case-made, as the original is now of record at his office. This, and nothing more.

The case will therefore be dismissed.

All the Justices concurring.

N. H. WOOD V. METROPOLITAN BUILDING AND LOAN ASSOCIATION.

Error from Leavenworth District Court.

On the motion of the defendant in error, and in accordance with the decision just made in the case of *Weeks v. Medler*, the petition in error herein is dismissed.

All the Justices concurring.

GEORGE & BROS. v. MYERS & GREEN.

VERDICTS AND JUDGMENTS; When Sustained; Weight of Testimony, not a Subject for Review by Appellate Courts. Where the findings and verdict of a jury have been rendered upon oral and written testimony, and the evidence taken orally is conflicting, but there is clear, positive and unequivocal testimony sustaining the findings and verdict, and the district court has approved the same by refusing to set them aside and grant a new trial, the supreme court will not reverse the judgment of the district court and order a new trial, where the only ground therefor is, that the findings and the verdict are against the evidence. [*Fort Scott v. Williams*, 20-456; *Hobson v. Ogden*, 16-388, and cases there cited; *R. R. v. Kunkel*, 17-145, 146, 168; post, 432; *R. R. v. Young*, 19-492, 493; *Greer v. Greer*, 24-106; *R. R. v. Richardson*, 25-408, 409; *R. R. v. Keller*, 31-439; *Jarrett v. Apple*, 31-695; *Weir v. Ins. Co.*, 32-327; *Buck v. Panabaker*, 32-489; *R. R. v. Diehl*, 33-422; *Wood v. Dickinson*, 34-138.]

Error from Ellsworth District Court.

ACTION by *John J. Myers*, and *Wm. Green*, as partners, against *George & Bros.* Trial at the May Term 1874. Verdict for plaintiffs, and judgment on the verdict for \$9,758, and costs. The defendants bring the case here on error.

L. C. Slavens, for plaintiffs in error.

A. H. Case, for defendants in error.

The opinion of the court was delivered by

HORTON, C. J.: This suit was brought for a balance of \$8,509, and interest, claimed to be due for 1,629 head of cattle sold and delivered to plaintiffs in error by the defendants in error, in 1871. The defense was a general denial of the allegations contained in the petition. The counsel for plaintiffs in error now insists in argument, that upon trial there was no evidence of a completed and perfected sale, nor any testimony of a delivery of cattle. In fact however, the errors complained of are, that the verdict, and findings of fact by the jury, are against the evidence. We say that this is *the result* of the objections, because there is clear, positive, and unequivocal testimony supporting the verdict and each finding. Not only this.

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but the plaintiffs in the court below introduced evidence showing, after the claimed delivery of the cattle to Messrs. George & Bros., that M. B. George, one of the firm, in payment of the cattle accepted the following order:

KANSAS CITY, MO., DECEMBER 11th, 1871.

MESSRS. M. B. GEORGE & BROS.: You will pay to G. W. A. Latham, or order, the whole amount due us for cattle delivered about the 10th of November 1871, and charge the same to account.

MYERS & GREEN.

The amount due from George, \$10,509.

On the back of this order is the following indorsement: "Accepted—M. B. George & Bro.—December 11th 1871." And plaintiff also introduced evidence, that in the spring of 1872, the George Brothers having failed to pay the order, the same was returned to Messrs. Myers & Green by said Latham, and that about April 1st 1872, J. J. Myers, of said firm of Myers & Green, sent an order to said George & Bros. at Sequin, Texas, for them to send him all the money that they could spare in payment of the money due on the cattle, and on this order the said George & Bros. sent two thousand dollars, and this was indorsed on the said order given to Latham as follows: "*April 6th 1872, received on the within, two thousand dollars in currency.*—MYERS & GREEN." Evidence was also introduced by Messrs. Myers & Green, that on said 11th of December 1871, said M. B. George admitted, in the presence of said Latham, to William Green, of Myers & Green, that over ten thousand dollars were due to M. & G. from George & Bros. for the said cattle, and that the case was continued in the court below over the October term 1873, by consent of Myers & Green, on the promise of said M. B. George that at the next term of the court he would confess judgment in the case for the amount of the claim. A considerable portion of the brief of the plaintiffs in error is filled with a discussion of the question, that there was no completed sale, because the cattle were not identified at the time of the purported sale, and that then the defendants in error did not have in their possession the cattle claimed to be sold. But all this argument is useless, in

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view of the evidence of the delivery and acceptance of the cattle. If the defendants in error had not a hoof of the cattle at the date of the contract, still, if there was afterward a delivery and acceptance of the cattle sued for, as testified to, the defendants in error were entitled to recover.

Some point is made by counsel, that as Messrs. Ferguson, Slavens & Co., of Kansas City, had made an agreement with Myers & Green to pack on commission these cattle, and had advanced thereon over ten dollars a head, and in all \$18,000, and as the cattle were shipped from Ellsworth, Kansas, to said F., S. & Co., the said George & Bros. neither saw, nor received them. All of this is explained by the testimony produced by Myers & Green. It was shown that George & Bros. were in the fall of 1871 having business transactions also with Messrs. F. S. & Co., and that George Bros. agreed to pay and satisfy said advances of Messrs. F. S. & Co., and the balance of the money was to be paid to Myers & Green; and that at the direction of M. B. George the cattle were delivered on the cars at Ellsworth, and shipped to Kansas City to Messrs. F. S. & Co. Much of the evidence on the trial was conflicting, but this court has time and again held that it will not reverse a case of this kind. "The case comes clearly within the rule so often declared by this court, that where there is clear and positive testimony sustaining every essential fact, and the verdict has received the approval of the trial court, this court will not interfere. In other words, in cases brought here on error from a trial upon oral testimony, this court is not a trier of questions of fact." *K. P. Rly. Co. v. Kunkel*, 17 Kas. 145, 168, and the numerous authorities there cited. The explanation of Messrs. George & Bros. as to the acceptance of the order of December 11th 1871, payable to said Latham, and the payment of the \$2,000 in April 1872, is not satisfactory in support of the theory that there was no delivery of the cattle; and we cannot say upon the evidence that the preponderance was in favor of the plaintiffs in error.

The judgment of the court below will be affirmed.

All the Justices concurring.

JOHN SEATON v. G. A. SCOVILL *et al.*

1. **PROMISSORY NOTE; Negotiability; Stipulation to Pay Attorney-Fees.** A note otherwise negotiable, is not rendered non-negotiable by the addition of a stipulation to pay costs of collecting, including reasonable attorney-fees, if suit be instituted thereon. [*Bliss v. Burnes, McC.*, 91; *Blood v. Northrup*, 1-35; *Pemberton v. Hoosier*, 1-108; *Dudley v. Reynolds*, 1-285; *Rose v. Madden*, 1-445; *Jones v. Eisler*, 3-134; *Palmer v. Hummer*, 10-484; *Schnier v. Fay*, 12-184; *Parker v. Plimell*, 23-403; *Killam v. Schoeps*, 26-310, 312.]
2. ——— Such a stipulation does not affect the certainty of amount, requisite in negotiable paper, due at maturity. It only creates an uncertainty in the amount recoverable, in case of non-payment, after maturity, and after the element of negotiability has ceased, and in event of suit being brought on the note.
3. **INDORSERS; PROTEST; DILIGENCE; Proof of Notice of Protest.** It is incumbent upon a party seeking to charge an indorser, to prove a legal notice; but this like any other question of fact, is to be settled upon the testimony as it is given, and need not be proved beyond the possibility of mistake. [*Couch v. Sherrill*, 17-622, 624; *Bank v. Ober*, 31-599, 600, 607; *Swayze v. Britton*, 17-625; *Selover v. Snively*, 24-672.]
4. ——— **Service of Notice; Time.** Where the holder, and party to whom notice is to be given, reside at different places, it is generally sufficient if notice is sent by the mail of the day next succeeding the day of dishonor.
5. ——— **To Whom Given.** The holder of dishonored paper may give notice directly to all prior parties, or only to his immediate predecessor on the paper. In the latter case, such predecessor has the same time to give notice to his indorser as though he himself had been the holder and had the paper protested.
6. ——— **Banker, or Agent, as Holder for Collection.** A banker or agent to whom paper has been transmitted for the purpose of obtaining acceptance, or payment, is, so far as the question of notice is concerned, to be considered as though he were the real holder, and his principal a prior indorser. [*Bank v. Ober*, 31-599, 600, 607.]
7. ——— A note payable in Topeka was, on August 5th, legally protested there, and notice thereof forwarded by mail, by the bankers who held the note for collection, to the owners at Fort Scott. Notice when received was sent by them by mail to the indorser at Atchison. It took a letter two days to go by mail from Topeka to Fort Scott, and two days to go in like manner from Fort Scott to Atchison. The indorser received the notice on August 10th. The 9th was Sunday. *Held*, That a finding that legal notice had been given must be sustained, although it appeared that there was a daily mail between Topeka and Atchison, and that all parties except the notary knew where the indorser resided, and although it was not shown at what exact hour the notice was deposited

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in the post-office at Topeka, or at Fort Scott, or received by the owners, or by the indorser, or what hours the mail left Topeka, or Fort Scott, or reached Fort Scott, or Atchison.

8. PLEADING; *Allegations of Petition, Not Challenged by Motion, or Answer.* Where a petition alleges that plaintiffs are the assignees in bankruptcy of a corporation, and have full authority to prosecute and maintain the action, that the defendant indorsed the note sued on to them as such assigns, (giving copy of the indorsement,) and that they are now the holders and owners thereof, and these allegations are not challenged by motion or answer, *held*, that a judgment in favor of the plaintiffs would not be reversed because the petition failed to allege any indebtedness of the indorser to the corporation, or any special authority from the bankrupt court to the assignees to discount notes.

Error from Atchison District Court.

ACTION by G. A. Scovill and T. H. Annable, as assignees of the Fort Scott Coal and Mining Company, against the Topeka Rolling-Mill Company and John Seaton. The action was upon a promissory note, a copy of which is given in the opinion, *infra*. The Rolling-Mill Company was sued as maker, and Seaton as indorser. Trial at the December Term 1874 of the district court. Judgment in favor of plaintiffs against both defendants for \$291.50, and costs. Seaton appeals and brings the case here. The errors assigned are stated in the opinion. Elaborate briefs were filed, but as the points submitted and authorities cited are fully stated in the opinion, the briefs are omitted. [After the subjoined opinion was filed, a motion for a rehearing was made and argued, and overruled.]

D. Martin, for plaintiff in error.

Everest & Waggener, for defendants in error.

The opinion of the court was delivered by

BREWER, J.: This was an action upon a promissory note, of which the following is a copy:

\$250.00. TOPEKA, KANSAS, JUNE 24th, 1874.

Thirty-nine days after date, we promise to pay to the order of John Seaton, at the Topeka Bank and Savings Institution, Topeka, Kansas, two hundred and fifty dollars with interest at twelve per cent. per annum after due until paid. Also, costs of

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collecting, including reasonable attorney-fees, if suit be instituted on this note. Value received.

TOPEKA ROLLING-MILL COMPANY,
By R. D. Coldren, Prest.

And the first question presented is, whether this is a negotiable note. And the claim is, that because of the stipulation for payment of costs of collection, and attorney-fees, the amount due on the paper is uncertain, while both the common law and the statute define negotiable paper as drawn for a "sum or sums of money certain." Story on Prom.

1. Rule as to negotiability.

Notes, § 1; Gen. Stat., § 1, p. 114. This claim cannot be sustained. The amount due at the maturity of the paper, is certain; and the only uncertainty is in the amount which shall be collectible in case the maker defaults at the maturity of the paper in his promise to pay, and the holder is driven to the necessity of instituting a suit for collection, and then only as to the expenses of such collection. In the case of *Sperry v. Harr*, 32 Iowa, 184, the stipulation in the note was: "If not paid when due, and suit is brought thereon, I hereby agree to pay collection and attorney-fees therefor;" and the note was held to be negotiable. The court says in the opinion: "The agreement for the payment of attorney-fees in no sense increased the amount of money which was payable

2. Stipulations, in notes.

when the note fell due, and we are unable to see that it rendered that amount uncertain in the least degree. It simply imposed an additional liability in case suit should be brought; and such liability did not become absolute until an action was instituted. This agreement relates rather to the remedy upon the note, if a legal remedy be pursued to enforce its collection, than to the sum which the maker is bound to pay. It is not different in character from a cognovit, which when attached to promissory notes does not destroy their negotiability." The same proposition is affirmed in *Garr v. Louisville Bank Co.*, 11 Bush, (Ky.) 180, in which the court declares, that "the reason for the rule, that the amount to be paid must be fixed and certain, is, that the paper is to become a substitute for money; and this it cannot be, unless it can be ascer-

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tained from it exactly how much money it represents. As long therefore as it remains a substitute for money, the amount which it entitles the holder to demand must be fixed and certain; but when it is past due, it ceases to have that peculiar quality denominated negotiability, or to perform the office of money; and hence, anything which only renders its amount uncertain after it has ceased to be a substitute for money, but which in nowise affected it until after it had performed its office, cannot prevent its becoming negotiable paper." *Dietrich v. Baylie*, 23 La. An. 767; *Stoneman v. Pyle*, 35 Ind. 103. That it is no longer an open question in the latter state, is evident from the cases of *Wyant v. Pottorf*, 37 Ind. 512, and *Walker v. Woolen*, vol. 4 Cent. Law J. 248. See also *Dinsmore v. Duncan*, 57 N. Y. 573, and *Zimmerman v. Anderson*, 67 Penn. St. 421—in which last case a stipulation waiving appraisement, stay of execution, etc., was held not to affect the negotiability of the paper. *Bradley v. Lill*, 4 Bissell, 473, in which the promise was to pay a certain amount with exchange, and the amount of the exchange not stated, and still it was held to be negotiable. And on same point see *Smith v. Kendall*, 9 Mich. 241; *Johnson v. Frisbie*, 15 Mich. 285; *Leggett v. Jones*, 10 Wis. 34; *Gutacap v. Woolwise*, 2 M'Lean, 581. (Contra, *First National Bank v. Gray*, 63 Mo. 33.). It seems to us therefore a just conclusion, that paper otherwise negotiable is not rendered non-negotiable by a stipulation for the payment of costs of collection, including attorney-fees, in case suit is brought thereon. [*Kellam v. Schoeps*, 26 Kas. 312, 313.]

A second proposition of plaintiff in error is, that if the note be considered negotiable, notice of nonpayment was not given within a reasonable time, so as to charge the indorser. The evidence upon this point showed, that the protest was made August 5th, and that the said John Seaton did not receive notice thereof until the 10th; that said John Seaton resided in Atchison, Kansas, within the knowledge of all the parties except the notary at Topeka making protest, and was in business there, and attended the post-office two or three times every day; that Atchison was and is the

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terminus of the Atchison, Topeka & Santa Fé railroad, a daily mail-route, and is also the terminus of the Missouri Pacific (or Atlantic & Pacific) railroad, a daily mail-route; that Topeka is situated on said Atchison, Topeka & Santa Fé railroad, fifty miles from Atchison; that the notice to said John Seaton was transmitted in the same envelope with the certificate of protest to the plaintiffs, at Fort Scott, where they resided, and said notice was sent by the plaintiffs to the said John Seaton, and that it took two days for a letter to go by mail from Topeka to Fort Scott, and two days from Fort Scott to Atchison, and that said note was placed in a Topeka bank, at Topeka, for collection and protest if not paid when due, and was in said bank when so due, and after protest was returned to plaintiffs at Fort Scott. No question is made upon the protest, providing the note was negotiable.

Upon this we remark, that it rests upon the party seeking to charge an indorser to prove a legal notice. No presumptions arise in his favor. It is a question of fact, and the *onus probandi* is upon him. But like any other question of fact, it is to be settled upon the testimony as it is given, and need not be proved beyond the possibility of mistake. A reasonable construction must be given to the testimony, and reasonable inferences may be drawn from it. And if from this it appears that legal notice was given, it will be sufficient, although it at the same time appears that further testimony more full, explicit, and definite might possibly show an unwarrantable delay on the part of some one of the various parties. We are not to presume facts that are not proven, and we may rest upon the testimony given, and any reasonable inferences to be drawn from it. We remark again, that where the holder and the party to whom notice is to be given reside at different places, it is generally sufficient if notice is sent by the mail of the day next succeeding the day of dishonor. *Williams v. Smith*, 2 B. & Ald. 501; *Bray v. Haduen*, 5 Maule & Selwyn, 68; *Bank of Alexandria v. Swan*, 9 Peters, 88. It is sometimes said that it must go by the next practicable mail;

⁴ When notice
to be served.

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and on the other hand, where the mail of the next succeeding day starts at an unseasonable hour, it will be sufficient if it is deposited in the post-office at any time on that day, so as to be ready for the mail of the succeeding day. Our statute says, "within a reasonable time." (Gen. Stat. p. 115, § 7.) What is "a reasonable time," is generally a question of law for the courts. Byles on Bills, 222, and cases in note; 2 Greenl. Evidence, § 186. We are not in this case advised as to the hour of the departure of the mail from Topeka for Fort Scott, or from Fort Scott for Atchison; and so no question of the seasonableness or unseasonableness of such hour is before us. We can then only fall back upon the general rule, that the notice must be deposited in the post-office in time for the mail of the next succeeding day. In other words, the protest having been on the 5th, the notice must have left Topeka in the mail of the 6th, or at least been deposited in the post-office in time for such mail. Again, the holder of protested paper is not obliged

to give notice to all prior parties. He may simply give notice to his immediate predecessor on the paper, and then such predecessor has the same time in which to notify his predecessor, and so on. So that where there are many parties to dishonored paper, the first indorser may not receive notice of the dishonor for weeks, or months, thereafter, and that too although all the parties reside in the same vicinity. In the case before us, it is entirely immaterial whether the notary did or did not know of the residence of John Seaton; or whether said Seaton resided nearer to Topeka than Fort Scott, the residence of plaintiffs. *Eagle Bank v. Hathaway*, 5 Metcalf, 212; *Triplett v. Hunt*, 3 Dana, 128; *Farmer v. Rand*, 4 Shep. 453; 3 Kent's Comm. 106, and note; 2 Greenl. on Ev., § 187; 1 Parsons on Notes and Bills, 513. And again, a banker or agent to whom the paper has been transmitted for the purpose of obtaining acceptance or payment, is, so far as the question of notice is concerned, to be considered as though he were the real holder, and his principal a prior indorser. He may notify only his

a. Notice, by holder, and intermediate indorser.

a. Banker, and agent.

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principal, and such principal has the same amount of time in which to give notice to prior parties. 1 Am. Lead. Cases, side page 394; 2 Greenl. Ev., § 187*a*; Byles on Bills, 224.

Now applying these principles to the case, and it was proper for the notary at Topeka to forward notices to plaintiffs at Fort Scott, without mailing any directly to Seaton, at Atchison, and whether he did or did not know of Seaton's place of residence. Notice leaving Topeka by the mail of the 6th,

7. Application of rules. would reach Fort Scott on the 7th; leaving Fort Scott on the 8th, would reach Atchison on the 9th.

It was received by Seaton on the 10th. But the 9th was Sunday, so that he received it on the very day that he should have received it, going by the first mail, and in the usual time. It is true, that the testimony fails to disclose the exact hours at which the notice was mailed at Topeka, or at Fort Scott; or of the departure of the mails from those places; or of the arrival of the mails at Fort Scott, or Atchison; or the receipt of the notice by plaintiffs, or Seaton. And if all these facts were disclosed, it might possibly appear that there was either on the part of the notary at Topeka, or of the plaintiffs at Fort Scott, such a delay in forwarding notice as would discharge the indorser. But upon the testimony as it stands, we think there was no error in finding that due diligence had been used in giving notice. 1 Parsons on Notes and Bills, 517, and cases cited in note.

A final proposition of the learned counsel for plaintiff in error is, that "neither the pleadings nor the proofs show any right of the plaintiffs below to recover against Mr. Seaton."

The petition alleges that plaintiffs are the assignees in bankruptcy of the Fort Scott Coal & Mining Company;

a. Pleading; when sufficient. that they have full power and authority to prosecute this action, and that John Seaton indorsed and transferred to plaintiffs said note, (giving copy of indorsement,) and that they are now the holders and owners thereof. No denial is made of these allegations. It is said by counsel, that it does not appear that Seaton was ever indebted to the coal

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company, and that assignees in bankruptcy have no general power or authority to discount notes, etc., in behalf of their estates, and that no special authority from the bankrupt court is alleged. It is unnecessary to inquire whether the petition could not have been attacked by motion, or the authority of plaintiffs challenged by answer. Nothing of the kind was attempted. The defendant was content to go into trial upon the admission (by failure to deny) that plaintiffs were the owners and holders of the paper, that they acquired title to it by indorsement to them, and that they had full authority to prosecute and maintain this action. As they could not be the owners and holders without having authority to receive title by the indorsement, and as it is not questioned but that under some circumstances they could legally take title to such paper, we think the general allegations of the petition, unchallenged by motion, answer, or evidence, are sufficient to sustain the judgment.

Upon the whole record we see no error, and the judgment will be affirmed.

VALENTINE, J., concurring

HORTON, C. J., not sitting in the case.

COMM'RS OF SALINE COUNTY V. J. E. YOUNG.

1. PLEADING; *Allegation of "Title;" Question of Fact, and Not of Law.* Whether the title to government land has so passed from the government that the land has become taxable, may be a question of fact, and not merely a question of law; and whether the title has or has not so passed, may be alleged, in a pleading, as a fact. [*Leonard v. Ross*, 23-300.]
2. ILLEGAL TAX-SALE; *Liability of County to Refund; Statute of Limitations.* Where land has been taxed for several years, and was sold to the county for the taxes of the first year, and the other taxes were charged up against the land, and Y. afterward purchased from the county the tax-sale certificate, and afterward the county clerk discovers that the land had belonged all the time to the United States, and was therefore not

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taxable, and refuses to convey said land to Y. for said taxes; and the county treasurer then, upon an offer to return the tax certificate, refuses to pay back to Y. the amount paid therefor by Y., with interest, etc., held, that the statute which provides that "no account against the county shall be allowed, unless presented within two years after the same accrued," does not apply to the claim of Y. for the moneys due him on return of his tax-certificate, and hence does not bar said claim of Y. in two years. [*Richards v. Comm'rs*, 28-326, 332, 334; *Comm'rs v. Land Co.*, 23-201.]

Error from Saline District Court.

ACTION by *Young* to recover from the county the amount paid by him for certain illegal tax certificates, and subsequent taxes on the lands illegally assessed and sold. The facts fully appear in the opinion, *infra*. The district court, at the November Term 1875, gave judgment in favor of *Young*, and the *Board of County Commissioners* brings the case here.

John Foster, for plaintiff in error.

J. G. Mohler, and *C. A. Hiller*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: On the 11th of August 1875, the defendant in error, J. E. Young, who was plaintiff below, commenced this action against the board of county commissioners of Saline county. He set forth in his petition thirteen separate causes of action; but as the legal questions involved in each cause of action are precisely the same as those involved in the

Statement of
facts. others, it will be necessary to state the facts set forth in only one of such causes of action. The

first cause of action sets forth substantially the following facts: In 1868 the proper officers of Saline county levied taxes on the northeast quarter of section 1, township 14 south, of range 5 west. On 28th June 1869, said land was sold to said county for said taxes, and afterward the subsequent taxes for subsequent years were charged up against said land. On 28th June 1872, the plaintiff, for the purpose of purchasing the tax title to said land, paid into the treasury of said county \$83.08, said sum being equal to the cost of redemption of said

land at that time. The county treasurer then issued to the plaintiff the proper certificate, and the county clerk duly assigned the same to the plaintiff. On the 1st of April 1873 the county clerk discovered that said land belonged to the United States, and that it was therefore exempt from taxation, and therefore that it ought not to be conveyed to the plaintiff for said taxes; and the county clerk refused to convey the same. The plaintiff then offered to return his said tax certificate to the county treasurer, and demanded that the treasurer should refund to him the amount he paid therefor, with interest, etc., but the treasurer refused. There are some other facts stated in the petition, but we do not think it is necessary to mention them. The defendant below demurred to this petition, on the ground that neither it nor any count thereof stated facts sufficient to constitute a cause of action. The court below overruled the demurrer, and the defendant excepted. The defendant, who is plaintiff in error, raises only two questions in this court: First, the plaintiff in error claims that the plaintiff below was bound to know that said land belonged to the United States; that if he did not know the same, and supposed otherwise, it was a mistake of law, and not a mistake of fact; and therefore, as he paid said money merely upon a mistake of law he cannot now recover the same back. Second, the plaintiff in error also claims that whatever action the plaintiff below may have had, the same was barred by a certain statute of limitations before this action was commenced.

The plaintiff in error might have raised still other questions; but it has not done so, and as these are the only ones it has raised in this court, these are the only ones which we shall consider or decide. We shall presume that the plaintiff in error waives all other questions.

Was the plaintiff below bound to know that said land belonged to the United States, and therefore that it was not taxable? And is his claim for a return of his money barred by any statute of limitations? We must answer both of these questions in the negative.

I. It is not an uncommon thing for land to be sold or

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granted by the United States so as to become taxable long before any public record shows it to be taxable. This has been preëminently so with respect to a great deal of land in Saline county. (*K. P. Rly. Co. v. Culp*, 9 Kas. 88; *Railway*

1. Mistakes of fact, and of law.

Co. v. Prescott, 16 Wallace, 608; *Railway Co. v. Mc-*

Shane, 22 Wallace, 444.) Such land was granted to the Leavenworth, Pawnee & Western Railroad Company, now Kansas Pacific Railway Company, upon certain conditions. (12 U. S. Stat. at Large, 489, et seq.; 13 U. S. Stat. at Large, 856, et seq.) When these conditions were all performed, the land became the property of the railroad, and not till then. But some of these conditions were such that no public record would show when they were performed. For instance, one of these conditions was that the railroad company should complete its road through these lands before any title should pass. Now as soon as this and the other conditions were performed, the land would belong to the railroad company so as to be taxable, although no record would then show such completion, and although no patent would then have been issued. (See cases above cited.) Indeed, it never was necessary that the patent for land granted by the United States should first be issued before the land could become taxable. (*McMahon v. Welsh*, 11 Kas. 280, 291, 292; *Gulf Rld. Co. v. Morris*, 13 Kas. 802.) All that was ever necessary was, that the grantee should be entitled to receive the patent. Now the completion of a railroad is certainly more a question of fact, than of law; and no person is bound as a matter of law to take notice of its completion. Therefore no person was bound as a matter of law to take notice of the completion of said railroad through Saline county, or rather through certain lands situated in Saline county. And therefore no one can be presumed to have known when said lands became taxable. But is any one, in any case, bound to know as a matter of law when the title to land so passes from the government that the land becomes taxable? As we have before said, the land is taxable as soon as some person is entitled to receive a patent therefor; but the patent may not be issued for months, or even years

after such person is entitled to receive it. And if every person is bound to know when land, sold or granted by the government, becomes taxable, he is also bound to know when all the facts transpire which give to any person a right to receive a patent for such land from the government. Can it be that the law requires any such thing? And even when the patent is issued, is any person except the one to whom it is issued bound to know that fact? It is true, the patent is recorded in Washington; but is any person bound to take notice of that record? We do not think that is necessary to answer these questions in this case. But passing on, is it necessary even, that the error or mistake in supposing said land to be taxable should be one of fact, instead of one of law? The plaintiff in this case claims under section 120 of the tax law of 1868, (Gen. Stat. 1058,) and not under any general rules of law or equity. That section provides among other things as follows:

"And if after any certificate shall have been granted upon such sale, [a tax sale,] the county clerk shall discover that, for any error or irregularity, such land ought not to be conveyed, he shall not convey the same; and the county treasurer shall, on the return of the tax certificate, refund the amount paid therefor on such sale, and all subsequent taxes and charges paid thereon by the purchaser or his assigns, out of the county treasury, with interest on the whole amount at the rate of ten per cent. per annum."

Now whether the said "error or irregularity" to be "discovered" by the county clerk, must necessarily be one of fact, or whether it may not be one of either law or fact, we do not think it is necessary to decide in this case. For the "error or irregularity" actually "discovered" by the county clerk in this case was probably and presumably one of fact. It consisted in supposing that the land did not belong to the United States, and that it was taxable, while in fact the land did belong to the United States, and was not taxable. Such an "error or irregularity" is sometimes, as we have already seen, a mistake of fact. Probably it generally is, and possibly it always is. It has already been decided by this court, that an

tion of the Court.

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was commenced August 11th 1875. Therefore, the claim of the plaintiff is not barred by said statute. It is not claimed that the plaintiff's claim is barred by any other statute of limitation.

The order of the court below overruling said demurrer will be affirmed.

All the Justices concurring.

ISAAC OWENS V. HASTINGS & SAXTON.

CONDITIONAL SALE; *No Title Passes, Until Performance.* H. & S., owning ties along the line of road of the St. Jos. & Denver City Railroad Company, made a contract with said company by which the latter was authorized to take as many of said ties as it needed for the repair of its track, in which contract it was stipulated that the ties were to be counted and accounted for after they were placed under the track, and that the title should not pass to the company until after they were under the rail. *Held*, That such stipulation, as to the time of passing the title, was valid, and that no creditor of the company, having notice of such contract, could, prior to such time, acquire any title to such ties as against H. & S. by a levy and sale on an execution against such company, although the employes of the company had taken possession of the ties and moved them to different places along the line of the road.

Error from Doniphan District Court.

REPLEVIN for 428 railroad ties, bought by *H. D. Hastings* and *Alba M. Saxton*, as partners, against *Isaac Owens*. Trial at September Term 1875 of the district court, and judgment in favor of plaintiffs. *Owens* brings the case here. The facts are stated in the opinion.

Albert Perry, for plaintiff in error, contended that, when the railroad company, by its agents, took possession of the ties, (under the contract set out in the opinion,) the title passed to said company, and the ties could be taken on execution by its

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creditors, as at such time there was a complete delivery and separation from the ties of Hastings & Saxton. The sale was not conditional. No provision was made in the contract that Hastings & Saxton might reclaim the ties if not paid for. This case is to be distinguished from the rule laid down in *Sumner v. McFarlan*, 15 Kas. 600, and *Hallowell v. Milne*, 16 Kas. 65. Moreover, H. & S. provided in their contract that the ties, as a *chattel*, should be (in the hands of the railroad company) utterly destroyed—that they should be put under the track—attached to the realty.

Doniphan & Reed, and *W. W. Guthrie*, for defendants in error, contended that it was competent for the parties to make a contract for the conditional sale of the ties, and that a conditional vendor can reclaim his property even in the hands of innocent purchasers at execution sales, or innocent purchasers for value. 36 Mo. 479; 44 Mo. 326, 412; 19 Me. 154; 3 Cush. 257; 4 Cush. 195; 1 Pars. Contr. 537; Story on Sales, § 313.

The opinion of the court was delivered by

BREWER, J.: This was an action of replevin brought by Hastings & Saxton against Owens, for a lot of railroad ties. Owens had theretofore recovered judgment in a justice's court against the St. Joseph & Denver City Railroad Company, and on the supposition that these ties were the property of said railroad company he had caused them to be levied upon and sold to satisfy his judgment, and Owens at such sale became the purchaser. Hastings & Saxton were in fact the owners of these ties, having purchased them, together with a large number of others, in 1872, when as contractors of said railroad company they had undertaken to build the said road from Marysville, Kansas, to Kearney Junction, in Nebraska; and the ties in dispute were among a large lot that were on hand when the said road failed in 1872, and Hastings & Saxton discontinued their work under said contract. The plaintiffs below had left these ties, as well as all on hand at that time, scattered along the line of said railroad where they had been

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delivered for use in the construction of said road, and they had thus remained until said railroad company was allowed to take them under the following circumstances: In May 1875, the said railroad, needing ties to replace decayed ones, entered into an agreement, *in writing*, with Hastings & Saxton, of which the following is a copy:

"Agreement between the St. Joseph & Denver City Railroad Co. and Hastings & Saxton. The following agreement made this second day of May 1875, by and between the St. Joseph & Denver City Railroad Co. of the first part, and Hastings & Saxton of the second part, witnesseth: That the party of the second part agrees that the party of the first part may select as many ties on the line of the St. J. & D. C. railroad as they may need, and after they (the ties) are placed under the track of said road they shall be counted, and accounted for to the parties of the second part at the price of thirty cents per tie; and the party of the first part agrees to pay for the same in monthly payments of one thousand dollars per month, and any fractional payment in proportion. And whereas, the party of the first part have used, previous to this time, bridge timber agreed on at four hundred dollars, they bind themselves to pay in like manner for any timber that the party of the first part may need. They shall have the right to use (at 18 per M.) as long as the timber remains in Elwood not otherwise disposed. The said ties shall not be considered the property of the St. Joseph & D. C. Railroad Co. until placed under the rail.

L. D. TUTHILL,

General Manager for St. Jos. & D. C. R. R.
HASTINGS & SAXTON."

No question of estoppel can arise in this case, because Owens had ample notice of Hastings & Saxton's claim, and as he himself testified, Saxton offered to show him the contract if he would come to their office. So that the only question is, whether this contract is valid, so far as it attempts to fix the time at which title to the ties should pass. And we fail to see any sufficient reason against its validity. Prior to the contract, the ties were the unquestioned property of Hastings & Saxton. No creditor of the railroad company had or could acquire any interest in them. How then could he in any way be wronged by any disposition which Hastings & Saxton made of them?

Why could not the latter fix the time at which their title should pass, and fix it too in such a manner, and with the purpose of cutting off any opportunity for just such levies as this? They knew that the railroad company was embarrassed; that a mortgage foreclosure was pending; and they had a right to make any stipulation like the one before us, for the purpose of protecting their own interests, and securing payment for their property. They might have been willing to trust to the mortgage creditors to pay for these ties, and not to the general creditors. Perhaps they held the mortgage bonds themselves. At any rate, they fixed the time at which they were willing to part with the title; and until that time arrived, no creditor of the railroad company could question their title, or acquire any interest in the property. It was a conditional sale, with condition not performed, and therefore no title passed. We see no reason to doubt their title, and therefore the judgment must be affirmed.

All the Justices concurring.

M. B. HAAS & Co. v. J. W. LEES.

1. *APPEAL, Operates as Appearance, and Confers Jurisdiction of the Person.* If, in an action pending before a justice of the peace, a judgment is rendered as upon default against a defendant who has not been duly served with a summons, and such defendant appears within ten days from the rendition of the judgment and presents an appeal-bond to be filed and approved by the justice, which is accordingly done, he thereby appears in the action, and submits to the jurisdiction of the court, and cannot afterward be allowed to deny such jurisdiction. [*Freeman v. Waynant*, 25-280; *R. R. v. Patch*, 28-470, 471; *Dickson v. Randal*, 19-213; *Comm'r's v. Heed*, 33-37.]
2. *APPEALS—To be Favored.* Appeals are favored, and mere technical defects or omissions are to be disregarded, as far as possible, without obstructing the course of justice.
3. ——— *Taking and Approving Bond; Date of Approval.* Where a judgment is rendered before a justice of the peace on December 14th, and

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the office of such justice becomes vacant by his removal from the township, and his dockets and papers are deposited with the nearest justice of the township, and such justice receives an appeal-bond signed by the defendant and a sufficient surety on December 24th, and within ten days from the rendition of the judgment, and then returns the bond by mail to the attorneys of the defendant to have the surety justify, and receives the bond back after the ten days have expired, but indorses the bond filed and approved of the date he originally received the same, *held*, that such filing and indorsement relate back to the time the bond was first received, and thereby the appeal is considered as perfected within time.

4. ——— *Quære*: Can a justice of the peace, who has filed and adjudged an appeal-bond of a date anterior to the time the indorsements are made thereon, be permitted thereafter, in a direct proceeding, to contradict his official acts as to the time such indorsements were made, by his own testimony to the court? (The question suggested, but not decided.) [In connection with page 454, see *McBride v. Hartwell*, 2-411; *Cohen v. Trowbridge*, 6-385; *Miller v. Bogart*, 19-117; *Bury v. Conklin*, 23-484; *Burdette v. Corgan*, 28-102; *Greenwell v. Greenwell*, 28-530; *Meisell v. Kirkpatrick*, 29-683; *Bents v. Eubanks*, 32-323, 324.

Error from Marshall District Court.

ACTION by *Lees*, as plaintiff, against *M. B. Haas*, and *H. B. Haas*, partners as "*Haas & Co.*" There is nothing in the record which shows the nature of the action, nor the amount of the judgment. The proceedings in the justices court, and in the district court, upon which the questions here are raised, are stated in the opinion, *infra*. The district court, at the August Term 1875, dismissed the appeal, and from such order of dismissal *Haas & Co.* appeal, and bring the case here for review.

Clough & Wheat, and *John A Broughton*, for plaintiffs in error, contended, 1st, that the judgment was improperly rendered against *Haas & Co.*, in the justices court, because there was neither service of summons upon, nor general appearance by, either of the defendants in that court; 2d, the appeal was improperly dismissed in the district court. The summons was directed to a deputy constable of Blue Rapids township, and was returned by him as such deputy constable. This was error, and gave the court no jurisdiction of the persons of said defendants. (Gen. Stat. 776, § 11.) Nor did the summons con-

Briefs of Parties, and Opinion.

tain the *names* of the defendants, nor did it describe them, as required by said § 11. There was no appearance by defendants before the justice, except for the special purpose of moving to dismiss the action, or perhaps more properly speaking, to quash the summons. Notwithstanding, it was error to dismiss the appeal. The bond required by § 121 of the justices act was filed within ten days after the rendition of the judgment. The only possible objection to the bond, was its non-approval by the justice within the ten days. This is no ground for dismissal; 8 Kas. 419; 13 Ohio St. 489; 23 How. 1; 8 Mass. 85; 10 La. An. 487, 548; 1 Disney, 113.

The testimony of the justice who received the bond on the 24th day of December, is, that the bond when received on that day was signed by Zellers as surety. It is not claimed that Zellers was not ample security, but merely that the justice did not know him. If the non-approval of a good bond can defeat an appellant's rights, then the justice may prevent any party from appealing by neglecting or refusing to approve any bond tendered within ten days after the rendition of the judgment. But here the justice indorsed the appeal-bond, "Filed, Dec. 24th, 1874," and this being the deliberate recorded act of said justice, he should not be allowed to stultify himself, by swearing *he did not* do what he has said in writing over his official signature in at least three places that *he did do*. 7 Ohio St. 480; 4 Blackf. 127; 8 Mich. 260. An officer cannot "contradict his official return by his oral testimony to the court." 17 Kas. 613.

J. D. Brumbaugh, for defendant in error, maintained that appeal-bonds must be *approved* within ten days after the rendition of the judgment; § 121, justices act. The court properly dismissed the appeal, for the reason that no bond had been given in the time required by statute; 1 Mo. 595; 1 Ind. 261.

The opinion of the court was delivered by

HORTON, C. J.: On the 7th of December 1874, J. W. Lees, the defendant in error, filed his bill of particulars against Haas

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& Co. before George W. Reece, a justice of the peace of Marshall county. On the same day a summons was issued to a deputy constable of Blue Rapids township in said county, commanding him to summon Haas & Co. to appear, etc., on the 14th of December 1874, etc., which was returned thus:

“Received this writ this 8th day of December 1874; served by delivering a copy with the indorsements thereon, duly certified thereto, to the within-named ——— Haas, December 8th 1874.
DELOS FORDHAM, *Dept. Constable.*”

On the return day, 14th of December, Mudgett & Smith, attorneys-at-law, appeared specially only for defendants, and filed a motion to dismiss the action for reasons therein stated. This motion was overruled, and without further service upon or appearance by Meyer B. Haas and Hartog B. Haas, judgment was rendered against them on said 14th of December, for \$146 and costs. Two or three days after said trial, Messrs. Mudgett & Smith, attorneys for Haas & Co., prepared an appeal-bond and “had it properly signed by the surety, and inclosed and addressed to George W. Reece, justice of the peace, at Irving, Kansas,” the justice before whom the case was tried. Two or three days after rendering said judgment, said Reece removed from Marshall county, and from the state, and his docket came into the possession of J. P. Turner, as justice of the peace, on the 20th of said December, under the provisions of § 191 of the justices act. On the 24th of December said Turner received the letter sent by Mudgett & Smith, as above stated, inclosing the bond directed to said Reece, justice of the peace, out of the postoffice, opened it, saw the appeal bond, but did not approve it, but sent it back by mail the same day to Mudgett & Smith. The surety had in the meantime left the county temporarily, and the affidavit of justification by the surety was not sworn to till 6th January 1875. But the affidavit of surety was appended to the appeal-bond, and the bond returned into court with the affidavit of said surety attached thereto. The transcript of the justice’s docket was filed (as were all the papers in the case) in the office of the clerk of the district court of Marshall county, on the 29th of

January 1875. Turner, as justice of the peace, received the bond back again from Mudgett & Smith in three or four weeks after it was returned to them on December 24th. In May following, said Turner indorsed the appeal-bond as follows: "*Approved by me this 24th day of December 1874.—J. P. Turner, Justice of the Peace.*" And he also wrote on the back of the bond the following: "*Lees v. Haas & Co.—Defendants' appeal-bond.—Filed, Dec. 24th 1874.—J. P. Turner, J. P.*"

On the 25th of August 1875, the defendant in error filed a motion to dismiss the appeal in the case, for the following reasons:

"1st, Because there was no appeal-bond approved in this case within ten days from the rendition of the judgment in the court below.

"2d, Because there is no appeal-bond in this case ever executed and approved as required by law.

"3d, Because the appeal was not perfected as required by law, in this, to-wit, that the papers were not transmitted to this court within twenty days from the rendition of the judgment.

"4th, Because the transcript, and an undertaking in appeal, and all the papers in this cause, were not transmitted to this court within twenty days from the rendition of the judgment.

"Affidavits will be used to support the motion."

This motion was sustained, and the appeal dismissed, and judgment rendered against the plaintiffs in error for costs. To this decision and judgment, exceptions were properly taken; and the plaintiffs in error claim, that the judgment was improperly rendered against them in the justices court, because there was neither service of summons upon, nor general appearance by, either of the defendants in that court; and that the appeal was improperly dismissed in the district court.

As to the first objection, to the order and judgment of the district court, the plaintiffs in error are in no condition to take any advantage of any defective service in the proceedings before the justice of the peace, (if there was, which we do not

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decide,) for by their appeal they are estopped from denying service of summons. Any defect existing in the service of process is thereby waived. The action of the plaintiffs in error, in presenting and having a bond of appeal filed and approved, is a submission in itself to the jurisdiction of the court; and they cannot be permitted on error to allege a want of jurisdiction. *Fee v. Big Sandy Co.*, 13 Ohio St. 563.

The second objection is well taken, as the court below erred in dismissing the appeal on the motion filed by defendant in error. The bond was received by Turner, the justice of the peace, within due time; and although he returned it to the attorneys of the plaintiffs in error at once, to have the surety justify, yet he received it back again, and before it was filed in the district court, and long before the motion to dismiss was made, he filed and approved the bond, as of the date it was originally received, and that date was within ten days from the rendition of the judgment. Under these circumstances, the appeal bond is held to have been filed in time, as shown by the records of the justice, and the indorsements on the bond itself. In this connection the question is suggested, whether the justice, who filed and approved the appeal-bond subsequent to the date of its reception by him, as of the time it was first received, can be permitted in a direct proceeding to contradict his official acts, as to the time such indorsements were made, by his own testimony to the court? We need not decide this interrogatory now. The bond stands as if filed and approved when first received by the justice, and thereby the appeal was perfected within time. Before the court convened, or the hearing of the motion to dismiss, all the papers in the case were duly filed with the clerk, and hence the failure of the justice to transmit the papers to the district court at an earlier date, furnished no good reason for any dismissal of the cause. Appeals are favored, and mere technical defects or omissions are to be disregarded, as far as possible, without obstructing the course of justice.

Whitford v. Horn.

The order and judgment of the district court are reversed, and the cause remanded for further proceedings.

All the Justices concurring.

B. C. WHITFORD v. MARY E. HORN.

TITLE BY GIFT, Sufficient to Maintain Replevin against Administrator of Donor; Personal Judgment for Costs against Administrator. N., being solvent, gave a watch to H., a little girl, and placed it in her possession, requesting her to wear it in remembrance of him. Some months thereafter her father persuaded her to let N. take the watch and keep it for her until she was old enough to take care of and wear it. While thus holding the watch N. made no claim to it, as his, spoke of it to the party who afterward became his administrator as the watch of H., and in his last sickness directed that it be delivered to her. Nearly two years after the gift, N. died, insolvent, the watch still being in his possession. His administrator took possession of the watch as property of the estate. Demand having been duly made, H. brought replevin for it. The administrator answered, disclaiming any personal rights in the matter, but alleging that he held it as the property of the estate: *Held*, that a judgment in favor of H. for the possession of the watch, and against the administrator for the costs, was correct; and that whether the administrator could thereafter recover these costs from the estate depended upon the *bona fides* of the defense.

Error from Franklin District Court.

MARY E. HORN, by her next friend, brought replevin against Whitford, and had judgment, at the March Term 1876 of the district court, for a return of the property replevied, and for costs. Whitford brings the case here. The opinion contains a statement of the facts.

John W. Deford, for plaintiff in error.

W. Littlefield, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: Action of replevin for a watch. Defense, general denial, and claim that the watch belonged to estate of I.

Whitford v. Horn.

Nicklisson, of which defendant was administrator. The testimony is not preserved, and the case is before us upon the pleadings and findings. Judgment was rendered in favor of the plaintiff, and of this, defendant, as plaintiff in error, now complains. And first, he claims that upon the facts found, and admitted by the pleadings, judgment should have been in his favor. We think not. The court finds, that in the autumn of 1878, Nicklisson gave the watch to plaintiff, a girl then about twelve years of age, delivered it into her possession, requesting her to keep it and wear it in remembrance of him; that some months thereafter her father induced her to let Nicklisson, who was an old man, have the watch to take care of for her until she should become old enough to have the care of and wear it; that Nicklisson never claimed the watch after his gift, spoke of it to defendant as Mary Horn's watch, and during his last sickness directed the delivery of it to her, and that at the time of the gift Nicklisson was solvent. Possession by Whitford, and demand by plaintiff, were also found.

What more was necessary? That the title passed by the gift accompanied by delivery of possession, is clear. Nicklisson being then solvent, the gift could not be set aside by creditors as void against them. Nor does the finding of the condition of Nicklisson's estate, militate with the finding of his solvency nearly two years prior to his death. He might have had an abundance of property then, and lost or squandered it all before his death. The judgment awarding her the possession of the watch was right.

Again, defendant claims that no judgment should have been rendered against him individually for the costs, as in his answer he disclaimed any property, or right of possession, in his private capacity, but claimed it only as administrator of Nicklisson's estate. We think the judgment must stand as it is. He was in the actual possession of the watch, and refused to surrender it to the owner when demanded. She had the right to recover the possession from

Statement
of facts.

Title—gift,
followed by
possession.

Administrator;
personal liability
for costs.

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him as the party in actual possession; and in an action for the recovery of specific personal property, costs are allowed of course to the successful party. (Gen. Stat. 746, §589.) Section 587 applies to cases where there is a full disclaimer. When that is made, there is no need of further litigation. But here, though defendant disclaimed any personal interest, he nevertheless retained possession, and asserted the right thereto as administrator. Perhaps too the court thought that the fact that Nicklisson spoke of it to him as Mary Horn's watch, and directed in his last sickness that it be delivered to her, was a sufficient reason under that section for charging him personally with the costs. Whether the costs thus paid by defendant can afterward be allowed as a claim against the estate, will depend upon his good faith in making the defense. If made with full knowledge of plaintiff's title, and without reasonable warrant therefor, he cannot charge the estate; but if made in good faith, and in honest and reasonable belief that the property belonged to the estate, he may; but that is a question which can be settled in the probate court.

The judgment will be affirmed.

All the Justices concurring.

ATLANTIC & PACIFIC RLD. CO. v. JOHN C. REISNER.

AGENTS—GENERAL, AND LOCAL; *Power to Bind Principal.* The general agent of a railroad company is authorized, by virtue of his position as such general manager of the company's affairs, to employ a hotel-keeper to furnish board and attendance, at the expense of the company, to a brakeman injured while working for such company. A mere station-agent of a railroad company, by virtue of his position as such agent, has not the like authority. [*R. R. v. Thomas*, 19-258; *R. R. v. Ingram*, 20-71.]

Error from Atchison District Court.

REISNER had judgment against the *Railroad Company*, and one Hyde, at the November Term 1875, and the *Railroad Company* brings the case here on error. The record discloses the fact, that after the issue was joined in the court below, a receiver was appointed for the *Railroad Company*, and that the affairs and management of said company passed into the hands of such receiver; that thereby the power and authority of the company's attorney ceased, and that no action was taken by or on the part of the receiver to protect the interests of the railroad company until after trial and judgment.

Everest & Waggener, for plaintiff in error.

Thomas Metcalfe, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: In the trial in the district court, it appeared that this action was brought by Reisner, defendant in error, a hotel-keeper, against one H. Hyde, and the Atlantic & Pacific railroad company to recover \$104, and interest, for board, room, and lodging furnished to one William Hurdle, a disabled employé of the railroad company, from April 2d to May 1st 1878, at two dollars per day, and also for the services of an attendant for nineteen days at one dollar per day, and for certain bandages of the value of three dollars. The following is Reisner's testimony, and is all the evidence introduced to the court:

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"I am the plaintiff in this action. In the months of April and May 1873, I was keeping a hotel, the same one that I now keep, and it is called the Tremont House. Mr. Hyde was the agent of the railroad company at this place, and attended to their business here. A man by the name of Hurdle got hurt while working for the company as a brakeman, somewhere below town, on a bridge. Mr. Hyde had him brought to my hotel, and sent for a doctor to care for him, and employed me to board, take care of, and nurse him, and said that the company would pay me, and that he would guarantee the payment of my account. He employed me to board him for the railroad company, as agent for the said company. I knew that he was doing business for the company, as agent, during this time. I asked him once or twice for pay, but have never received a dime. My account here in court, and annexed to the petition, is just, and the services reasonable, and worth the amount charged in my bill. This man was sick, and we waited on him nearly a month. I hired a person to take care of him. I knew Mr. Hyde was the *general agent* of said road at Atchison, and station-agent for this company, and he said the company would pay me, and that he would guarantee it; and neither said Hyde nor said company have ever paid me any part of my said account."

Judgment was rendered against both defendants in the court below, and the railway company brings the record here, and seeks to reverse the judgment against itself. The railway company assumes in the argument presented to this court, that Hyde, the person who made the arrangement with the defendant in error for the board and services sued for, was only a station-agent of the railway company, and that neither his duties nor his authority gave him power to bind the company, so as to make it liable in this action. The authorities cited sustain the proposition that a station-agent of a railroad company is not authorized, by virtue of his position as such agent, to employ a hotel-keeper, at the expense of the company, to attend to one of its brakemen, injured while working for the company, nor to furnish such employes with board and lodging while disabled. *Tucker v. St. Louis, K. C. & Northern Rly. Co.*, 54 Mo. 177; *Cooper v. N. Y. Central & Hudson River Rld. Co.*, 6 Hun. 276; *Stephenson v. N. Y. & Harlem Rld. Co.*,

2 Duer, 841; *Cox v. Railway Co.*, 8 Exch. 268. The testimony however, brief as it is, discloses the fact that Hyde was the *general agent* of the company. We cannot ignore this evidence. Upon it rests the liability of the plaintiff in error. The power and authority of the *general agent* of a railroad company is much greater than that of a station-agent. In the case of a general agency, the principal holds out the agent to the public as having unlimited authority as to all his business. When the witness testified that Hyde was the *general agent* of the road at Atchison, he thereby gave evidence that the railroad company held out to the public such person as its agent in *all* its business and employment. In other words, the *general agent* of the company is virtually the corporation itself. It has been usual in the construction and operation of railroads in this state for some person therewith connected to act as general manager, or general agent, of the railroad being constructed or operated; and such general manager, or general agent, has had while occupying this position the full control of all the company's affairs, and complete direction over its treasury. General manager, and general agent, are synonymous terms.

It does not appear from the evidence that there was any legal liability on the part of the railroad company to furnish board and attendance to the brakeman. Still, we do not think this proof was necessary to establish the liability of the company to Reisner. It was proven that the brakeman was hurt while in the employ of the company; and it is not unfrequent for railroad companies and other corporations to furnish board and medical attendance to employes disabled in the service of such companies, even when the injuries are not the result of the negligence of the corporation. Such action, whether resulting from humane or selfish motives, is certainly to be commended; and no court would hold the contract of a railroad company duly entered into for such an object as *ultra vires*, and incapable of being enforced. Hyde, being the *general agent* of the company, and having unlimited authority as to all its business, had the power to make the arrangements

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with Reisner, testified to, and the company was liable upon his engagement. The defendant in error was not compelled to institute inquiry as to the moral or legal liability of the railroad company to take care of the disabled employé before receiving him into his hotel, after the general agent of the company had agreed that the company would pay for the board and service. *I. W. & W. Rly. Co. v. Prince*, 50 Ill. 28; *I. W. & W. Rly. Co. v. Rodrigues*, 47 Ill. 188. See also, *M. & O. Rld. Co. v. Taft*, 28 Mich. 289, 294. It may be, that the witness was mistaken as to the position held by Hyde; and the fact that the testimony shows that Hyde was the general agent of the company, and also station-agent, gives some force to the suggestion. We suppose it is not usual for a general agent of a railroad company to also occupy the office of station-agent of the same company. But in this case the evidence is conclusive upon the point, and we are compelled to accept it as true. The unfortunate position in which the counsel for the plaintiff in error were placed by the action of the receiver of the Atlantic & Pacific railroad company dispensing with their services on the trial, prevented any cross-examination of the witness by them, or the presentation of any contradictory testimony; in fact, prevented any defense being made to the account sued on. For all this, the defendant in error was not responsible. And as there was legal evidence which tended to support and uphold the judgment of the district court, we cannot now interfere.

The judgment will be affirmed.

All the Justices concurring.

 Hopkins, Warden, v. K. P. Rly. Co.

HENRY HOPKINS, as Warden, &c., v. KANSAS PACIFIC RAILWAY COMPANY.

NEGLIGENCE, OF RAILROAD COMPANY; *Stock-Killing Act of 1874*. The purpose and scope of the law of 1874, requiring all railroad companies whose roads are unfenced to pay for injuries done to stock by their engines and cars, was to obviate the necessity of inquiring into the mere negligence of the owners of the stock, or of the parties in charge of the trains. Where cattle get upon the track at a place where the road can and ought to be fenced, and, without any wanton or willful act of the owners or persons in charge, are there injured by a passing train, the law applies, and the company is responsible for the injury. [*R. R. v. Mower*, 16-573; *R. R. v. Taylor*, 17-567; *R. R. v. Harper*, 19-529; *R. R. v. Duckett*, 20-623; *R. R. v. Shirley*, 20-660; *R. R. v. Yeates*, 21-613; *R. R. v. Hegwir*, 21-622; *Hadley v. R. R.*, 22-359; *R. R. v. Butman*, 22-639; *R. R. v. Ewing*, 23-273; *R. R. v. Byron*, 24-351; *R. R. v. McReynolds*, 24-368; *R. R. v. Landis*, 24-406; *R. R. v. McHenry*, 24-501; *R. R. v. Wiggins*, 24-588; *R. R. v. Weichselbaum*, 24-619; *R. R. v. Piper*, 26-58; *R. R. v. Leggett*, 27-323; *R. R. v. Cash*, 27-587; *R. R. v. Dyche*, 28-200; *R. R. v. Harris*, 28-206; *R. R. v. Dudgeon*, 28-283; *R. R. v. Griffiths*, 28-539; *R. R. v. Wilson*, 28-637; *R. R. v. Hays*, 29-193; *R. R. v. Abney*, 30-41; *Gooding v. R. R.*, 32-150; *R. R. v. Shaft*, 33-521; *R. R. v. Bradshaw*, 33-533; *R. R. v. Roads*, 33-640; *Prickett v. R. R.*, 33-748; *R. R. v. Gabbert*, 34-132. See also, *R. R. v. Miller*, and cases cited, 18-212.]

Error from Leavenworth District Court.

ACTION by Henry Hopkins as warden of the Kansas State Penitentiary, to recover from the *Railway Company* the value of two mules. The facts are stated in the opinion, *infra*. The district court, at December Term 1875, gave judgment for defendant. New trial refused, and plaintiff brings the case here.

J. H. Gillpatrick, and *J. W. Taylor*, for plaintiff.

J. P. Usher, and *Chas. Monroe*, for defendant.

The opinion of the court was delivered by

BREWER, J.: This was an action brought by the plaintiff to recover the value of two mules, killed on the railroad track of defendant, by one of its trains. The testimony, which is preserved in the record, is, so far as any question of negligence on either side is concerned, as follows:

Hopkins, plaintiff, testified: "The mules in question, the property of the State of Kansas, and in plaintiff's possession

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as warden, together with several others, a small herd, were sent by him, on the 7th of June 1874, along a private or neighborhood road from the penitentiary, to be driven on said private road across the railroad of defendant, near by, to graze on the timber-bottom beyond. He sent them by and they were under charge of two convicts from the penitentiary, whom witness then regarded and still thinks were at the time thoroughly competent and trustworthy men for the purpose, and whom he was in the habit of placing in charge of said mules, and had ever faithfully discharged their duties as such herdsmen."

Charles Franke, witness for plaintiff, testified, that, "He was driving in a buggy, with his brother, from their farm in the vicinity, along said neighborhood road, and had approached near the said railroad of defendant, where the said mules were killed; that he saw the mules in charge of the two convicts who were driving them, and that the mules seemed to be coming up from drinking at the creek, which makes a bend just there, leaving a narrow strip between it and the railroad track, and that they were coming out from this bend as the train came around the curve in the railroad near by; that he heard no whistle, or ringing of the locomotive bell, till just before the engine struck the animals; that there was no grass in the bend of the creek where the mules were when first seen by witness, and some of them in crossing the track were struck by the locomotive. There was no other place where they could have approached the water in the creek."

Henry Franke, for the plaintiff, testified substantially the same as the last witness.

John Robinson, called as a witness by plaintiff, testified, that, "He was a fireman on the engine and train which ran over the mules mentioned; that the train was an excursion train, chartered by the German Turners' Society of Leavenworth, and was en route from Leavenworth to Lawrence, on Sunday morning, at a point near the Kansas State Penitentiary, at about eight o'clock, or about one hour and-a-half or two hours before the usual time for the passing of the morning train on the road at that point. We were ordered to leave an hour or more before the regular leaving-time from the Leavenworth depot, and were running at about the rate of twelve to fifteen miles per hour, which was within the time ordered by schedule. Could not say whether the whistle was blown before passing the curve, which is from one to two hundred yards from where

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the mules were killed, but the whistle was blown when the engineer saw the animals on the track ahead, after and as the train rounded the curve. The train was not supplied with the Westinghouse air-brake, and could have been stopped considerably sooner with, than without, that appliance, but could not have been stopped before it reached the place where the mules were."

The value of the mules killed was conceded to be three hundred dollars, and it was admitted that the defendant had the right, but had not, at the point named, fenced its track. Upon this testimony the court found as matters of fact, among other things that—"3d, the running over and killing of said mules was not the result of any negligence of the defendant; but, 4th, was the result of substantial negligence of the plaintiff contributing thereto;" and as a conclusion of law, the plaintiff was not entitled to recover. .

It seems to us that the judgment of the court below must be reversed. We fail to see any evidence of negligence on the part of the plaintiff in the matter. Certainly, it was not negligence to send the mules out to graze, although to reach the place of grazing they must be driven across the railroad track, providing they were, as in this case, driven across at a place where it is conceded they might rightfully be driven. They were sent in charge of trusty and competent men. Nor is there in the meager statement of what took place at the time of the injury, anything showing negligence on the part of the men in charge. The same may perhaps be said with equal truth of the conduct of those in charge of the train. But it is unnecessary to enter into this question of negligence, for we conceive that the purpose and scope of the stock-killing law of 1874, in force at the time of this injury, was to obviate the necessity of such inquiry. It imposes liability for stock killed and wounded by running trains, "irrespective of the fact as to whether such killing or wounding was caused by the negligence of such railway company or corporation, or the assignee, or lessee thereof, or not." (Laws 1874, p. 148, §1.) That applies to such a case as this, where stock is killed by a passing train. We do mean to decide that where the injury results

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from the willful or wanton act of the owner, that he can recover; nor that this law applies where the stock is killed at a public crossing, or depot-grounds, at which there can be no fence, or where the stock get upon the track at such a place, and then stray along the track to the place of injury, or where stock which is being carried in the cars is injured. But where the road is unfenced at a place where it can and ought to be fenced, and stock there gets upon the track through no wanton or willful act of the owners, or persons in charge, and are injured by passing trains, then the law applies, and obviates the necessity of all inquiry into the mere negligence of the parties concerned, whether owners, persons in charge of the stock, or managers of the railroad trains. [Stock law of 1874, and the necessity for fencing railroad tracks, further discussed in case *A. T. & S. F. Rld. Co. v. Jones*, 20 Kas. 527.]

The judgment will be reversed, and the cause remanded for a new trial.

All the Justices concurring.

E. L. PATEE V. A. A. PARKINSON.

PRACTICE; *Saving and Preserving Testimony, or Agreed Facts.* Where the journal entry of a case shows that the action was tried upon an agreed statement of facts, and the transcript purports to contain a statement of facts signed only by the attorneys of the parties to the suit, but such statement of facts is not contained in the journal entry of the judgment, nor otherwise identified as the facts upon which the case was tried, and the agreed statement of facts is not preserved in any bill of exceptions, or case-made, and there are no findings of fact separately made, and no motion for a new trial, and no error is apparent in the record, there is no case for the consideration of alleged errors, and the supreme court must necessarily affirm the judgment of the district court. [*Gallaher v. Southwood*, 1-143; *Brown v. Rhodes*, 1-359; *Ins. Co. v. Duffey*, 2-342; *Ed. Ass'n v. Hitchcock*, 4-36; *McGrew v. Armstrong*, 5-284; *Topeka v. Tuttle*, 5-323; *Turner v. Hale*, 8-38; *State v. Montgomery*, 8-356; *Hale v. Bridge Co.*, 8-468; *Smith v. Hale*, 10-74; *Brown v. Johnson*, 14-377; *Kshinka v. Cusker*, 16-63; *Jackson v. Soper*, 17-605; *R. R. v. Wagner*, 19-335; *Shumaker v. O'Brien*, 19-476; *State v. Bohan*, 19-48; *Pfeiffer v. Church*, 20-100; *Greenwood v. Bean*, 20-240; *Whitney v. Harris*, 21-97; *Comins v. Roberts*, 22-762; *Minnis v. Jordan*, 24-287; *State v. Schoenwald*, 26-288, 289; *State v. Nickerson*, 30-545; *Murray v. Kelley*, 23-30—19 Kas.

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666; *R. R. v. Andrews*, 34-563; *Weaver v. Hatt*, 33-619. See also, *Backus v. Clark*, 1-303; *R. R. v. Caldwell*, 5-84; *Zane v. Zane*, 5-138; *Gray v. Ulrich*, 8-123; *Altschiel v. Smith*, 9-90, 91; *Porter v. Hall*, 11-514; *McIntosh v. Comm'rs*, 13-177; *R. R. v. Milliken*, 8-652; *Mugan v. Haley*, 16-69; *R. R. v. Kuntel*, 17-168; *Jenks v. School District*, 18-360.]

Error from Riley District Court.

THE only question decided in this court is one of practice, as to which all material facts are stated in the opinion. The district court decided that the property in question was not exempt, and *Patee* appeals, and brings the case here on error.

R. B. Spilman, for plaintiff in error.

Samuel Kimble, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: An attempt was made in this case to have the question determined, whether a two-wheeled vehicle, commonly called a sulky, with an attachment thereto specially adapting it to the use of a physician and surgeon, and actually kept and used by a physician in the business of his profession, is exempt from seizure and sale. But no bill of exceptions was taken in the court below, and no "case-made" is filed here. The transcript purports to copy an agreed statement of facts filed with the clerk of the court, signed by the attorneys of the parties to the suit; and the journal entry recites that a jury was waived, and the issues in the action submitted to the court upon an agreed statement of facts on file with the clerk. But the statement of facts copied in the transcript is not contained in the journal entry, nor otherwise identified as the agreed facts upon which the court tried the case. In addition, it is not set forth that the court stated separately the findings of fact. Nor was there any motion for a new trial. An agreed statement of facts is simply the presentation of evidence to the court in another and different form than by the introduction of witnesses in person, or the reading of depositions taken in the case. It takes the place of the oral or written evidence intended to be submitted by the parties to the suit. Perhaps, more accurately speaking, it may be said to be the written ad-

missions of the parties to the suit on the trial. Nevertheless, such an agreement is only regarded as evidence for the consideration of the court. Parties may agree to all the facts in issue by the pleadings; or only a part of the facts in dispute may be agreed upon, and evidence submitted as to the other questions of fact in controversy; but in either case, such an agreement is no part of the pleadings, nor can it be regarded as a part of the record of the court. This court has already decided that affidavits filed and read on a motion in the court below, to become a part of the record so as to be reviewable by the supreme court, must be included in a bill of exceptions, or a case-made; and an agreed statement of facts stands in the same relation to the proceedings in a trial of a case, as affidavits upon the hearing of a motion. The agreed statement of facts contains the evidence upon which the case is decided. The affidavits contain the evidence upon which the motion is granted, or denied. *Young v. The State*, 23 Ohio St. 577; *Backus v. Clark*, 1 Kas. 808; *Altschiel v. Smith*, 9 Kas. 90; *Porter v. Hall*, 11 Kas. 514. Under this view there is no error apparent on the record, and we cannot question the correctness of the judgment of the district court. There is no case here for our consideration by which we can review the decision rendered.

The judgment will be affirmed.

All the Justices concurring.

LOUIE J. VOSS *et al.* v. UNION SCHOOL DISTRICT No. 11 *et al.*

1. INJUNCTION; PARTY; *When School District is Necessary Party.* Where an action is commenced against the county treasurer and sheriff, to enjoin a school-district tax, it is not error for the court to allow the school-district to be joined as a co-defendant. [*Hays v. Hill*, 17-360; *Beyer v. Reed*, 18-92; *Comm'rs v. R. R.*, 21-749.]
2. SCHOOL-DISTRICT; *Organization, When Not to be Questioned.* Where an attempt is made in 1871 to organize a certain school-district, and such district afterward became a school-district *de facto*, being recognized as a valid organization not only by the people of the district, but also by the county superintendent of public instruction, and by other county officers,

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and by the people generally, and has elected officers, received public school money, built a school-house, and maintained schools up to the commencement of this action in 1875, the question, whether the original organization of the district was legal and valid, cannot be inquired into in an action to enjoin a tax levied in 1874 by and for such school-district. [*School-District v. State*, 29-57, 58; *R. R. v. Wilson*, 33-223; *Wildman v. Anderson*, 17-348.]

Error from Crawford District Court.

INJUNCTION, brought by Louie J. Voss, James A. Hales, C. W. Whitson, W. H. McGuire, J. W. Woodcock, Peter Patee, H. B. Smith, F. D. Matthias, R. M. Ross, Wm. W. Smith, W. Jett and Samuel Evans, as plaintiffs, against E. W. Majors, as treasurer of Crawford county, and S. R. Greenwood as sheriff of said county, defendants. The plaintiffs alleged that they were "citizens and taxpayers in the county of Crawford, and holders and owners of both real and personal property subject to taxation in 'School District No. 71' in said county, and are chargeable with and liable to pay legally-assessed school-taxes against them in said school district No. 71, and are willing so to do," but they alleged that certain taxes assessed and levied as school-district taxes on their said property as being in "Union School District No. 11," were illegal and void—and they prayed that said sheriff and treasurer be restrained and enjoined from collecting such taxes. A temporary injunction was granted. Afterward, said "Union School District No. 11," a joint school-district of Crawford, Labette, and Neosho counties, applied to the court to be made a co-defendant. The application was granted over the plaintiffs' objections and said *Union School District* filed an answer, and plaintiffs replied. The treasurer and sheriff made no defense. The action was tried at the April Term 1876 upon the issues joined between the plaintiffs and *Union School District No. 11*. The facts, as shown by the findings of the court, and the testimony, are these: In March 1870, School District No. 71, of Crawford county, was duly organized, comprising sections 35 and 36 in T. 30, R. 21, section 1, and the east-half of section 2, in T. 31, R. 21, the west-half of section 31 in T. 30, R. 22, and the west-half of section 6 in T. 31, R.

Statement of the Case.

22; in March 1871, the county superintendents of the counties of Crawford, Labette and Neosho met and formed a Union School District, comprising two sections of land lying in Neosho county, two sections and-a-half in Labette county, and all the territory in Crawford county, designated above as comprising school-district No. 71, except the west-half of section 31, T. 30, R. 22, and the west-half of section 6, T. 30, R. 22. The county superintendent of Crawford county was called as a witness, and produced the records pertaining to his office. Such records showed the proper organization of "District No. 71," in March 1871. The first entry in said records respecting *Union School District No. 11*, is dated "September 22d 1874," and was made by the then county superintendent, reciting that "a certified statement pertaining to Union School District No. 11, Crawford, Labette and Neosho counties," was that day received and filed. This entry correctly describes the territory, but does not give the date when such district was formed; and the superintendent did not produce the "certified statement," but testified that there was no record in his office tending to show the organization of "District No. 11," except the above-mentioned entry made by his predecessor, of date 22d September 1874. Respecting this district No. 11, the district court found that—

"Said county superintendents made a plat of such union school district, and a certificate of their action, in a district-school record-book, which certificate was signed and fully concurred in by the county superintendent of Crawford county; that thereafter notices were given, and a meeting held, and officers for such school-district elected and qualified, and the machinery of the district put into operation; that from such time to the present, such district No. 11 has done that which it was competent for school districts to do, voting bonds, and building a valuable school building, employing teachers, maintaining school, etc.; that no effort has been made by the superintendents of the said counties to break up or change said school district No. 11 since the organization thereof in March 1871; that some of the plaintiffs have been officers in such school-district since such time; others have paid taxes thereto; and the most of them have at some time sent their children to its school, and participated in its district meetings."

that previous to September 22d 1874, (when a sworn copy of the original certificate was filed and recorded in the office of the county superintendent of Crawford county,) the officers of such school-district had from time to time reported their proceedings to the superintendent of Crawford county, and had received taxes, school funds, etc."

All the property of the plaintiffs is situated in that part of old district No. 71 now embraced in district No. 11. There was no claim or pretense, that plaintiffs had been assessed with school-district taxes for *both* districts. The district court found in favor of the defendants, dissolved the temporary injunction, dismissed the plaintiffs' petition, and gave judgment against plaintiffs for costs. The plaintiffs bring the case here on error.

John T. Voss, for plaintiffs, contended that it was error, and against justice and equity, to permit the school-district to be joined as a party defendant. As well make *the state* a party, when a state tax is enjoined—or *the county* a party, when a county tax is enjoined. But Union District No. 11 was never legally organized. It does not in its answer even allege that it was duly or legally organized. Some of the findings in regard to the meeting of the county superintendents in March 1871, and their pretended creation of an union district, are not supported by the testimony. There is no evidence of any petition being ever presented, or signed by five householders, or any other number; no evidence that the superintendents ever laid off "Union District No. 11;" nor any pretense of evidence that the proper papers, as the legitimate result of such meeting, were ever filed in their offices, or any of the superintendents' offices of the three counties. The state superintendent of public instruction says, that "the superintendents of the respective counties, after they have formed and organized the union district, should evidence that fact by filing the proper papers in their respective offices." Such a record is necessary. But none was made, as required by law. The only pretended record, found by the court, was in the school-district record-book, and that supposed "record" is a nullity. The county superintendent's records show a valid organization of district

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No. 71, and utterly fail to show that the pretended district No. 11 was ever legally organized. But if it was organized in 1871, what became of it during the three years until 1874, when the taxes complained of were levied in its name? How these taxes came to be levied, seems to be a mystery. They were levied at the district meeting held in August 1874, (laws 1874, p. 188, § 2,) while no evidence is found anywhere in Crawford county, of any such district, until the 22d of September following—and then no evidence of any legal “district No. 11.”

Daniel Scott, for the sheriff and treasurer—filed no brief.

Henry G. Webb, for Union School District No. 11—that the school-district was a necessary party, cited *Hays, Treas., v. Hill*, 17 Kas. 860; and that said school-district had a legal and valid organization, cited *Wildman v. Anderson*, 17 Kas. 844, 848. Whether such district was sufficiently proven by the records, or not, its existence since 1871 had been constantly recognized and acquiesced in, and that is sufficient. But plaintiffs have mistaken their remedy. The validity of taxes, otherwise valid, which have been voted by a *de facto* school district, cannot be questioned by showing that such district was not organized in strict compliance with the requirements of the statute. Nor can the validity of such *de facto* district be questioned by proceedings to enjoin the collection of such taxes.

The opinion of the court was delivered by

VALENTINE, J.: This was an action to restrain the collection of certain taxes levied by and for school district No. 11 of Crawford, Labette, and Neosho counties, on property situated in that part of said district which is located in Crawford county. The action was originally commenced against the treasurer and sheriff of Crawford county alone, but
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—necessary
party. afterward the court permitted said school-district to be made a party defendant. The plaintiffs, who are also plaintiffs in error, complain of this action of the court below. We think however that the action of the district court in this

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respect was entirely correct. (*Hays v. Hill*, 17 Kas. 360.) Said treasurer and sheriff were merely nominal parties, and the school-district was the real party in interest.

The action was tried in the court below without a jury, and the court made certain findings of fact, and then rendered judgment upon these findings of fact in favor of the defendant, and against the plaintiffs; and of this judgment the plaintiffs as plaintiffs in error now complain. We think the judgment is correct; or at least we cannot say that sufficient error was committed to require a reversal thereof. That the facts found sustain the judgment we think there can be no doubt. And we think there is sufficient evidence to sustain all the material findings of fact. It is true, that the evidence upon some points is conflicting, and not very conclusive; but still there is some evidence, and sufficient evidence upon every material point to sustain all the material findings of fact.

The only ground upon which the plaintiffs claim that said taxes are invalid is, that said school-district never had a valid organization. The court below however found that it had a legal and valid organization; and if that finding were really material in this case, still we think that this court could not under the evidence set it aside. That the school district had an organization *de facto*, we think there can be no doubt; and if it were competent in this case to show that it never had any organization *de jure*, then we think it devolved upon the plaintiffs to show that it never had such organization. Now the plaintiffs did not show it, and it was not shown in the case. But as the district had a *de facto* existence, a *de facto* organization, we do not think it was competent in this case for any one to show that it did not have any legal existence or legal organization. That the district had a *de facto* existence as a school-district, is sufficiently shown. In 1871 the county superintendents of public instruction of the counties of Crawford, Labette, and Neosho attempted to organize it into a school district. And since that time it has been recognized as a valid organization, not only by the people

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conflicting
testimony.

2. School district;
organization,
when valid.

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of the district, but also by county superintendents of said counties, and by other county officers, and by the people generally. It has received public funds from said counties the same as though it was a valid school-district. It has elected officers, built a school-house, and maintained schools, up to the commencement of this action. And some of the plaintiffs in this action have not only been officers of the district, but have also sent their children to the schools of the district. The taxes which the plaintiffs now wish to enjoin have been placed upon the tax-roll of Crawford county by the county clerk of said county, and the county treasurer and sheriff of said county are now proceeding to collect the same. Under such circumstances it is not competent for the plaintiffs to show, in an action to enjoin taxes, that said district, being an existing *de facto* school-district, has never had any legal or valid organization. If in fact the district was never legally organized, if in fact the attempted organization has never become valid by acquiescence, (*Wildman v. Anderson*, 17 Kas. 348,) then the only remedy for the plaintiffs is by an action in the nature of *quo warranto*. They cannot attack the legality of the organization of the district in the collateral manner in which they have attempted to attack it in this case. The organization of corporations, or *quasi* corporations, can only be set aside by a direct proceeding. If said school district were not a school district *de facto*, probably such an action as this might be maintained.

The judgment of the court below will be affirmed.

All the Justices concurring.

CITY OF WATERVILLE V. HUGHAN & McDOWALL.

EVIDENCE; WRITTEN INSTRUMENT; *When Error to Admit Copy*. It is error for a court, on the trial of a case, to permit a copy of an instrument in writing to be introduced in evidence, unless it is also shown that the original is lost or destroyed, or placed beyond the reach of the party introducing the evidence. Where the verdict of the jury and the judgment of the court are founded upon such evidence, the error is material

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and substantial. [*Guthrie v. Merrill*, 4-187; *Johnson v. Matheus*, 5-118; *Shaw v. Mason*, 10-184; *Grant v. Pendery*, 15-237; *Shepard v. Pratt*, 16-209; *Brock v. Cottingham*, 23-383; *R. R. v. Walters*, 24-504; *Stainbrook v. Drawyer*, 25-383; *Lee v. Birmingham*, 30-312.]

Error from Marshall District Court.

ACTION by Alex. Hughan and John McDowall, as partners, who had judgment at the August Term 1875. The City of Waterville, defendant, brings the case here. All the facts and proceedings are stated in the opinion.

B. P. Waggener, for plaintiff in error.

J. W. English, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by Hughan & McDowall against the city of Waterville, for work, labor and materials furnished by them to the city upon a certain written contract entered into between the parties for the construction of a certain dam on the defendant's land across the Little Blue river. The plaintiffs allege in their petition, among other things, that they constructed said dam in accordance with said contract, and that the value of their labor and materials furnished amounted according to the contract to the sum of \$7,871.85; that at sundry times the defendant paid them for such labor and materials various sums, amounting in the aggregate to the sum of \$4,498, and that there still remains due from the defendant to the plaintiffs the sum of \$3,378.85; that for this sum the defendant, through its mayor and clerk, gave to the plaintiffs a certain paper in effect a due-bill, which sum still remains due and unpaid, and for which with interest the plaintiffs ask judgment. The defendant answered to this petition, putting in issue substantially all the allegations of the petition except those setting forth said payments made by the defendant to the plaintiffs, and setting forth substantially that said dam was a mill-dam, and that said contract was *ultra vires*, illegal, and void, and therefore that the defendant was under no legal obligation to pay the plaintiffs for the construction of said dam, etc. The allegations of the answer putting in issue

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the execution of said due-bill were duly verified by affidavit. The plaintiffs replied to said answer, denying generally all the allegations of new matter contained in the answer. A trial was had before the court and a jury.

On the trial the plaintiffs introduced in evidence *a copy* of said due-bill, and did not introduce the original in evidence. This was allowed to be done over the objections of the defendant; and in this we think the court below erred. It was shown on the trial that the original due-bill, after it was signed by the mayor and clerk, was handed to the plaintiff McDowall. And there was no legal evidence showing that it was ever destroyed, or lost, or ever went into the hands of any other person. The other plaintiff, Hughan, testified on the trial however, that McDowall told him (Hughan) that he (McDowall) gave said due-bill, along with the other papers in the case, to their attorney, H. P. Cooper. Cooper was the attorney who commenced this action for the plaintiffs. There was nothing further shown with reference to said due-bill. There was no attempt made to ascertain whether Cooper still had it, or not. This case was tried in Marshall county. McDowall was at the time of the trial in Chase county; and Cooper was in Washington county, about twenty-seven miles distant from the place of trial. Said copy of said due-bill showed that the plaintiffs had done 692 5-27 yards of masonry at \$10 per yard, and 100 yards at \$9.50 per yard, amounting in the aggregate to \$7,871.85, and that \$4,498 of that amount had been paid, leaving \$3,373.85 still due to the plaintiffs. This due-bill was the only evidence introduced on the trial showing that the plaintiffs did the amount of work which they claimed to have done, and the only evidence showing the value of the work which they actually did do. The only other evidence upon this subject was the testimony of two witnesses, one of whom testified, that "There was over 600 yards of work done on the contract;" and the other testified, that, "As near as I can remember, about 200 yards" of work was done under the contract. This was all the evidence introduced with respect to the amount and value of the work done.

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The court below instructed the jury in substance, to find for the plaintiffs for the full amount of their claim; and so the jury found—finding in favor of the plaintiffs and against the defendant for \$3,792.24, and the court rendered judgment in accordance with this verdict. A motion in arrest of judgment, and a motion for a new trial, were made by the defendant, each setting up various grounds, and each was overruled by the court.

We think it will appear from the foregoing statement of the case, that the court below erred in permitting said copy of said due-bill to be introduced in evidence, and that the error was material and substantial. There was no showing that the original was lost or destroyed, or placed beyond the reach of the plaintiffs. On the contrary, it was traced to one of the plaintiffs by competent and legal testimony, and to an attorney of the plaintiffs by incompetent testimony; and there the evidence leaves it. And without the evidence furnished by said copy of said due-bill, no such judgment could have been rendered upon the evidence as was rendered. Instead of showing that there were 792 5-27 yards of work done, as said copy of said due-bill did, the other evidence showed that there were only "over 600 yards," or "about 200 yards," done; and instead of showing that said work was worth from \$9.50 per yard to \$10 per yard, as said copy of said due bill did, the other evidence was wholly silent upon the subject.

The judgment of the court below will be reversed, and cause remanded for a new trial.

BREWER, J., concurring.

HORTON, C. J., not sitting in the case.

MORRIS CENTER *et al.* v. MCQUESTEN AND WILLIAMS.

1. STATUTE OF FRAUDS; *Promise Made to Debtor.* A promise made to a debtor, for a valuable consideration, to pay his debt to a third person, is not a promise to answer for the debt of another person; within the statute of frauds, which applies only to promises made to a creditor; and such a promise made to the debtor need not be in writing. [*Anthony v. Herman,*

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14-694; *Harrison v. Simpson*, 17-508; *R. R. v. Hopkins*, 18-494; *Floyd v. Ort*, 20-164; *Strong v. Marcy*, 33-109, 112.]

2. GARNISHMENT; *Money in Hands of Agent*. Where a principal places money in the hands of his agent to pay a debt due from him to another person, and such other person at the time has no knowledge of the direction and acts of the principal, and the agent, while on his way to make the payment, is duly garnisheed at the instance of certain judgment-creditors of his principal, such money is liable to be applied under the proceedings of garnishment to satisfy the claims of the judgment-creditors.
3. ——— After such garnishment, the agent is not liable for said money to the person to whom he was directed by his principal to make the payment thereof.

Error from Franklin District Court.

AN action was brought by *Wm. Williams* against *B. C. McQuesten*, to recover \$506, alleged to belong to *Williams*. *Center* and two others were afterward joined as co-defendants. The district court, at the March Term 1874, gave judgment in favor of *Williams* and against *McQuesten* for the amount claimed, and adjudged that *Center* and the other defendants had no interest in said moneys. *Center* and the other two defendants appeal, and join *Williams* and *McQuesten* as defendants in error. All necessary facts are stated in the subjoined opinion.

Benson & Parkinson, and *Goodin & Stoughton*, for plaintiff in error — after quoting from the decision of the court below, "That a creditor may maintain an action against a party upon a special promise made by such party to the debtor to answer for the debt; that in an action on such promise, no one but the promisor can set up as a defense, that the promise was not in writing" — contended, that such statement is exactly the reverse of what the law is upon the subject; (§6, ch. 48, Gen. Stat. 505.) "No action shall be brought whereby to charge a person upon any special promise to answer for the debt of another person, unless the agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, signed by the party to be charged therewith." And see, 5 Cush. 488; 5 Metc. 496; 98 Mass. 296; 31 Conn. 95; 43 N. H. 491; 24 Wend. 260; 108 Mass. 246; 1 Wis. 77; 12 Johns. 291. Again, the district court found that the com-

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sideration for the cattle was *paid* by Williams to Cowgill, and held that the subsequent transactions made McQuesten the owner of the money in Williams' hands. Now, admitting that the money was *paid*, then the sum of \$506 of Cowgill's money was placed in Williams' hands, and while so in his hands he was garnisheed, having *moneys in his hands* belonging to the principal debtor, Cowgill; and by virtue of their proceedings plaintiff in error became entitled to the moneys. So whether we treat Williams as owing Cowgill, or as having funds in his hands belonging to Cowgill, in either case, the attachment-plaintiffs became entitled to the funds.

John W. Deford, for defendants in error, maintained that the judgment is supported by the facts found; that the conclusions of law, as explained by the facts, are not erroneous; 36 Iowa, 616; 58 Mo. 589. The plaintiffs in error had shown no right to, or interest in, the fund in court, hence it did not lie in them to impeach the promise of Williams as void under the statute of frauds. But even if Williams had set it up, it would have done him no good, for it plays no part in this case. 36 Iowa, 616; 5 Wend. 235; 15 Kas. 236. The promise was not made to McQuesten, the creditor, but to Cowgill, the debtor. But that McQuesten *assented* to the promise of Williams to Cowgill, for his benefit, is to be presumed, until his dissent be shown; (58 Mo. 589;) his assent is clear from his bringing this suit to enforce the promise. Hence, if needed to sustain the judgment, this court will presume that McQuesten, before Williams was garnisheed, had seen him, and received his promise, assented to it, and released Cowgill, and whatever other fact, not found, if any, needful to an affirmation.

The opinion of the court was delivered by

HORTON, C. J.: From the findings of fact in this case, it appears that the defendant Williams bought of one H. E. Cowgill a number of cattle, for the sum of \$1,749; that at the time the consideration was being paid, Cowgill requested Williams to retain \$506 of the money to pay to

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B. C. McQuesten on a note of that amount due to McQuesten from Cowgill, and Williams verbally promised Cowgill to pay McQuesten said sum. Shortly afterward, Morris Center, Henry Center, and Joshua Hodge severally recovered judgments against Cowgill before a justice of the peace, and caused proper proceedings to be instituted whereby the said sum of \$506 was duly garnisheed in the hands of Williams as the money of Cowgill, and therefore liable to be appropriated to pay such judgments. After all these proceedings, McQuesten brought suit against Williams to recover the said \$506; and to this action said plaintiffs in error were also made parties defendant. The court below held that McQuesten had the right to maintain his action on the special promise of Williams to Cowgill, and treating the money in Williams' hands as due to McQuesten, gave judgment in favor of McQuesten, and ordered the said \$506 (which had been deposited in court) to be paid to McQuesten, thereby denying the claims of said plaintiffs in error to any part of said sum by virtue of their several judgments against Cowgill, and their garnishment of Williams. It does not appear from the record, that McQuesten had any knowledge of the promise of Williams to Cowgill prior to the garnishee proceedings, or that he was privy to the agreement.

The judgment of the court below was erroneous, but not on the principle contended for by the counsel for plaintiffs in error. It is urged by them, that the promise of Williams to Cowgill to pay the debt of Cowgill, was a special promise to answer for the debt of another person, and not being in writing, signed by the party to be charged, was within the statute of frauds. (Sec. 6, ch. 43, Gen. Stat. 505.) The case is not within such statute. It is well settled, that a promise to a *debtor* (as in this case) to pay his debt to a third person, is not a promise to answer for the debt of another within the statute. The statute applies only to promises made to the *creditor*. (*Eastwood v. Kenyon*, 11 Ad. & El. 445; *Howard v. Coshov*, 38 Mo. 118; *Skelton v. Brewster*, 8 Johns. 376.) For a full discussion of this question, and for a

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citation of further authorities, see Throop on Verbal Agreements, chapters 11 and 18, vol. 1, 390, 453. Neither is it true that an action cannot be maintained upon a verbal promise made by a defendant, upon a valid consideration, to a third party for the benefit of a plaintiff, although the plaintiff was not privy to the consideration. *Anthony v. Herman*, 14 Kas. 484; *Harrison v. Simpson*, 17 Kas. 508. But while it is true, that the promise to Cowgill by Williams is to be deemed made to McQuesten, if adopted by him, though he was not a party, nor cognizant of it when made, yet such adoption to be effectual must have been made before the rights of other parties had intervened. McQuesten, by assenting to the promise or agreement of Williams, stands in no better position than if Cowgill had brought the suit. McQuesten is subject to all the equities that Cowgill would have been. After the proceedings had been instituted to divert the \$506 to pay the judgments against Cowgill, McQuesten had no better right to recover the same, than Cowgill would had he been plaintiff in the court below instead of McQuesten.

The findings of fact virtually show that the relation of principal and agent was created between Cowgill and Williams. At the time the consideration of the \$1,749 was paid for the cattle, \$506 of the money was separated from the sum, and ^{2. Garnishment; agent, and principal.} Williams, under the direction of Cowgill, was to deliver this to McQuesten. It was his duty to have so delivered the money, or to have returned it to Cowgill, unless prevented by legal proceedings. He was thus prevented. Prior to the payment, or delivery, the money was still the property of Cowgill, intended by him to be used to pay his note held by McQuesten. Before the money could be delivered to McQuesten, and while Williams was on his way to do so, the garnishment orders were served on him, and thereby the money in his hands (which he was to pay to McQuesten under the orders of Cowgill,) became liable to be appropriated to the satisfaction of the several judgments of the plaintiffs in error. From the time of the garnishment, the money in Williams' hands, so belonging to Cowgill, was in fact in

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custodia legis; and after the money was deposited in the court, and all the parties making claim thereto were before the court asserting their respective interests, the court should have distributed the same in accordance with the respective rights of the plaintiffs in error under their judgments and the garnishee proceedings. McQuesten was not entitled to any portion of the fund in controversy, until the claims of the plaintiffs in error had been satisfied.

As the findings of the district court do not set forth the sums due on the respective judgments of the plaintiffs in error, we can only reverse the judgment of the court below, and remand the case for further proceedings in accordance with the views expressed in this opinion.

Judgment reversed.

All the Justices concurring.

WICKERSHAM & KEITH v. CHICAGO ZINC COMPANY *et al.*

1. **KNOWLEDGE; Corporation Agent's Knowledge, When Acting for Himself, is Not Knowledge of Corporation.** The general superintendent of a zinc and mining corporation conveyed to such corporation by a general warranty deed certain lands, to which W. & K. not being in possession, asserted some claim by virtue of a written lease from a prior vendor. Of this lease said superintendent had actual notice when he purchased the said premises in his own interest, and said lease was also recorded in the office of the register of deeds of the county where the land was situated, but was not acknowledged and certified as required by sections 9, 11 and 12, of the act regulating conveyances. *Held*, That said superintendent, having acted in the transaction, not for the corporation, but for himself, his knowledge of the lease to W. & K. was not the knowledge of the corporation, and cannot affect its rights, unless shown to have been communicated to it, or unless such facts had been presented to it to have put the corporation on inquiry.
2. **CONSTRUCTIVE NOTICE; Unauthorized Record, Does Not Impart Notice.** The provision of section 20 of the act relating to conveyances, to the effect that the filing of written instruments with the register of deeds for record imparts notice to all parties and persons of the contents thereof, applies

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to such instruments only as are certified in the manner prescribed by law. [*Young v. Thompson*, 2-83; *Swartz v. Stees*, 2-236; *Simpson v. Munder*, 3-172; *Cockrill v. Downey*, 4-426; *Hutchinson v. Hartmann*, 15-134; *Setler v. Alvey*, 15-158; *Sch. Dist. v. Taylor*, 19-288; *Coon v. Browning*, 10-85.]

3. **ESTOPPEL**; *What Acts Will Constitute*. W. & K. in November 1872 executed a written lease with one W., whereby they could mine coal on W.'s land for a term of twelve years, which term was to commence January 1st 1873. W. & K. were to pay W. (as rent for the land and right to mine coal) one-half cent for every bushel mined, to be paid monthly. The lease stipulated that W. & K. should have the right to commence mining coal at any time, and W. & K. agreed to do so as early as they could make the necessary preparations. W. & K. did nothing under the lease, but refused to answer W., who wrote them in the spring of 1873, asking them what they intended to do as to mining coal on his premises, and W. in a few weeks thereafter sent a letter to the address W. & K. canceling the lease. W. & K. thereafter took no other steps to mine coal on the premises, or to commence work therefor, but to make inquiry as to the costs of mining and loading coal at said premises on the cars, until June 1874, when they sent their agent with a laborer to mine, and to make demand for the premises if forbidden to work; and at this time said premises were owned and in the possession of a zinc and mining corporation under a purchase made in October 1873, which corporation, with the knowledge of W. & K., and without objection from them, or any assertion of W. & K.'s claim thereto, had expended \$65,000 on the premises in the construction of extensive mining works. *Held*, That W. & K. were, by the terms of said lease, the notices of the lessor, and their own acts and conduct, estopped from asserting against said zinc and mining company any rights under the lease, or any possession to the premises, or any claim for damages.

Error from Cherokee District Court.

ACTION by J. R. Wickersham and R. H. Keith, against the Chicago Zinc & Mining Company, J. A. C. Thompson, and W. A. Wilkinson. Trial at the October Term 1875 of the district court, and judgment against plaintiffs and in favor of defendants for costs. Plaintiffs bring the case here for review. The facts are stated in the opinion.

McComas & McKeighan, for plaintiffs, contended, that the zinc company, at the date of the delivery of the deed to them by Thompson, knew all about the lease to plaintiffs, as he was general superintendent of the zinc company. Notice to offi-

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cers and agents of corporation, is notice to corporation; *Angell & Ames on Corp.*, §§ 305, 306; 16 Md. 456; 38 Mo. 228; 19 Vt. 410.

Blair & Hill, for defendants, maintained, that, while it is true in some instances and under certain circumstances, knowledge of a general officer of a company is knowledge of a company, yet it is equally true that his knowledge is not the knowledge of the company in a contract of sale between him and the company, where he is acting as a private individual, and where there is no community of interest between them; (*Angell & Ames on Corp.*, §§ 308, 309; 15 Denio, 337.) Therefore the zinc company had no knowledge of the lease through Thompson's knowledge. Again: The company had no constructive knowledge by the record of the lease. Our statute of conveyance provides how instruments affecting real estate may be acknowledged, and how the acknowledgment shall be certified to entitle them to be recorded, and declares that when *so certified* and recorded they shall be notice to all the world.

The acknowledgment of the lease to plaintiffs, however, is not *so certified*, and the instrument was not entitled to be recorded. Hence, the record imparts notice to no one; and the defendant corporation had no actual or constructive notice of its existence, and therefore is not bound by its covenants. But even if the lease was valid and binding on all the defendants, the plaintiffs have no cause of action. This is a suit for damages, and the court says the plaintiffs have sustained none.

The opinion of the court was delivered by

HORTON, C. J.: On the 2d of November 1872, Wickersham & Keith made a contract and mining lease in writing with one Wm. A. Wilkinson, who then occupied and claimed certain real estate under and by virtue of land-contracts made and entered into before that time between said Wilkinson and the Mo. River, Ft. Scott & Gulf Railroad Co., whereby they had the right to mine coal on said land,

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and to erect such houses or shelters on the land as said W. & K. might deem necessary for the convenient prosecution of the work of mining. The contract or lease was for the term of twelve years, the term to begin on the 1st of January 1873, and also contained among other stipulations, the following:

"The parties of the second part shall have the right to commence mining said coal at any time, *and they agree to do so as early as they can make the necessary preparations*; and until they shall commence mining, the party of the first part reserves the right to mine coal on said land, but to desist when the parties of the second part shall commence mining. The parties of the second part agree to pay the party of the first part, as rent for said land, one-half cent for every bushel of coal they mine, to be paid monthly on the 15th of each month for the month previous.

"When the parties of the second part commence mining they agree to furnish the party of the first part all the coal he may need for his private use at the cost of mining same, and this sum is to be credited monthly upon the monthly payments of the parties of the second part for rent."

From the time of the signing of the lease, until in June 1874, Wilkinson neither saw nor heard from W. & K., and W. & K. took no steps to mine the land until in said June 1874, when they sent an agent to the land, accompanied by a laborer with shovel and pick, to go to mining, and to make a demand for the premises provided they were forbidden to work. At this time, the Chicago Zinc & Mining Co. were in the possession of the premises, had their works in operation, and had expended in the construction of their works, etc., upon the premises the sum of \$65,000. After the months of January and February 1873 had passed, and W. & K. had done nothing under the lease in the way of mining, or commencing work therefor, Wilkinson wrote to them at Kansas City, Mo., wanting to know what they were intending to do; and not getting any reply from them, or receiving any information, he, a few weeks thereafter, wrote them a second letter, declaring the contract forfeited. The first letter from Wilkinson was received by W. & K., but not answered; the second letter they say they did not receive. W. & K. were coal merchants

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at Kansas City, Mo. In the month of June 1878, Wilkinson got his contracts with the railroad company embracing these premises renewed and extended, and in September of the same year sold the premises for a valuable consideration to one J. A. C. Thompson, and assigned the land-contracts with the railroad to him; and executed to him a general warranty deed, in which his wife joined. Thompson knew at the time of his purchase of the lease in question. On September 12th 1878, said Thompson received from the railroad company a general warranty deed to the said premises, and paid therefor the balance of the purchase-money, which Wilkinson yet had to pay. On September 11th 1878, Thompson made out a warranty deed from himself and wife to the Chicago Zinc & Mining Co. for the lands. At such time, the company was not fully organized, and the deed was not delivered until the 23d of October 1878. The zinc company completed its organization, so that a certificate of incorporation was issued to it on the 23d of September 1878. After such organization, Thompson turned over the land to the company for \$10,000, and received paid-up certificates of stock for such amount. On September 15th 1878, said Thompson was chosen general superintendent of the corporation. After all of the above transactions, W. & K. filed their petition against the Chicago Zinc & Mining Co., and Thompson, and therein demanded damages for \$15,000, and that the defendants be perpetually enjoined from mining and digging coal on the said premises, and from interfering with the rights of W. & K. On the trial a jury was waived, and the case tried to the court. Findings of fact were filed by the court, embodying among other things, all the above facts, and on all the findings of fact, the court held that W. & K. could not recover.

The court having found as a conclusion of fact, that the C. Z. & M. Co. had no actual knowledge of the lease of W. & K. at the time of purchasing the land from Thompson, such finding is conclusive of the case, and fully sustains the judgment, unless, as the plaintiff in error contends, the company was bound by the knowledge of Thompson, its

1. Knowledge,
principal and
agent.

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general superintendent, as to the lease, or unless the company is held to have had constructive notice of the lease through the record of the same in the office of the register of deeds. It is undoubtedly true as a general proposition, that the principal is charged with the knowledge and bound by the acts of the agent; but this general rule, like most other rules, has its exceptions and limitations. The general rule is based upon the principle, that, as it is the duty of the agent to act upon the notice for his principal, or to communicate the information to his principal in the proper discharge of his trust as such agent, notice to the agent is likewise legal notice to his principal. This rule applies to the agents and officers of corporations, as well as others. This general rule has no application however to a case in which the one party does not act as agent, but avowedly for himself, and adversely to the interests of the other. In other words, neither the acts nor knowledge of an officer of a corporation will bind it in a matter in which the officer acts for himself, and deals with the corporation as if he had no official relations with it. *Angell & Ames on Cor.*, §§ 308, 309; *Winchester v. B. & S. Rld. Co.*, 4 Md. 231; *Fulton Bank v. N. Y. & S. C. Co.*, 4 Paige, 127; *Story on Agency*, § 140. In this case, Thompson bought the land for himself and one C. F. Russell; the deeds were taken to himself; and in the transfer and conveyance of the same to the company, he did not represent the company. He was acting in behalf of his own interests, and in an adversary character. His knowledge of the lease, under the circumstances, was not notice to the company of which he was an officer, unless it had been shown by proof to have been communicated to the company, or at least such facts had been established as would have been sufficient to have put the company on inquiry. In the contract or sale between Thompson and the company, he was acting as a private individual, and there was no community of interest between him and the company; therefore the company had no knowledge of the lease through Thompson's knowledge. With these views, it is unnecessary to comment upon the actual or constructive notice to Russell, and his relations with the corpora-

tion, as the conclusions we have reached, as to the knowledge of Thompson not being notice to the corporation, include all that could be said as to Russell.

We must also hold that the company had no constructive knowledge of the lease, by the record thereof. It is true, that it was filed for record April 14th 1873, in the office of the register of deeds of Cherokee county, and afterward recorded in that office. But it was not certified as required by sections 9, 10 and 11 of the General Statutes, page 186, and therefore did not impart notice to the company. In place of a proper acknowledgement of the lease, there is only the following:

2. Record; constructive notice.

"Subscribed to this 2d day of November 1871.

"E. A. PERRY, Notary Public. [SEAL.]"

Section 20, Gen. Stat. 187, prescribes that instruments, *certified* and recorded as provided for in the act regulating conveyances of real estate, shall be notice to all persons of the contents thereof. As the lease was not certified as the statute directs and requires, the record of the lease imparted notice to no one.

The judgment is sustainable again, upon another proposition. There was such an abandonment of the lease by W. & K., and such a concellation thereof by Wilkinson, and such acts and conduct on the part of W. & K., that they were estopped from asserting any right to the premises against the

3. Estoppel; acts of party.

Zinc and Mining company, or to any claim for damages against this corporation. If a contract specifies no time, the law implies that it shall be performed within a reasonable time. In this case, while the term of the lease was not to commence till January 1st 1873, it was specially provided that W. & K. should have the right to commence mining coal at any time, and *they agreed so to do as early as they could make the necessary preparations*, and the said Wilkinson was to receive as rent for his land one-half cent for every bushel of coal mined, to be paid monthly. In view of all the conditions of the lease, it certainly must be apparent that the parties to

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the lease had in view in making the contract an early commencement of the mining of coal by W. & K. A long delay would have been injurious to Wilkinson, as in fact it actually was, because in the end, he became deprived of his property, owing to his inability to meet his payments to the railroad company, as he relied upon the payments on the lease to obtain funds to pay installments due on his land-contracts at the date of the lease, and for the nonpayment of which the railroad company had the right to forfeit his interest in the land. After waiting till the spring of 1873, and nothing having been done, Wilkinson properly wrote to W. & K., inquiring what they intended to do in the matter. They received the letter, and refused to answer. In a few weeks Wilkinson wrote them again, declaring the contract forfeited. Nothing being attempted to be done by W. & K. under the lease, the Zinc and Mining company in the fall of 1873 purchased the premises. When the company was commencing work, an agent of W. & K. visited the premises described in the lease to see what coal could be mined for, and delivered to the cars on the Gulf railroad. After examinations he reported to W. & K. that it could not be mined and delivered for less than eight or nine cents per bushel, and at this time W. & K. were getting their coal delivered to them upon the same railroad from other mines at seven cents per bushel, and were able to fill all their orders they secured from the coal which they were obtaining from other mines. They watched the growth of the extensive mining works upon the land in question, and the consequent expenditure of large amounts of money, making no attempt to assert any claim, and giving no notice to the company of the existence of their lease. After sixty-five thousand dollars had been expended by the company upon the land, to lay a foundation for a suit they sent (in June 1874) an agent, with one man with a shovel and pick, to go to mining, and make demand for the premises. They then sought to resuscitate their lease, made in November 1872 in anticipation of immediate work thereunder. They had no right so to

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do. In view of their conduct to Wilkinson, and to the Zinc and Mining company, they were too late in asserting any claim under the lease. It would be grossly inequitable to hold otherwise. The judgment was rightfully given. If the plaintiffs in error have been damaged in the premises, which is not apparent from the record, the result comes from their own *laches*, and for such acts innocent parties should not suffer.

The judgment will be affirmed.

All the Justices concurring.

A. J. SCOTT v. SAMUEL MORNING *et al.*

PLEADINGS; Failure to Reply; Judgment on Pleadings. Where a plaintiff in an action on a note and mortgage, sets forth in his petition that S., one of the defendants who did not execute said note or mortgage, claims to have some interest in the mortgaged property, but that whatever interest he may have therein is junior and inferior to the mortgage-lien; and S. answers, setting forth in his answer in detail, that he is the absolute and exclusive owner of the mortgaged property, showing how he became the owner thereof; that the mortgagors never had any interest in the mortgaged property, and therefore that the mortgage is void as against him, and no reply is filed by the plaintiff to this answer, and the court, on motion of the plaintiff, rendered judgment on the pleadings in favor of the plaintiff and against all the defendants, *held*, that said judgment is erroneous as against S.

Error from Cherokee District Court.

FORECLOSURE, commenced by *Morning* against Charles Harmon, Almira Harmon and *T. M. Harmon*, as makers of a promissory note, and said *T. M. H.* and *Margaret* his wife as mortgagors, and against *Scott* as a subsequent incumbrancer. The note and mortgage were executed, and dated "January

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10th 1871." *Scott* answered, claiming to be the owner in fee of the mortgaged lands, alleging that said lands were patented in May 1870, and that he purchased the same in 1874 from the patentees, and denying that the mortgagors (defendants *T. M. Harmon* and wife,) ever had any title to or interest in said lands. He also denies that the mortgage is a lien on the lands, alleges that said mortgage is a cloud upon his title, and asks to have the mortgage adjudged void, and canceled. Afterward said *T. M. Harmon* filed what he called an "answer," (evidently an answer to *Scott*, treating *Scott's* answer as a cross-petition,) admitting the execution of the note and mortgage on 10th January 1871, and alleging that on the 13th of February 1871, he (said *T. M. H.*) together with his wife sold and conveyed said land to *Scott* for \$1,000, and that *Scott* as a part of his contract of purchase, and as part payment of said \$1,000 purchase-money, promised and agreed to pay said note and mortgage then held by *Morning*, and that in pursuance of said contract *Scott* did pay to *Morning*, in November 1872, \$500 on said note. To this answer, *Scott* filed a reply. The action came on for trial at the October Term 1875. The journal entry reads as follows:

(*Title.*) "And now comes the said plaintiff, by Kelso & Barnes his attorneys, and the said Thomas M. Harmon by H. G. Webb and W. B. Glasse his attorneys, and the said A. J. Scott by J. N. Ritter his attorney; and thereupon this action came on for trial, upon the petition of the said plaintiff, the answers of the said defendants Thomas M. Harmon and A. J. Scott, and the reply of said Scott to the answer of said Harmon; and the said plaintiff by his said attorneys moved for judgment upon said pleadings, and said motion was argued by counsel for plaintiff, and defendants T. M. Harmon and Scott; and the court being sufficiently advised in the premises, finds that the several averments in said petition are true as therein averred, and that there is due and unpaid upon the note therein described the sum of \$652.95," etc.

Upon the findings the court gave a personal judgment, in favor of *Morning* and against defendants Charles, Almira, and *T. M. Harmon*, and decreed a foreclosure of the mortgage and

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sale of the mortgaged premises. *Scott* alone appeals, bringing the case here on error, and he joins *Morning* and all the *Harmons* as defendants in error.

John N. Ritter, for plaintiff in error, contended, that as the allegations of the petition of *Morning*, and the answer of *T. M. Harmon*, were all denied by *Scott*, except those specially admitted, and as the allegations of *Scott's* answer or reply were not denied, they were to be taken as true, and showed the paramount title in *Scott*, freed from any lien of the *Harmon* mortgage. *Scott* is not estopped from denying the title of the mortgagors to said land, he having procured all the title to said land both legal and equitable from the patentees. When the vendee of a mortgagor purchases an outstanding paramount title of a third person, the purchase does not inure to the benefit of the mortgagee; 38 Ala. 845. Admitting, for the purposes of this case, that the mortgagee, *Morning*, could upon the mortgage maintain an action to foreclose and sell any title to said land which *Scott* derived from the mortgagors, (*Harmon* and wife,) and that *Scott* stands no better than they in that respect, yet the court will see by the pleadings, that neither of the mortgagors had any title either legal or equitable to said land, and hence there was no interest to sell, and none to foreclose.

W. C. Webb, for defendants in error, contended, that the record shows a trial, and a finding *as a fact*, that the averments of the plaintiff's petition are true; that the findings of the court authorized and sustain the decree; that the presumption, from the record, is, that such trial must have been and was as upon proper issues joined between *Morning* and *Scott*, as upon a reply by *Morning* to *Scott's* answer, and that if no reply was in fact filed, it was waived, (9 Kas. 177, 189; 17 Kas. 173,) and the case tried as if a reply was duly filed, and that there was testimony sufficient to warrant the finding. A trial of the action, of course was a trial to all the parties, and it

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determined all their rights. That it was so intended, appears from the fact that the real contest respecting the lands, as shown by the pleadings in the record, was between plaintiff Morning and defendant Scott, and the court explicitly finds that the claim of Scott is subsequent and subject to the lien of Morning. It does not matter whether this fact was found upon an issue joined between Morning and Scott, (by a reply denying the claim of Scott that he had and held the superior and anterior title, or as upon such denial a reply being waived,) or whether upon the issue joined between Scott and Harmon, wherein Harmon averred that Scott bought the land with full knowledge of the mortgage and mortgage-debt, and agreed as part of the purchase-money to pay such debt. In either case, the finding of the court, that Scott's title was subsequent, and subject to Morning's lien under the mortgage, is conclusive. All the presumptions of the law, within the oft-repeated decisions of this court, are in favor of the judgment; 18 Kas. 462; 15 Kas. 823; 17 Kas. 297.

The opinion of the court was delivered by

VALENTINE, J.: In this action, Samuel Morning was the plaintiff below, and A. J. Scott and several others were the defendants. Judgment was rendered in favor of the plaintiff below and against all the defendants; but as Scott is the only person who is now complaining of such judgment, it will be necessary only to consider whether the judgment rendered against him was correct, or not.

The plaintiff set forth in his petition that three of said defendants (other than Scott) executed to him a certain promissory note; that one of said three, and another defendant (other than Scott) executed to him a real-estate mortgage to secure said note; and that Scott claimed to have some interest in the mortgaged property, but that whatever interest he might have therein was junior and inferior to plaintiff's mortgage-lien. Scott answered to this petition, setting forth in his answer, in detail, that he was the absolute and exclusive

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owner of said mortgaged property, showing how he became the owner thereof; that the said mortgagors never had any interest in the mortgaged property, and therefore that the mortgage was void as against him. There was no reply filed by the plaintiff to this answer. At least no such reply is found in the record. The record tends to show that no such reply was filed; and the clerk of the court below certifies at the bottom of the record, "that the above and foregoing is a true, full, and complete transcript of the above and foregoing cause, and the same contains *all the pleadings* filed, and proceedings had in said cause." Hence we must presume that no such reply was filed. The defendant T. M. Harmon also filed an "answer," and the defendant Scott filed a reply to Harmon's answer. These, and plaintiff's petition, were the only pleadings in the case. Upon these pleadings the plaintiff Morning moved the court for judgment, and the motion was sustained, and judgment was rendered in favor of the plaintiff and against all of the defendants. The judgment was a personal money-judgment, as against the said three defendants who executed said promissory note, and a judgment that the mortgaged property be sold, etc., as against all the defendants. This judgment was probably correct as against all the defendants except Scott. As against him, the judgment was erroneous. He was not in default, and no judgment could properly have been rendered against him on the pleadings. Upon the pleadings, the judgment should have been rendered in his favor.

The judgment of the court below as against the defendant Scott will be reversed, and cause remanded for further proceedings.

All the Justices concurring.

KANSAS PACIFIC RAILWAY CO. v. SAMUEL D. HOPKINS.

1. **CONSIDERATION; Assumption by Railway Company, of Another's Contract, and Liability; Pleading.** Where the petition sets out the execution of a written agreement between the J. C. & Ft. K. Railway Co., and a land-owner for a right-of-way for a railroad through the latter's premises, upon the condition that such railway company should construct a side-track, depot, and station buildings on the premises of the land-owner, and furnish to such person Osage orange plants to fence the railway, and also pay him for growing the fence, when sufficient to turn stock; the assumption of the obligations therein created against the J. C. & Ft. K. Railway Company, by the K. P. Railway Co.; the fact that the only consideration moving the land-owner to part with his land for such right-of-way was the concurrent agreement of the railway company; the entry and possession of the two corporations upon the premises of the land-owner in pursuance of the agreement, and the continued use and occupation of the same for a right-of-way by the K. P. Railway Co.; the failure and refusal of either company to perform any of the said agreements contained in the contract; the damage occasioned by such failure, and the demand of judgment, *held*, that sufficient facts are therein set forth to constitute a cause of action against the K. P. Railway Company.
2. **CONTRACT; Consideration; Promise to One Party, for Benefit of Another.** Where, in such an action as above stated, the two railway companies are impleaded together, but a demurrer to the evidence is sustained as to the one company, and thereafter the cause is prosecuted against the other company only, the election of the latter company implies an abandonment of the former; and the action against the latter is maintainable, on well-settled rules. The promise of the K. P. Railway Co. to the J. C. & Ft. K. Railway Co., made upon a valid consideration, and having been adopted by the land-owner, is to be deemed as made to him, though he was not a party nor cognizant of it when made. [See cases cited in *Center v. McQuesten*, 18-476; *Floyd v. Ort*, 20-164; *Strong v. Marcy*, 33-109, 112.]
3. **RIGHT-OF-WAY, FOR RAILROAD; Damages; Action.** Where a land-owner consents that a railway company shall take possession of a right-of-way for its railway on and through his lands, under a written agreement conditioned that the company should within a given time construct a side-track, depot, and station buildings on the premises of the land-owner, and furnish hedge plants to fence the railway, and pay the land-owner for growing the hedge, and such railway company takes possession under the agreement, obtains the right-of-way thereby, and continues to use and occupy the premises of the land-owner for such purpose, and fails and refuses to comply with the terms of the agreement upon which it made entry, took possession, and acquired the right-of-way, *held*, that the land-owner can at once, upon breach of the contract, bring his action at

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law in the proper district court for his damages against the railway company, and need not resort to the tribunal prescribed by the statute to have his damages assessed for the right-of-way.

Error from Davis District Court.

ACTION brought by *Hopkins*. Trial at the November Term 1875 of the district court. A demurrer to the evidence was sustained as to the Junction City & Fort Kearney Railway Co., one of the defendants, and overruled as to the *Kansas Pacific Railway Co.*, the other defendant. Judgment against the latter company for \$100, and costs, and said *K. P. Railway Co.* brings the case here.

C. E. Bretherton, for plaintiff in error.

McClure & Humphrey, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: This case comes here on the record, without case-made or bill of exceptions, and the only error alleged is, that the petition does not state facts sufficient to constitute a cause of action against the plaintiff in error. The defendant in error sued jointly the Junction City & Fort Kearney Railway Company, and the Kansas Pacific Railway Co., to recover \$600 as damages caused by the failure of the said J. C. & Ft. K. railway company to comply with a certain contract entered into between said company and said Hopkins, whereby the said Hopkins was to deed the right-of-way through a half-quarter-section of land, and the fee-simple title of a piece of land bordering on such right-of-way, to the J. C. & Ft. K. railway company upon their building a side-track, depot, and station buildings on said half-quarter-section; and said railroad company was also to furnish Osage orange plants to fence the railroad, and was to pay for growing the fence, when sufficient to turn stock. The contract was dated 27th January 1878, and it provided that the depot and side-track should be constructed on or before the 1st of January

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1874. The petition further alleged that the J. C. & Ft. K. railway company afterward assigned, transferred and conveyed to the K. P. railway company, by a lease for ninety-nine years, its railroad, property, rights and franchises pertaining thereto, and that the K. P. railway company, in consideration of such conveyance, and the property and rights it thereby received, agreed and undertook on its part to discharge and perform all obligations and contracts to be performed by the J. C. & Ft. K. railway company and to pay all debts and dues of said company which were or had been entered into, incurred, or contracted; that immediately after the execution of the said agreement of January 27th, both of said railway companies entered upon and operated for a right-of-way, without other compensation than the said premises and agreements, a portion of the plaintiff's premises stated in the contract, and that the K. P. railway company has ever since continued to occupy and use as a right-of-way, for its road-bed and railway track, the said premises, and continues in the possession and enjoyment of the same; that neither of the railway companies has ever paid or offered to pay for the land so appropriated, or for any damages occasioned to said Hopkins by reason of the building of the road, and that the said railway companies have wholly failed, neglected and refused to perform any of the agreements of the written contract to build the depot, station buildings and side-track, or furnish, as agreed, the Osage orange hedge plants. The petition was filed January 30th 1875. A verdict was returned by the jury for the defendant in error against the K. P. railway company for \$100, and thereon judgment was rendered against the plaintiff in error.

The petition is attacked upon the grounds, that the averment of the refusal of the companies to build the depot, station buildings, and side-track, on the premises, or furnish the Osage orange plants, is inconsistent with the text of the agreement, which plaintiff in error claims imposes no obligation whatever on the railroad company to build, but was in the nature of a conditional promise to convey. This condition being unperformed, the contract was

Pleading; aver-
ment of facts.

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altogether (it is claimed) determined, and the rights of the parties were just the same as if it had never been entered into at all, and that the pleading cannot be maintained, because the plaintiff below does not therein allege that either entry or possession was without his consent, but adopts the possession of the companies, and grounds his claim for payment upon it. We do not think the petition liable to the construction placed upon it by counsel of plaintiff in error. The petition sets out the execution of the agreement; the assumption of the obligations therein created against the J. C. & Ft. K. railway company by the K. P. railway company; the fact that the only consideration moving to Hopkins to part with his lands for a right-of-way in this manner was the concurrent agreement of the J. C. & Ft. K. railway company; the entry of the two companies named upon the land of defendant in error immediately after the execution of the agreement, and in pursuance of such agreement; the continued use and occupation of the land for a right-of-way by the K. P. railway company; the failure and refusal of either company to perform any of the said agreements; the damages occasioned by such failure, and demand of judgment. Under the agreement, the said K. P. railway company, by its contract with the J. C. & Ft. K. railway company, has received all the benefits of said agreement, has obtained the possession of the premises occupied by it, and it cannot now be relieved of its liability in the premises. The plaintiff in error accepted the agreement between Hopkins and the J. C. & Ft. K. railway company with its burdens as well as its benefits. But for this agreement and the contract between the two railway companies, Hopkins could have prevented the entry of either company on his land, until full compensation therefor had been first made in money, or duly secured, irrespective of any benefit from the construction of either road. He consented to the entry and occupation thereof, relying on the written promise of the J. C. & Ft. K. railway company, for which the K. P. railway company made itself liable; and defendant in error did not adopt the possession of

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the companies as his claim for damages, but the entry of such companies and the possession of the same by virtue of the contract, and their refusal to comply with the terms of the contract on their part. As the deed to be executed by Hopkins was not to be made until after the construction of the depot and side-track, of course, as a condition precedent to maintain this suit for damages, it was not necessary for Hopkins to either deliver or offer to deliver to the railroad companies a deed.

Counsel for plaintiff in error cites many authorities to show that the statute furnishes the only mode of ascertaining the damages consequent upon taking private property for public use, and asserts that these support his objection to the petition.

Right-of-way;
contract for;
remedy.

The authorities in our opinion do not apply where a written contract exists between the parties as to the price to be paid for the right-of-way to be appropriated by a railway company. In this case, the compensation agreed upon to be paid for the right-of-way was the erection of the structures, the furnishing of the hedge-plants, paying for the cultivation thereof, etc., as provided in the contract; and the failure of the company to comply therewith, after entry and possession for right-of-way, rendered it necessary to ascertain their equivalent value in money to Hopkins, or in other words to assess his damages as compensation for the particular thing the company agreed to do for the right-of-way under the contract, and which the company had failed to perform. In such a case the land-owner can at once, upon breach of the contract, have recourse to a court of law, and need not of necessity resort to the tribunal prescribed by the statute to have his damages assessed for the right-of-way appropriated from his lands. There is nothing in the statute prohibiting parties from making their own agreements as to the price to be paid for a right-of-way for a railway; and when a contract is made therefor, the parties thereto are equally as much bound as the obligors to any other valid agreement. When parties do not voluntarily agree as to the compensation for the right-of-way

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appropriated (or to be appropriated) by a railway corporation, the statute provides the mode of ascertaining the compensation to the land-owner; but this statute in no manner prohibits parties from making their own agreements as to such compensation. The contract being in writing, the law presumes that there was a sufficient consideration for the agreement, and not being violative of any statute, or against public policy, of necessity is valid and capable of being fully enforced. (*Northern Kansas Land Co. v. Oswald*, ante, 336-339.)

Again, the petition is attacked on the ground that it is wholly bad, because it does not allege that Hopkins accepted the Kansas Pacific railway company instead of the J. C. & Ft. K. railway company, and that as both companies were made defendants in the court below, such action amounted to an election to preserve the liability of the J. C. & Ft. K. railway company, which negated the liability of the K. P. railway company. The counsel for plaintiff in error con-

Contract; promise to one, for benefit of another.

tends, that, "even if such an action could be maintained against the person assuming the debt, it could not coëxist with one against the original debtor. The creditor may assume the contract made for his benefit by the original debtor, and so take the place of the original debtor; but he cannot hold both. The new debtor does not become co-debtor with or surety for the original debtor; but if the creditor accepts the new contract, it replaces the old one, and the original debtor is released." The question is not presented in the record as suggested by the counsel. It is true, suit was brought by Hopkins against both railway companies; but on demurrer to the evidence by the J. C. & Ft. K. railway company, the demurrer was sustained, and judgment rendered in favor of the last-named company, and thereafter, all the proceedings were had as to the K. P. railway company, as though it had not been impleaded with the J. C. & Ft. K. railway company. The claim against the latter company was abandoned; and as the case was given to the jury, the action was maintainable on the rule, that the promise of the K. P. railway company to

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the J. O. & Ft. K. railway company, made upon a valid consideration, and having been adopted by Hopkins, was to be deemed as made to him, though he was not a party, nor cognizant of it when made. *Anthony v. Herman*, 14 Kas. 494. In the absence of any motion to make the petition more definite, and considering all the pleadings, we do not think that the same was fatally defective in not more clearly setting forth the acceptance of the K. P. railway company in place of the J. C. & Ft. K. railway company.

The judgment will be affirmed.

All the Justices concurring.

GAUSS & SONS V. BAINBRIDGE F. HOBBS.

1. *PARTNERS; Unauthorized Contract, by One, Before Partnership Formed, not Binding on the Other.* Where P. and H. have a conversation about forming a copartnership, but do not enter into any agreement with reference thereto, P. cannot afterward without the knowledge or consent of H., contract a debt or obligation in the name of P. & H. and thereby make H. responsible for such debt or obligation.
2. ——— *Partnership, no Ratification of Prior Contract.* And where such a conversation has been had between P. and H., and such a debt or obligation has afterward been contracted by P. in the name of P. & H., without the knowledge or consent of H., and P. and H. afterward form a copartnership under the name of P. & H., and H. still has no knowledge that such debt or obligation was contracted, but some time after forming such partnership he obtains such knowledge, *held*, that H. is not liable for such debt or obligation, unless after forming such partnership he does something from which it may be inferred that he intends to assume, or that the partnership shall assume, such debt or obligation.

Error from Mitchell District Court.

ACTION by *C. W. Gauss & Sons*, merchants, of St. Louis, Mo., against *James A. Pope* and *Bainbridge F. Hobbs*. Trial at

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December Term 1875 of the district court, and judgment in favor of plaintiffs and against defendant Pope for \$387.02, and costs, as upon default; and judgment in favor of defendant *Hobbs*, and against the plaintiffs, for costs. *Gauss & Sons* appeal from this last judgment, and bring the case here on error. The facts are fully stated in the opinion.

A. J. Banta, for plaintiffs.

W. W. Guthrie, for defendant.

The opinion of the court was delivered by

VALENTINE, J.: The plaintiffs in error Gauss & Sons, brought this action against James A. Pope and Bainbridge F. Hobbs as partners, under the firm-name of "Pope & Hobbs," on an account for goods alleged to have been sold and delivered to said Pope & Hobbs. Pope made default, but Hobbs answered, denying his liability for said goods. A trial was had by jury between the plaintiffs and the defendant Hobbs. Hobbs admitted on the trial that said account was correct, and that there was an unpaid balance due thereon of \$387.02, but simply denied his own liability thereon. No question was raised in the court below concerning the admissibility of any evidence, or with regard to any of the instructions of the court to the jury. None of the instructions are brought to this court, and therefore it must be presumed that they were all entirely satisfactory to the plaintiffs below, who are now the plaintiffs in error. The jury found generally in favor of the defendant Hobbs, and also made several special findings. The plaintiffs moved the court for judgment on the special findings of the jury, which motion was overruled. The plaintiffs then moved for a new trial, on the ground that both the general verdict and special findings were against the evidence, which motion was also overruled. Judgment was given in favor of Hobbs and against the plaintiffs for costs. The plaintiffs assign said three rulings of the court below for error.

I. We shall consider the second of said rulings first. Does

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the evidence sustain the verdict and the special findings of the jury? The most of the facts were undoubtedly proved to be just as the jury found them to be. But with respect to some of the other facts, the evidence was so contradictory and inconclusive that the jury might have found either way, and might have given the verdict to either party. There was really sufficient evidence introduced on the trial by each party, if it had been true, to sustain a verdict in favor of such party. And there was also enough evidence introduced by each party, if it had been true, to have defeated the other party. But as the jury found upon all the doubtful questions in favor of Hobbs, and against the plaintiffs, and as their findings have been sustained by the court below who saw the witnesses and heard them testify, this court which sees the evidence only on paper, cannot, upon the well-settled rules of this court, set aside such findings. Take all the evidence of the defendant, and all the evidence of the plaintiffs not inconsistent with the defendant's evidence, and exclude the balance, and then the evidence would be amply sufficient to sustain the verdict and findings of the jury.

II. We shall consider the first and third rulings together. Do the special findings, and the general verdict, taken together, sustain the judgment? If the special findings are in any respect inconsistent with the general verdict, they will of course control the general verdict, and the judgment should be rendered accordingly. (Gen. Stat. 684, § 287.) But we do not think there is any such inconsistency in this case. We think the special findings in this case are entirely consistent with the general verdict. The special findings are in substance as follows: Prior to September 8th 1874, Pope was selling goods at Cawker City, Kansas, and Hobbs had some goods in Nebraska. On the 8th or 9th of said September, they had a talk about forming a copartnership, but did not enter into any agreement with reference thereto. Soon after that time Hobbs went to Nebraska, and while gone Pope bought the goods for which the plaintiffs brought this action. He bought them in the name of "Pope & Hobbs," and the plaintiffs

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shipped them to him in the same name. On the 19th of October following, Hobbs returned from Nebraska, and on the next day he and Pope entered into a copartnership for the purpose of dealing in merchandise under the name of "Pope & Hobbs." Pope, who had previously received said goods from the plaintiffs, invoiced them along with his other goods, and put them into the copartnership as a part of his (Pope's) share of the capital. Hobbs did not know at that time that any of said goods were purchased from the plaintiffs, or from whom they were purchased, or in what manner they were purchased; and he did not know that any goods had been bought or shipped by, for, or to Pope in the name of Pope & Hobbs. On October 29th, a bill for a part of said goods purchased by Pope from the plaintiffs was entered by Pope on the books of the firm of Pope & Hobbs; and between the 4th of February and the 9th of April 1875, a bill for the remainder of said goods was entered by Pope on the books of the firm of Pope & Hobbs. On February 4th, March 8d, April 30th, June 29th, and July 5th, 1875, payments were made by Pope to the plaintiffs out of the partnership funds, amounting in the aggregate to \$301, and Pope at the time entered these payments on the partnership books. Hobbs had access to said books, but he did not know anything concerning said entries, or said bills, or said payments, until after April or May 1875. Hobbs never consented that either himself, or the firm of Pope & Hobbs, should become responsible for said goods, and never acquiesced in or ratified what Pope had done with reference thereto. Hobbs did not inform the plaintiffs that he would not be responsible for said goods until October 1st 1875, but the plaintiffs lost nothing on account of the delay. It was shown by the evidence that Hobbs was a farmer by occupation; that he "knew nothing about keeping books, or the mercantile business," that "he entrusted everything to Pope," and that the partnership was dissolved on the 20th of July 1875. This suit was commenced October 18th 1875.

Now there is nothing in the foregoing facts, contained in the

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special findings of the jury, which would override or overthrow the general verdict of the jury. Hobbs was not liable for said goods at the time they were purchased, or shipped, and he never did anything afterward to make himself liable. It is true, the goods were put into the partnership business; but Hobbs did not at the time know anything concerning the previous transactions between Pope and the plaintiffs, and he accounted to Pope for the whole of the goods as the individual property of Pope. Hobbs never had any transactions himself with the plaintiffs, and never did anything by way of ratification, or affirmance, or approval of Pope's transactions with them. He never in any manner recognized Pope's debt to the plaintiffs as his debt, or as a debt of the firm of Pope & Hobbs. And the plaintiffs lost nothing by any failure on the part of Hobbs to sooner notify them that the acts of Pope were unauthorized. But why should Hobbs have notified the plaintiffs at all? An incoming partner is not bound to notify the creditors of the other members of the firm that he will not be responsible for their debts and obligations previously contracted; but he may simply remain silent, and refuse to pay or discharge them. It is not necessary that an incoming partner should *do something*, in order to *escape* liability for the previous debts and obligations of his copartners, but on the contrary it is necessary that he should *do something* in order to *make himself liable* for such debts or obligations. It is in fact necessary that the incoming partner should do something from which it may be inferred that he intends to assume, or that that the new partnership shall assume, the previous debts and obligations of his copartners. The principal wrong committed by Hobbs in this case was to engage in a business of which he was wholly ignorant, and wholly incompetent to manage.

The judgment of the court below will be affirmed.

All the Justices concurring.

JAMES J. AVERY *et al.* v. W. J. EASTES.SALES BY INSOLVENT DEBTOR; *Good Faith; Intent to Defraud; Instruction.*

Where it was shown that Harris sold certain property to Somerville, and Somerville sold it Eastes for \$250, of which \$185 was paid by Eastes in notes of one Dodson (made payable to Eastes,) and \$65 in Eastes' note (made payable to Somerville,) and Harris was present at the time of the sale from Somerville to Eastes, and Somerville at the time of said sale handed said Dodson notes to Harris, and Harris handed them to his wife, and his wife afterward, with the consent of Dodson, paid \$185 of debt due from Harris to Dodson by delivering said Dodson notes to Dodson, and Eastes at the time of the sale to him "knew Harris was indebted to Dodson about \$200, and believed that the Dodson notes which he gave Somerville were to be turned over to Harris by Somerville, and by Harris to Dodson," and the defendants in the action claimed that said sales from Harris to Somerville, and from Somerville to Eastes, were made with the intention of defrauding Harris' creditors, *held*, that the following instruction given by the court to the jury was not erroneous, as against the defendants, to-wit: "If the jury believe from the evidence that Harris sold the property in question in good faith to pay any particular creditor of his, to the exclusion of others, without any intention to defraud, but simply to prefer one creditor to another, although the plaintiff (Eastes) may have had full knowledge of such intent on the part of Harris, it would not vitiate the purchase of Eastes." [*Cuendet v. Lahmer*, 16-527; *Campbell v. Warner*, 22-604; *Frankhouser v. Ellett*, 22-147; *Arm v. Hoersman*, 26-418; *Randall v. Shaw*, 28-419, 422; *Bishop v. Jones*, 22-680; *Kealey v. Harrison*, 29-148; *Toole et al. v. Coldwell*, 30-125, 134; *Furlin v. Sook*, 30-404; *Kennedy v. Powell*, 34-22, 25.

Error from Bourbon District Court.

TRESPASS, brought by *Eastes*, against *Avery*, a constable, and *Gottlieb*, an execution-creditor of one Harris. Trial at the September Term 1875 of the district court. Judgment in favor of *Eastes* for \$259.75, and costs. *Avery* and *Gottlieb* bring the case here. The facts are stated in the opinion.

Hulett & McCleverty, and *McComas & McKeighan*, for plaintiffs in error, contended, that the verdict is not sustained by sufficient evidence. The testimony shows a plain case of fraud and conspiracy upon the part of Eastes, Harris, and Somerville, to assist Harris in defrauding his creditors; and as the general rule of reviewing courts is not to disturb the verdict

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of a jury, so long as there is evidence to sustain it, yet when, as in this case, the plaintiff's claim is made to rest upon his evidence alone, which was so much weakened in the cross-examination, and placed in such suspicious light by the testimony for the defense, the court will find plenty of room to declare the verdict to be against the weight of the evidence. There was error also in the instruction to the jury respecting the pretended sale made by Harris. There was no evidence to base such an instruction upon. There is nothing in the testimony to show that Harris *at the time of sale* intended to satisfy any particular creditor with the proceeds of the property received from Eastes. It merely shows that he, through his wife, afterward used a portion of the proceeds to satisfy one of his creditors; not that the sale itself was made distinctly for such purpose.

Harris & Spencer, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: Jacob Gottlieb commenced an action in a justice's court against T. D. Harris. An order of attachment was issued in said action, and delivered to James J. Avery, constable. Avery levied the same upon a team of horses, a wagon, harness, fly-nets, blanket, and whip, as the property of said Harris, and afterward sold the same. W. J. Eastes claimed the property, and commenced this action in the district court of Bourbon county to recover its value. A trial was had, and the plaintiff Eastes recovered a verdict and judgment against the defendants, Avery and Gottlieb, for the sum of \$259.75. To reverse this judgment the defendants below as plaintiffs in error now bring the case to this court. They assign two grounds for error: 1st, that the verdict of the jury is not sustained by the evidence; 2d, that the court below erred in giving a certain instruction to the jury.

I. The question presented to the jury, and determined by the jury, was simply which side had the preponderance in a great mass of contradictory and conflicting evidence. Either

side presented sufficient evidence, if it had been true, to have obtained the verdict in favor of that side; and the question for the jury was, simply, which of the evidence it would believe, and which it would disbelieve. The jury found in favor of the plaintiff below, upon such evidence, and this court cannot now set the verdict aside.

II. The plaintiffs in error claim that the court below erred in instructing the jury that—

“If the jury believe from the evidence, that Harris sold the property in question in good faith to pay any particular creditor of his, to the exclusion of others, without an intention to defraud, but simply to prefer one creditor to another, although the plaintiff may have had full knowledge of such intent on the part of Harris, it would not vitiate the purchase of Eastes, the plaintiff.”

We cannot say that this instruction was erroneous. It would seem from the evidence, that the property once belonged to Harris; that Harris sold it to Somerville, and Somerville sold it to Eastes. Harris was present at the time Somerville sold the property to Eastes. Mrs. Harris was probably also present. Eastes held Dodson's notes for \$185, and interest. Harris owed Dodson about \$200. When Eastes bought said property he gave to Somerville Dodson's notes, and one of his own for \$65. Somerville then handed the Dodson notes to Harris, and Harris handed the same (probably at that time) to his wife. This was on Saturday afternoon, of January 16th 1875. On the next Monday morning, early, Harris left the state, and has never returned. A short time afterward Mrs. Harris sent said Dodson notes by Eastes to Dodson, and Dodson accepted the same as payment to that extent of his claim against Harris. Eastes testified on the trial, among other things, as follows:

“Don't know as Harris said much of anything at sale. He saw the trade taking place.” “I knew Harris was indebted to Dodson about \$200, and believed that the Dodson notes which I gave Somerville were to be turned over to Harris by Somerville, and by Harris to Dodson.” “I turned the Dodson notes over to Somerville at the time I made the trade with him.” “I turned them over when I bought the horses. Mrs.

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T. D. Harris got the notes. Somerville turned the notes over to Harris at that time." "T. D. Harris left the notes with his wife. After that, she asked me if I ever saw old man Dodson. She asked me to turn the notes over to him, and I did so."

It would also seem from the evidence, that Harris, prior to said transactions, had been in the coal business, and that he failed in such business. He was then able to pay a portion of his debts, but not all of them. And he did pay a portion of his debts, but not all of them. A portion of the testimony of Dodson, brought out by the defendants below on cross-examination, will indicate something as to how Harris acted after his failure. Dodson says that he went to see Somerville after Harris left the state, "and made inquiries from him if Mr. Harris had left me [Dodson] the money, because I had understood that he had paid all other coal men up for their coal." Now it is fair to infer from the foregoing facts, that said sale was made from Eastes to Somerville in the presence of Harris, for the purpose of obtaining funds to pay Dodson, and that it was all in good faith. After Harris left the state, and after Dodson received said notes, he had a settlement with Mrs. Harris, and she paid him the balance of his claim. Taking into consideration the foregoing facts, we do not think that said instruction was erroneous.

The judgment of the court below will be affirmed.

All the Justices concurring.

W. M. WICKS *et al.* v. SOLOMON SMITH *et al.*

1. **EJECTMENT; Defense; General Denial; Proof.** In action for the recovery of real property, it is sufficient in the defendant to deny generally the title alleged in the petition; and under such a denial, he may prove any fact tending to show that plaintiff has not the title, or the right of possession.
2. ——— **Setting Out Facts.** While a general denial is sufficient, the defendant may, if he prefer, set out fully and specifically the facts constituting his defense, and then his answer is to be governed by the ordinary rules of pleadings.

Statement, and Brief of Plaintiffs.

3. **OFFER OF TESTIMONY; Relevancy; Duty of Court.** Where evidence offered is *prima facie* irrelevant, the court may require the party offering it to show its relevancy by connecting it with other facts, and upon his failure to do this, properly reject it; but where it is pertinent, though insufficient, it should as a rule be received. [*Armstrong v. Brownfield*, 32-116, 123.]
4. ——— **Testimony; Pleadings.** To determine the pertinency and relevancy of testimony offered, reference must be had to the pleadings; and while these are no longer, except in special cases, required to be verified, they are still the professional statements of counsel of the claims of their clients, and the matter they expect to prove.
- [In connection with page 514, see *Durham v. Coal Co.*, 22-247; *Nay v. Morgan*, 24-79; *Overman v. Hathaway*, 29-437; *Ellicott v. Barnes*, 31-173; *State v. McKinney*, 31-575; *Clark v. Marbourg*, 33-477; *Stout v. Hyatt*, 13-233, 242, 243.]

Error from Woodson District Court.

EJECTMENT, for the N.E. $\frac{1}{4}$ of the S.E. $\frac{1}{4}$ of section 18, and a fifteen-acre tract of timber land lying in section 8, in township 19, range-12, in Lyon county, brought by *Solomon Smith* and *Julia Smith* as plaintiffs, against *W. M. Wicks* and *Harrison Mays*. The action was commenced in Lyon district court, and afterward the place of trial was duly changed to Woodson county, where the case was tried at the June Term 1875. Plaintiffs claimed as owners in fee simple, and on the trial showed a regular chain of title from the government to themselves. The defendants were in possession, and they claimed as owners under a contract of purchase from plaintiffs, made by one Blankenship. The particulars of defendants' title, and the proceedings on the trial, are fully stated in the opinion, *infra*. The district court gave judgment in favor of the plaintiffs for the recovery of the lands, and for \$100 damages for use and occupation. Defendant *Mays* died before trial, and the action as to him was revived in the name of his widow and children, and *Wicks* and the heirs of *Mays* now bring the case here on error.

John V. Sanders, for plaintiffs in error, contended, that the court erred in refusing to permit defendants to prove the facts they offered to prove by the witness Smith. The second de-

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fense stated facts sufficient to take the contract out of the statute of frauds. (*Gregg v. Hamilton*, 12 Kas. 333; *Edwards v. Fry*, 9 Kas. 417; *Galbraith v. Galbraith*, 5 Kas. 402.) These cases show that if our second defense was true we could have brought suit and compelled the plaintiffs to execute to us a warranty deed to the premises; and an equitable title which is not strong enough to enforce specific performance, may be a good defense in ejectment when the defendant is in possession. (*Courtney v. Woodworth*, 9 Kas. 443.) Defendants were not trespassers, and ejectment would not lie.

Pinkerton & Lynn, and *Ruggles & Sterry*, for defendants in error, maintained that there was no error in rejecting the testimony offered. The second defense set forth in the answer was good, for the reason that the law presumes that both of the sales and transfers therein stated, (first from Smith and wife to Blankenship, and second from Blankenship to Wicks and Mays) were in due form of law, and that there was some note or memorandum thereof in writing. This might be a good and sufficient warranty deed, from aught that appears in the allegations. "Where the plaintiff declares, as he might, at common law upon the agreement generally without stating whether it is in writing or not, it will be presumed to be in writing, and if the making of the agreement is denied, he is simply required to produce the memorandum in evidence at the trial or hearing." (Brown on Stat. of Frauds, § 505.) Now it nowhere appears in this second defense or in the answer that these sales were *not* in writing, hence the law presumed they were in writing, and oral evidence was not as good as the allegations. Then again, the defense alleges that Blankenship *paid the purchase price* to Smith, and that Wicks and Mays *paid Blankenship the purchase price*; but the offer of proof is not the payment of the purchase price by Blankenship to Smith, but an *agreement to pay*; the allegations are that Blankenship *paid* Smith *divers hundred-acre tracts of land* in Kentucky; but the offer of proof is, that he *agreed to pay* in *deeds*, not land, and no offer to show that Blankenship ever

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paid or offered to pay even in deeds, but only *agreements*—a poor compensation to Smith for his homestead. And again, the offer of proof is, that Smith and wife in consideration of said Blankenship's *performing* said several acts on his part orally agreed to convey, etc. Now it was the *performing*, not an *agreement to perform*, which was the condition precedent to Smith's conveying.

There was no note or memorandum of any of these sales, as required by §6, p. 505, Gen. Stat. 1868; and the question arises, ought the court to have admitted this evidence as proof of part performance such as would take the case out of the statute of frauds and perjuries? We don't suppose that there can be found a lawyer anywhere that will claim that the proof offered would be sufficient of itself to take the case out of the statute of frauds. The plaintiffs in error don't claim so much. They only claim that the evidence offered was some evidence on a vital link in the chain of testimony—for there was no offer to show that Blankenship ever paid Smith anything whatever for the land, and no offer to show Wicks and Mays ever paid anything whatever to Smith or Blankenship—no offer to show that either ever took possession except by receiving the key to the door—no offer to prove that either ever made any *improvements* whatever on the land—no offer to show that Blankenship was to perform his part at a *future time* by the terms of the agreement; but on the contrary, Blankenship's performance was a *condition precedent*, and the allegation of the answer is that he did *perform* at the time as agreed—showing it to have been a sale, if at all, for purchase-price down, and not a credit; then all we have here to work a man out of a valuable estate is *delivering over the key*. We don't want any stronger cases than those cited by plaintiffs in error, to show that this is no part performance; 12 Kas. 383; 9 Kas. 417; 5 Kas. 402. And in *McArthur v. Fry*, 10 Kas. 238, the court say: "Before the plaintiff would be entitled to the execution of the contract he must show that he has in all respects performed the stipulations on his part."

Again, we maintain that the defendants below were bound

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to make further offer of testimony to make their exception good. If they had gone forward and proved the facts offered, and stopped, the trial court would have struck it all out for the reason that it is not such a part-performance as would take it out of the statute; and this court could not have said that the court below erred. When an objection is made to an improper question, then it is the duty of counsel propounding the question to show to the court by a statement or offer of proof how the question may become competent or relevant, as the case may be. Plaintiffs in error appreciated this fact in the court below, for when there the question was objected to they did not wait to have a ruling of the court, and exception, but made this offer then. The question called for *oral testimony*, and the offer of proof was *oral proof*, of facts which the statute of frauds required to be in *writing*, and the objection was well taken, unless the offer of proof showed some *exception* to the statute.

The opinion of the court was delivered by

BREWER, J.: This was an action of ejectment. The answer was, first, a general denial, and then certain equitable defenses. The second defense was, substantially, that in August 1871, Smith and wife sold the lands in question to one Noah M. Blankenship, and received of him the purchase-price thereof, consisting of other lands and some personal property, (describing the same,) all of which said Blankenship conveyed to said Smith; and after said Smith and wife had sold said lands to Blankenship, and while they (the Smiths) were still in possession thereof, defendants, Wicks and Mays, bought said lands of Blankenship, and paid him the purchase-price, and said Smith and wife, knowing of and acquiescing in the purchase of said real estate by Wicks and Mays, voluntarily, and of their own accord, with the intention of carrying out both their own sale to Blankenship and Blankenship's sale to Wicks and Mays, delivered the possession of said lands to Wicks and Mays, which they still hold. The third defense supplemented the

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the case.

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facts stated in the second, with an allegation that after plaintiffs, Smith and wife, had made their sale to Blankenship, and while defendants were negotiating with Blankenship, one of them, the defendant Wicks, went to plaintiffs to ascertain whether Blankenship had any title or right to sell, giving the reason for the inquiry, and was told by plaintiffs that they had sold to Blankenship, and that if defendants purchased from him it would be all right, and that said defendants relied upon these statements, etc. The fourth defense added still further allegations of defendants' equitable title, but it is unnecessary to notice them.

Upon the trial plaintiffs proved a chain of title from the government, and rested. Then, as the record recites, the defendants put Solomon Smith, one of the plaintiffs below, on the stand as a witness, and after some preliminary questions, asked the following question: "State whether or not, you ever made any agreement with Noah M. Blankenship for the sale of the lands now in controversy?" To this question the plaintiffs below objected, on the grounds that the same is irrelevant, incompetent, and not the best evidence under the statutes of frauds and perjuries. Upon this question there was no ruling of the court, or exception, until after the offer of proof. The defendants below then made the following offer of testimony:

"The defendants now offer to show and prove by Solomon Smith, the witness now on the stand, that sometime in August 1871, the plaintiffs, Solomon Smith, and Julia Smith, his then wife, by a verbal agreement with Noah M. Blankenship, sold the lands in controversy to said Blankenship; that said agreement was as follows: Noah M. Blankenship was to give Solomon Smith a warranty deed to 286 $\frac{3}{4}$ acres of land in Pulaski county, Kentucky, (describing it as the 286 $\frac{3}{4}$ acres of land mentioned in defendants' second defense is described,) and said Blankenship was also to give said Solomon Smith a quitclaim deed to 200 acres of land in Pulaski county, Kentucky, (describing it as the 200 acres of land is described in defendants' second defense,) and said Blankenship was also to assign to said Solomon Smith a judgment in the circuit court of Pulaski county, Kentucky, (describing it as the judgment

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in the defendants' second defense is described,) and that was all that said Blankenship was to give said plaintiff for said land in controversy; and that in consideration of said Blankenship's performing said several acts on his part, the said plaintiffs orally agreed to execute to said Blankenship a warranty deed to the land in controversy. That after the said agreement between the said plaintiffs and said Blankenship was made, and while the plaintiffs were still in possession of the said lands in controversy, said Solomon Smith was informed by defendants, W. M. Wicks and Harrison Mays, that they had bought the land in controversy of said Blankenship, and that the said plaintiffs, with the intention of carrying out their said agreement with Blankenship, and the agreement they had been informed had been made between said Blankenship and the defendants for the sale of said lands, moved off the said lands in controversy, and delivered up to said defendants the key to the house on the said lands, the house in which, up to that time, they had been living, for the purpose of said defendants taking possession of said lands."

The court thereupon sustained the objection and ruled out the testimony. Exceptions were duly taken; and the correctness of this ruling is the question now presented for our consideration. It may be remarked that all the matters alleged

1. Rejection;
defense.

in the second, third, and fourth defenses, could have been given in evidence under the mere denial of the first defense. For the statute has provided, that in these actions it is sufficient for the defendant to deny generally the title alleged in the petition. Gen. Stat. 748, § 596; *Stout v. Hyatt*, 13 Kas. 233. It is also clear, that the facts stated in the second, third, and fourth defenses, if true, constituted a perfect defense to this action, and established a complete equitable title in the defendants, and that too although the allegations therein were specifically of a *parol* agreement for the sale of the property. There was a parol contract, receipt of price, and delivery of possession, besides matters of estoppel. *Edwards v. Fry*, 9 Kas. 417. And while these three defenses were unnecessary, they were notice to the opposite party, and the court, of at least one line of defense, and the scope of a part of the testimony. Again, there was no question as to this testimony being in the line of

2. Setting up facts
in defense.

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the defense set out fully in the answer—no intimation on the part of the court that it desired to have the relevancy of the testimony disclosed, or query as to the other testimony to be offered. The offer was entirely a voluntary one on the part of the defendants, made immediately upon the objection to the question. And again, the offer did not purport to be of all the testimony the defendants had, but simply of the matters they proposed to prove by the witness then on the stand. Though the facts stated were all that could be proved by this witness, *non constat* that other witnesses were not present to prove all the matters in the answer. On the other hand it may be conceded, that the matters stated in the proffer of proof were not of themselves sufficient to create an equitable title. They disclose simply an executory contract, with no performance on the part of either party, or at least with none on the part of the vendee. Now under these circumstances was there error in the ruling of the court? We think there was. There can be no question of the proposition, that where testimony apparently irrelevant is offered, the court may properly reject it unless its relevancy is disclosed by a proffer of other and further testimony. The rule is well stated in the case of *Abney v. Kingsland*, 10 Ala. 355, where the court says, "Where evidence is pertinent, but insufficient, the court should not assume that the party has no further proof to adduce, and reject it; but if it is *prima facie* irrelevant, it is incumbent upon the party offering it to show how it may become relevant by connecting it with other facts, and if this is not done it should not be received." See also *Baker v. Lessee of Swan*, 32 Md. 355; *Piper v. White*, 56 Penn. St. 90; *Howard v. Coshaw*, 38 Mo. 118; *Depuy v. Williams*, 28 Cal. 315. Now the testimony offered, was *prima facie* relevant and pertinent. It was evidence of a fact specifically alleged, and which with the other facts alleged constituted a perfect defense. True, the answer did not in terms allege whether the contract was in writing, or parol; but the manner in which it was stated, in connection with other facts, was clear intimation that a parol contract was all that was intended, for

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if it were a written contract the other facts were unnecessary, and secondly, it was immaterial whether the contract were one way, or the other, for either, taken in connection with the other facts alleged, was sufficient. It appears therefore, that, under an answer alleging a series of facts which taken together constitute a full defense, a question is asked as to the existence of one of those facts, and that then, without any inquiry by the court or the opposite party as to the extent of the further proof, and with only a statement by the defendant that he proposed to prove certain facts by the witness on the stand, without intimation as to what other witnesses or further testimony he had, an objection is sustained to the question. This we think was error.

But say counsel, a pleading is not presumed to be true, except when challenged by demurrer; and although the allegations of the answer were sufficient, the court was not to assume them to be true, and base its rulings accordingly, but was justified in basing its rulings solely upon the oral statement of counsel. We are aware of the fact that since verification of pleadings has been done away with, there has been a great laxity of statement in them. Many counsel seem to think it entirely immaterial how much of unquestioned fiction they incorporate into their pleadings, especially their answers. But it is still true, that the issues presented to the court for hearing and trial arise out of the matters set forth in the pleadings, and still true that the pleadings are professional statements by counsel of the claims of their clients, and the matters they expect to prove. The oral statement of counsel in the presence of the court, as to what he expects to prove, is not a whit more sacred than his written statement in the pleading. True, he may often be mistaken in either; he may be misled or misinformed by his client, and therefore does not guarantee the truth of either. But still, in both, and in one as much as the other, he is presumed to be acting in good faith, and to state only those matters of which there is a reasonable expectation of proof. In this respect we are constrained to think there is a great growing evil. There

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is a disposition to look upon pleading as affording a legitimate field for the exercise of counsel's imagination, and ^{obligation, and duty of counsel.} to regard the signature of counsel thereto as nothing more than a means of giving the party a standing in court; while in fact the pleadings are, or should be, the exact statements of the facts the parties expect to prove; and the signatures of counsel, their professional statement that they believe those facts to be true. If all counsel would govern themselves by this rule, there would be less litigation, greater dispatch of business, a higher standard of professional character, and less occasion for severe reflections upon law and lawyers. We do not mean to decide that a court may not, if it has any reason to doubt the *bona fides* of any pleading, interrogate counsel as to the facts he expects to prove, and rely upon the counsel's answer as a full statement of all the facts, and rule upon the admissibility of evidence accordingly. That question is not before us. Nothing of that kind took place. The court asked no question. Counsel did not pretend to disclose all his evidence. We may remark in passing however, in reference to such a case, that there should be no misunderstanding between court and counsel as to the purpose and scope of the interrogatory, that counsel may be careful to state all the facts he expects to prove; for it would be unjust to have the rights of a litigant cut off by an omission of counsel, in the hurry and excitement of a trial, to gather into his statement all the facts of his client's case; and it must be remembered, that the same rule must apply to all cases, whether they contain but a single fact, or a long series of facts, some of them, it may be, trivial and minute, yet, like the links of a chain, absolutely essential to the case.

Without pursuing this digression any further, and returning to the case before us, it seems to us that the ruling of the court cannot be sustained; that the testimony offered was relevant and pertinent, and should have been received. For this error the judgment must be reversed, and the case remanded for a new trial.

All the Justices concurring.

upon by the plaintiffs, and also excepting that portion of the answer admitting that said several notes were given for the purchase-money of the premises described in said petition."

The defendant's answer was afterward by leave of the court withdrawn from the case, and the defendant made no further appearance in the case. An entry was then made by the court, that the defendant was in default, and that the several allegations of the petition would be taken as true against him. Of course judgment should then have been rendered in favor of the plaintiffs, and against the defendant, upon the allegations of the petition. There was really nothing in the case to try, after said answer was withdrawn. But nevertheless, the record shows that the case came on for trial, that the plaintiffs waived a jury, that the case was tried by the court, that "the court having heard the evidence on the part of the plaintiffs, and being well advised in the premises, finds for the plaintiffs, and assesses their damages" at \$597.13, the amount of said notes, that said amount is purchase-money for said land described in the plaintiffs' petition, and that the plaintiffs have a lien on said land for the amount of said purchase-money; and the court then renders a personal judgment in favor of the plaintiffs and against the defendant for said amount, and in addition thereto renders a judgment that said land be sold to satisfy said personal judgment.

The defendant now brings the case to this court, and complains of that portion of said judgment which orders that said land should be sold. He claims that the court below erred in finding that the plaintiffs had a lien for the amount of said notes on defendant's land, and also erred in rendering judgment for the sale of said land. These are the only questions in the case. We think the court below did so err. There is no such thing in this state as a vendor's lien created by mere operation of law, or by mere force of the rules of equity. (*Simpson v. Munde*, 3 Kas. 172; *Brown v. Simpson*, 4 Kas. 76; and as explanatory of these cases, see *Stevens v. Chadwick*, 10 Kas. 406; *Smith v. Rowland*, 13 Kas. 245; *Seitz v. U. P. Rly. Co.*, 16 Kas. 133.) Vendors' liens can be created in this state only

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by the parties themselves, and can be created only by express stipulation in writing to that effect, or by an agreed reservation of the title in the vendor at the time of the sale as security for the purchase-money. Whether the land in this case was "occupied as a residence by the family of the owner," (who is the defendant,) so as to make it his homestead under the homestead-exemption laws, is hardly shown in this case; but that does not make any difference. A lien for purchase-money cannot be created on a homestead in any different manner than it can be created upon any other real estate. The homestead-exemption laws do not make any difference. (*Nichols v. Overacker*, 16 Kas. 58.) Indeed, there is no homestead-exemption law as against purchase-money. As to purchase-money, the homestead is just like any other real estate, and governed by the same rule as other real estate. A homestead may be sold on an execution for the purchase-money; but the judgment rendered for the purchase-money is no more a lien on the homestead than it is on any of the other real estate belonging to the judgment-debtor. The debt for the purchase-money would not be a lien on any of the real estate of the judgment-debtor until the judgment were rendered, and then the judgment would be a lien on all the real estate of the judgment-debtor, including the homestead; and if there was no personal property, any of such real estate might be sold to satisfy such judgment. And in all cases, where the judgment is not a specific lien upon any particular property of the judgment-debtor, he has an undoubted right to have his personal goods (subject to execution) exhausted first, before any of his real estate is taken to satisfy the judgment. (*Koehler v. Ball*, 2 Kas. 161; Gen. Stat. 714, 715, § 448.) And after all his personal goods have been exhausted, he still has the right to take the chances of the officer levying on some other real estate before levying on his homestead. The judgment in this case deprives the judgment-debtor of these rights, and is therefore erroneous.

If the land in this case is a homestead, and if the judgment-debtor has a wife, the judgment is erroneous for still another reason. It is an adjudication concerning the homestead where

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only the husband is a party. (*Morris v. Ward*, 5 Kas. 239; *Dollman v. Harris*, 5 Kas. 597.) The judgment in this case should have been an ordinary personal judgment against the defendant for the amount of the notes and costs, authorizing an ordinary execution to be issued against the property in general of the judgment-debtor subject to execution; and on such an execution, the officer, after exhausting the personal property of the judgment-debtor subject to execution, might levy on the real estate for which said notes were given, (or any other real estate of the judgment-debtor subject to execution,) whether the real estate for which said notes were given was occupied as a homestead or not.

Perhaps before closing this opinion we should say something with reference to the case of *Pratt v. Topeka Bank*, 12 Kas. 570. In that case a mortgage was executed by the husband alone to secure a portion of the purchase-money for the homestead of himself and wife, and also to secure certain other money. The mortgage however did not show how much of the money was purchase-money, or how much was other money. Now it might seem from the opinion in that case, that the court intended to hold that the mortgage was void as to the purchase-money as well as to the other money, but nevertheless that the judgment to be rendered in the case should be made a specific lien upon the homestead for the purchase-money. Such was not intended however by the court. The court intended to hold, that the mortgage was void only as to that portion of the money it secured which was not a part of the purchase-money, and that it was valid as to the purchase-money, and therefore and for that reason that the judgment for the purchase-money should be made a specific lien on the homestead. In the opinion of that case (page 572,) where it states that the mortgage was "invalid for the purpose of establishing any lien upon the homestead," it was intended to refer to the mortgage as an entirety, as including both funds in the aggregate as one fund, and had no reference to the purchase-money as a separate and distinct fund, [for which distinct sum, when ascertained, a judgment of fore-

closure might be rendered, which would be a lien upon the mortgaged premises.]

That portion of the judgment rendered in the present case, which orders a sale of the lands mentioned in such judgment, will be reversed, and the cause will be remanded with the order that said judgment be so modified as to correspond with the views expressed in this opinion.

All the Justices concurring.

KANSAS PACIFIC RAILWAY CO. v. WILLIS KESSLER.

1. **GROSS NEGLIGENCE; Exemplary Damages.** Where the testimony discloses gross and wanton negligence on the part of the defendant, the jury may award exemplary damages, and an instruction to that effect is not error. [*Hefley v. Baker*, 19-12; *Parsons v. Lindsay*, 26-426; *Malone v. Murphy*, 2-250; *Wiley v. Keokuk*, 6-106; *R. R. v. Rice*, 10-426, 436, 437; *Tucker v. Green*, 27-357; *R. R. v. Frazier*, 27-463; *Parli v. Reed*, 30-537; *R. R. v. Richardson*, 25-391, 407; *Moulton v. Aldrich*, 28-311; *R. R. v. Wilson*, 28-641; *R. R. Morgan*, 31-79; *R. R. v. Pierce*, 33-61, 64; *R. R. v. Adams*, 33-429; *R. R. v. Houts*, 12-332; *R. R. v. Pointer*, 14-50; *R. R. v. Young*, 19-488.]
2. ——— **Expulsion of Passenger, from Railway Train.** Where it appears that prior to January 1st, the railway company had been in the habit of carrying passengers on its freight-trains, and that on that day a regulation went into effect prohibiting the carrying of passengers on such trains east of Brookville, but making no change as to such trains west thereof, and where it does not appear that any public notice was given of such change, and does affirmatively appear that the ticket agent at Boeland, one of its stations west of Brookville, received no notice thereof, and did not in fact know of it until the middle of March following, and then only as he heard it from a passing conductor, and that on the 2d of March he sold plaintiff a ticket to Salina, a station east of Brookville, and assured him that it was good to carry him there on a freight-train then approaching the station, and that plaintiff entered such train and rode without objection, or notice of the change of rule, until it had passed Brookville, when he was put off after dark by the conductor at a small station about half-way between Brookville and Salina, and where it appears from the testimony of the agent that he had been in the habit up to said 2d of March of selling passenger-tickets to be used on freight-trains east of Brookville, and from the testimony of the conductor that he had frequently put passengers off from his train, but had never had any trouble about it before; *held*, that a verdict of eight hun-

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dred and twenty dollars, eight hundred dollars of which the jury specifically awarded as exemplary or punitive damages, would not be set aside by this court.

Error from Saline District Court.

KESSLER had judgment at November Term 1875, and the *Railway Company* brings the case here. No briefs on file.

C. E. Bretherton, and C. A. Heller, for plaintiff in error.
J. G. Spivey, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This was an action to recover damages for a wrongful expulsion from the train. The verdict and judgment were for \$820—\$20 of which the jury assessed for compensatory, and \$800 as exemplary damages. It seems to be conceded by the plaintiff in error, that the former was proper; and the only question raised here is, whether the case was one for exemplary damages. And first, in this respect, are challenged the instructions. The court charged as follows:

“Now before you can allow this kind of damages at all, you must find that there was in this case on the part of the defendant, mingling in the transaction complained of, either fraud, malice, gross negligence, oppression, or violence. And if you shall so find *either of these*, you can allow for it. Gross negligence means, the want of slight diligence; and slight diligence means, the lack of that care and prudence in and about a transaction which persons of less than common prudence would use and exercise.

“But again, our supreme court has said that you must find that this negligence is not only gross, but wanton also. And wanton means, a licentious act by one person toward another, without regard to his rights, or again, it is a reckless disregard of another's rights.”

The subject of exemplary damages has several times been passed upon in this court. In *Wiley v. Keokuk*, 6 Kas. 91, it is said: “Whenever the elements of fraud, malice, gross negligence, or oppression, mingle in the controversy, the law allows the jury to give what are called exemplary or vindictive

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damages." This case is followed in *Sawyer v. Sauer*, 10 Kas. 466. Again, in *L. L. & G. Rld. Co. v. Rice*, 10 Kas. 426, where it is said: "The ninth instruction is to the effect, that if the injuries complained of were caused by gross negligence, and the jury so found, they might find exemplary damages. This is the law as settled by this court. *Malone v. Murphy*, 2 Kas. 250; *Wiley v. Keokuk*, 6 Kas. 94. But the negligence should be so gross as to amount to wantonness, to authorize exemplary damages." See also, *M. K. & T. Rly. Co. v. Weaver*, 16 Kas. 456.

Counsel for the plaintiff in error criticise the word "licentious," as inapt, in this connection. Even if this be conceded, we do not think it at all misleading. In the instructions given, the court followed the law as heretofore laid down by this court. We see no reason to change the views hitherto expressed by us, and must therefore sustain the instructions.

It is claimed that the supreme court of the United States, in the cases cited, of *Milwaukee Rld. Co. v. Arms*, 1 Otto, 489, Gross negligence, discussed. and *Western Union Tel. Co. v. Eyster*, 1 Otto, 495, has laid down a more stringent rule, and limits the recovery of exemplary damages to cases of intentional wrong, or its equivalent. Thus, in the first case, speaking through Mr. Justice Davis, it says: "Gross negligence is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term ordinary negligence. But after all, it means the absence of the care that was requisite under the circumstances. In this sense, the collision in controversy was the result of gross negligence, because the employ  s of the company did not use the care that was required to avert the accident. But the absence of this care, whether called gross, or ordinary, did not authorize the jury to visit the company with damages beyond the limit of compensation for the injury inflicted. To do this, there must have been some willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences." And in the other, "There was an act of negligence entitling the plaintiff to compensatory damages;

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but there was nothing to authorize the jury to consider this omission as willful; on the contrary, the evidence rebuts every presumption that there was intentional wrong." It may be, after all, that the difference is only one of definitions, and springs from an evident inclination of that court to ignore degrees of negligence as defined by most law-writers and courts. But be that as it may, we adhere to the prior rulings of this court, and hold that a case which discloses, on the part of the wrongdoer, negligence which is gross and wanton, is one in which the jury may award exemplary damages. The law, by tolerating this kind of punishment by way of damages, would check not merely intentional wrong, but gross carelessness.

We do not see that plaintiff in error was prejudiced by the failure to submit to the jury the first six of the questions prepared by it. The questions that were submitted brought out all the facts material in the case. Neither do we think \$800 an excessive allowance for exemplary damages. The purpose of such damages being partially at least punishment to the wrongdoer, and to deter from similar wrongs, it must not be expected that they be merely commensurate with the damages actually done. Not that we would be understood as holding that even in a case properly calling for exemplary damages, the action of the jury is conclusive and beyond supervision: But simply this appears to us, that if in this case exemplary damages are proper, \$800 therefor is not so large an allowance as to justify any interference with the verdict.

This brings us to the last, and to our minds really the only serious question; and that is, Was this case one in which exemplary damages were proper? Was there such gross negligence on the part of the plaintiff in error, such wanton and reckless disregard of the rights of the defendant in error, as to justify mulcting it in any more than the actual damages its wrongdoing caused? The case stated generally is as follows: The plaintiff below, defendant in error, desiring to go from Bosland, some forty miles west of Salina, to that town, where he resided, asked the ticket and freight agent (himself having some doubts about the matter,) if he

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could ride to Salina on a freight-train then entering Bosland depot. The agent told him he could, and he bought a ticket, and started. The agent had misinformed him. The regulations of the company did not allow passengers to ride on that freight-train beyond Brookville, which was the end of that division of the road, where a change of cabooses (the only accommodation for passengers,) and conductors, was made; and at Bavaria, about half way between Brookville and Salina, the new conductor put him off by force, as he refused to go without. According to the plaintiff's testimony, nothing was said about these regulations until after the train had started from Brookville, while according to the defendant's evidence the conductor notified him before, and told him he could not ride on the train. It was early in the evening when Bavaria was reached and the plaintiff expelled from the cars. The regulations prohibiting passengers from riding upon freight-trains east of Brookville, were made on January 1st 1875, and this transaction took place on the 2d of March thereafter. The ticket-agent who sold the ticket to Kessler, had not been informed of these regulations, in fact knew nothing of them until the middle of March, when he was told by a conductor that such had been made. Prior to the first of January 1875, passengers were carried in freight-trains east, as well as west, of Brookville; and up to the 2d of March the agent at Bosland, as he himself testified, had been in the habit of selling tickets to passengers for destinations east of Brookville by freight-trains. The conductor who put Kessler off the train testified, that "the present rule came in force first January 1875. Conductors all obeyed it. I have put persons off train frequently. I never had any trouble before." In reference to the expulsion, Kessler did not claim that any insults, indignity, or unnecessary violence accompanied it, though from the testimony of a friend traveling with him it would seem that the conductor was both rough and profane. Upon these facts, can a finding of gross negligence and violence be sustained? With much hesitation we are constrained to answer this question in

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the affirmative. It appears that prior to January 1st, the defendant had been in the habit of carrying passengers on freight-trains both east and west of Brookville. On that date a new regulation went into effect, prohibiting the carrying of passengers on such trains east of Brookville, but making no change west thereof. Doubtless the company had power to make and enforce such regulations. Doubtless there were good reasons for them, and for making the distinction between the distances east and west of Brookville, though nothing of the kind is disclosed by the record, and it there appears as simply an arbitrary rule. Having made such regulations, the first duty was to give public notice of them, and especially to see that the agents who by the sale of tickets were to make contracts with passengers for transportation, were fully informed of them. And such notice should have been given so fully, and so long before the regulations were to go into effect, as to make it reasonably certain that no passenger in the exercise of ordinary diligence would have been caught in such a predicament as the plaintiff in this case was. On the contrary, it does not appear that any public notice of the change was given. It does affirmatively appear that notice was not given to the ticket agent at Bosland, and that he knew nothing of the change for two months and-a-half after it was made, and then only as he heard it from the conductor of a passing train. Nor does it appear that this was the only instance. The agent says he was in the habit of selling tickets for such trains for over two months after the change; and it would seem from the conductor's testimony that he was in the habit during the same time of putting passengers off from his train. It doubtless occurred to the jury, that it was time that such habits were changed on the part of one or other of these agents of the defendant, and that their continuance for such length of time indicated gross negligence, a reckless indifference to the rights of passengers. A single instance would indicate negligence. Repeated instances imply something more. Such a rule ought also to be enforced

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by *preventing* passengers from taking passage on a freight-train, rather than by *putting them off* after half the journey is completed. In this matter we know there is a conflict in the testimony, but the plaintiff's testimony shows no objection to his riding in that train until after it had started. It seems to us therefore, after a careful review of the evidence, and in matters of conflict giving full weight to plaintiff's testimony, that it cannot be said that there was absolutely no case for exemplary damages, nothing which would justify a jury in awarding such damages; and therefore, although not impressed with this as a case of very aggravated wrong, we are constrained to affirm the judgment.

All the Justices concurring.

 ROACH AND ROACH V. JAMES S. KARR.

1. NOTICE; *Principal, and Agent.* Notice to an agent, to be notice to the principal, must be of some matter connected with the business in which the agent is engaged for the principal.
2. ——— Where A. personally made an agreement with B. and his wife to purchase of the wife, for a valuable consideration, and in good faith, a note and mortgage not yet due, and under the agreement the note and mortgage were not delivered and paid for until a month afterward, and before maturity, and when delivered were duly indorsed, and at the time of such delivery the said B. was the agent of A. to collect and secure certain securities, and B. delivered the said note and mortgage to A., *held*, that the knowledge of B. as to the usurious character of the note and mortgage, was not constructive or other notice to A. thereof.
3. MORTGAGE-DEED; *Execution of, by Illiterate Person; Rights, and Duties; Gross Negligence; Estoppel.* Where a wife signed a mortgage-deed on a homestead, to secure a note executed by her and her husband, to take up a prior usurious note of a like amount secured on the same homestead, and the wife alleged in her answer that the mortgage was given without her consent, and the proof showed that the wife was illiterate and could only read a little by spelling the words, that the mortgage was

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not read to her, that she inquired of her husband as to its contents at the time of making her mark to the mortgage, and was told by him "that it was none of her business, that it did not amount to a row of pins—that it was a note;" and that she signed the instrument believing it was a note; held, that if the wife was mistaken or deceived as to the contents of the said written instrument it was the result of her own gross negligence; that she should have demanded the paper to be read to her, and that if she relied upon the representations of her husband, it was at her peril alone; and that after the delivery of the mortgage to the mortgagee, who was innocent of any irregularity in the signing of the instrument, and who had no notice of the statements of the husband to the wife, and the surrender of the prior note to the husband, and the cancellation of the prior lien on the homestead, the wife could not assert, as against such innocent mortgagee, the defense that she never consented to the execution of the mortgage. [*Buchanan v. Gibbs*, 26-377, 379.]

Error from Neosho District Court.

FORECLOSURE of mortgage, brought by *Karr* against *Roach* and wife. Trial, and judgment in favor of *Karr*, at December Term 1875, and the defendants bring the case here. The subjoined opinion contains a sufficient statement of the facts, pleadings and proceedings.

L. Stillwell, for plaintiffs in error.

Cory & Kimball, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: This was an action commenced by *Karr*, to recover a judgment on a note of \$1,288, executed by the plaintiffs in error, and to foreclose a mortgage alleged to have been given by the same parties to secure the note. Separate answers were filed. J. N. Roach plead usury. Elizabeth Roach alleged in her answer, that the premises were at the date of the mortgage, and for more than ten years had been, the homestead of herself and husband, and occupied as such with their family; that the mortgage mentioned was given without her consent, and that she never consented to the execution of the mortgage; that the pretended certificate of acknowledgment attached to the mortgage was wholly false and

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fraudulent, and was procured to be made by the connivance of the said James S. Karr, his agents and attorneys, with the intent to defraud and injure her the said Elizabeth Roach.

As regards the defense interposed by J. N. Roach, the facts are, that on February 28th 1872, the plaintiffs in error executed their note to Mrs. S. C. Karr, a sister-in-law of James S. Karr, and wife of one J. C. Karr, for \$840, due in one year from date, with twelve per cent. interest from date. This note was confessedly usurious. The plaintiffs in error claimed they received on the note only \$700. The Karrs alleged they got \$785. James S. Karr resides in Canada, but came to Kansas in May 1872, to negotiate some loans. He bought from \$4,000 to \$5,000 of securities, and among them this note of \$840. He agreed with Mrs. S. C. Karr, and Mr. J. C. Karr to take the securities at their face-value, payment and delivery being by the terms of the contract expressly postponed until they should want the money in an enterprise which they were about to commence. Sometime in June or July 1872, and long before the maturity of the \$840 note, it, with other securities, was sent to the defendant in error, and he paid for them in accordance with his contract. When the note of \$840 was delivered it was duly indorsed by both J. C. Karr and wife. When this note fell due it was surrendered to plaintiffs in error, and they executed in lieu thereof to James S. Karr their note of \$1,150, bearing date February 28th 1873, due in one year with twelve per cent. interest from date. The interest due on the note of \$840, and an additional \$50 loaned the plaintiffs in error by James S. Karr, added to the principal of the original note, made up (with usury included) the \$1,150 note. When this note matured, it was also surrendered, and the note sued on, of \$1,288, was given in lieu thereof. Upon the trial, the jury found as a matter of fact, that the defendant in error purchased the note of \$840 in May 1872, and that the purchase was made in good faith by James S. Karr, and without notice to him that the note was usurious. Thereon, and upon the general verdict in the case for the defendant in error, the court rendered judgment against said J.

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N. Roach for the full amount of the note sued on, (less the usury included therein and first embraced in the note of \$1,150,) with interest and costs.

It is alleged on the part of said J. N. Roach, that the special findings and judgment were erroneous, for the reason that it appears from undisputed evidence that the purchase of the note of \$840 by James S. Karr was not completed till in June or July, the time the note was delivered and paid for; and as J. C. Karr was appointed as the agent of James S. Karr in May 1872, and so continued to be for a long time thereafter, and as J. C. Karr had complete knowledge of all the transactions incident to the execution of the note of \$840, and the amount of usury included in the said note, that the knowledge of J. C. Karr as to the usurious character of the note was notice to James S. Karr. An agent for all the purposes of his agency, stands in the place and stead of his principal, and is presumed to communicate to him every fact coming to such agent's knowledge, which might in any way affect the interests of his principal; but the knowledge must be of some matter connected with the business in which the agent is engaged for the principal. Notice to an agent, to be notice to the principal, must be as to a matter within the scope of the agent's employment. In this case, whether the note of \$840 was purchased in May 1872, or not till June or July thereafter, is immaterial, as J. C. Karr acted at no time as the agent of James S. Karr to purchase or negotiate for this note. If he acted for any one other than in his own interest, he acted as the agent of his wife. There is no evidence in any way tending to prove otherwise; and James S. Karr is not chargeable with the knowledge of J. C. Karr as to the said note. James S. Karr left certain securities with him to look after in the way of collecting them, securing them, and of delivering them to him; but the agency of J. C. Karr did not extend to the purchase of this note. James S. Karr was, upon the evidence, an innocent purchaser of the note of \$840, before maturity, for a valuable consideration, and the said note having been duly transferred to him by indorsement, he could not

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be charged with any of the equities of J. N. Roach, having had no notice of the same prior to its purchase, and having made the purchase personally, and not through J. C. Karr or any other agent, he is not affected in this one transaction by the knowledge of J. C. Karr. Under this view of the case, it is unnecessary to discuss the various instructions of the court as to J. N. Roach's defense, as the testimony shows conclusively that the defendant in error was an innocent and *bona fide* holder of the note of \$840 before maturity, and all usurious interest added to the subsequent notes was properly excluded by the court and jury.

As to the defense of Mrs. Roach, a more serious question is presented. But assuming the allegations of the answer sufficient, and that a verification thereof was not necessary to avoid the mortgage upon the facts set forth in the plea, still, considering all the evidence given and offered on the part of the said Mrs. Roach, we see no sufficient facts to justify a judgment in her favor. As to the execution of the mortgage in suit, Mrs. Roach testified:

"No one read the mortgage to me, and no one explained the nature of the mortgage to me. I inquired the nature of the papers before I made my mark to them. I believed it to be some notes my husband was giving. I cannot write, nor read writing. I can read a little in the Testament, by spelling the words. I didn't touch the pen until I asked questions. I did sign the papers. I think my husband held the papers on his knee. I never had them in my hand. On the 12th of next March, if I live, I will be sixty-four years old."

Mrs. Roach then produced one Ann Harkness, and offered to prove by her, that, "just prior to the time that defendant Elizabeth Roach made her mark to the mortgage, she inquired of her husband, J. N. Roach, what it was; that he told her it was none of her business; that the paper offered her to sign did not amount to a row of pins, and then told her to sign it; that he further told her that the paper was only a note." The court excluded the proposed testimony. At the time of the

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execution of the mortgage in suit, it (such mortgage) and the note secured thereby were to take up a note of 28th February 1873 of \$1,150, bearing twelve per cent. interest from date, executed by the plaintiffs in error, and to obtain a reconveyance of the title to the homestead from Mrs. Sarah C. Karr, to whom the same had been conveyed by a warranty deed in form as security for the original loan of \$840 of 29th February 1872, and held by James S. Karr to secure the renewals of that note. There is no claim that James S. Karr had any notice of the conversation between Mr. and Mrs. Roach, which attended the execution of the mortgage at the time it was accepted by him, and for which he surrendered up the note of \$1,150 and had the title to the homestead placed upon the records in the name of J. N. Roach. The mortgage was complete, except the signature of Mrs. Roach, when presented to her by her husband to be signed, and she at no time asked for it to be read to her. If she was in any manner mistaken or defrauded as to the contents of the mortgage, such result was the consequence of her own gross negligence. She should have demanded that the instrument be read to her. If she relied on the representations of her husband, it was at her peril alone. The sound policy of the law forbids that a person thus situated, as Mrs. Roach was, and signing a mortgage under such circumstances as herein presented, should thereafter, as against the mortgage, innocent of any irregularity in the execution of the instrument, assert that she never consented to the execution thereof. *Helm v. Helm*, 11 Kas. 21; *Hallenbeck and Wife v. Dewitt*, 2 Johns. 404. A different rule would open the door to the grossest frauds, and lead to unfortunate results scarcely to be realized. With the view that, considering all the testimony presented by Mrs. Roach, and all the evidence offered by her and which was excluded by the court, the court properly held the mortgage valid, and of full force for all moneys due thereon, deducting the usurious interest therein embodied, the questions raised as to the acknowledgment, and the erroneous instruction as to the consideration of the testi-

mony by the jury, need not be commented upon. These could not affect the validity of the judgment.

The judgment of the court below will be affirmed.

All the Justices concurring.

HARRISON & WILLIS V. ELIZABETH W. ANDREWS.

1. **MOTION TO SET ASIDE SHERIFF SALE; By whom Made.** The rule enunciated in the case of *White-Crow v. White-Wing*, 3 Kas. 276, that where land has been sold on execution, any person claiming to be the owner thereof, and interested in defeating the sale, may, although he may not be a party to the suit, move the court to set aside such sale, cited and followed. [*Treptow v. Buse*, 10-170; *Rice v. Poynter*, 15-264; *Green v. McMurry*, 20-193; *Comm'r's v. McIntosh*, 30-239; *Cowdin v. Cowdin* 31-529.]
2. ——— **Parol Evidence, On Motion.** Where the public records, and all the written evidence applicable to the subject, apparently show that certain land was subject to be sold on execution, a party moving to set the sale aside, may nevertheless show by competent and proper parol evidence, embodied in affidavits, that the land was not in fact subject to be sold on said execution.
3. ——— **Decision on Motion, Not Conclusive of Title.** The right of the party moving to set aside a judicial sale, is subject to an extensive discretion in the court hearing the motion, and the final decision of the court upon such motion is not conclusive as the ultimate rights of either of the parties.
4. **DEED; Delivery.** A deed does not take effect until it is delivered; and it may be shown by parol evidence that a deed drawn up, signed, dated and acknowledged on a certain day was not delivered until a long time afterward, or that it was never delivered at all. [*R. R. v. Owen*, 8-410; *Babbitt v. Johnson*, 15-252; *Mitchell v. Skinner*, 17-565; *Green v. Green*, 34-745; *Walker v. Newton*, 22-109.]
5. **JUDGMENT-LIEN; When it Does Not Attach.** Mrs. A. and her husband occupied a certain piece of land as their homestead, she being in equity the owner thereof and he holding the legal title thereto. They agreed with one H. that they would transfer the title to said land to H., and that he should then transfer the title to Mrs. A. In pursuance of this agreement they, on May 24th, drew up, signed and acknowledged a deed conveying said land to H., but they did not deliver said deed until June 5th. On that day, H. executed and acknowledged a deed conveying said land to Mrs. A., and both of said deeds were then delivered at the same time. H. never had possession of said land, nor did he ever have any interest

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therein except as above specified; *held*, that H. never had such an interest in said land as could be held by the judgment-lien of any of his judgment-creditors, nor did he have any such interest as could be sold on execution. [*Ransom v. Sargent*, 22-520; *English v. Law*, 27-245; *Long Bros. v. Murphy*, 27-381.]

6. ——— A judgment-lien attaches merely to the interest of the judgment-debtor in the land, and to nothing more; and the courts will protect every equity of third persons therein.
7. JUDICIAL SALE; *Purchaser*; *Notice of Equities*. A purchaser of real estate at a sheriff's sale, who has notice of all the equities of third persons cannot take any greater interest in such real estate than the judgment-debtor himself possesses. [*Treptow v. Buse*, 10-170.]

Error from Montgomery District Court.

THE district court, at the December Term 1875, on the motion of *Andrews* set aside a sheriff's sale of real estate. *Harrison & Willis*, the plaintiffs in the execution, and the purchasers at such sale, appeal, and bring the case here on error. **All** necessary facts are stated in the opinion.

Harrison & Willis, plaintiffs in error, for themselves, contended, that the court erred in admitting parol evidence to be introduced in the shape of affidavits in support of defendant's motion to vary and contradict written deeds—citing, 1 *Greenl. Ev.* §§ 275, 276; 2 *Phil. Ev.* 350; 2 *Stark. Ev.* 544, 548; 1 *M. & W.* 379; 12 *Wend.* 573; 4 *Kas.* 429; 1 *Kas.* 115; 2 *Pars. Contr.* 547, § 10. The plain and obvious import of the deed from *Andrews* and wife to *Hoag*, cannot be varied by parol. Nor is parol evidence competent to show that a deed, absolute on its face, was given in trust for the benefit of the grantor; except in cases where fraud in procuring the deed, or mistake in making it absolute, instead of expressing the trust, is alleged—citing 9 *Wis.* 379; 7 *Kas.* 199; 2 *Blackf.* 207; 15 *Mich.* 94; 2 *Iowa*, 60, 860; 2 *Story Eq.*, § 1199; 28 *Ind.* 35; 14 *Ill.* 503; 20 *N. Y.* 39; 9 *Kas.* 549. There was error too in permitting defendant in error, not a party to the action or judgment, to come in by motion, and without pleadings, and try the question of title in this summary way. Where the "showing indicates the existence of a substantial question as to the ownership"

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between the debtor and a third person, or if it appear that the debtor had some sort of an interest in the property, the motion ought to be overruled." (*White-Crow v. White-Wing*, 8 Kas. 281.)

J. B. Zeigler, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This is a proceeding in error instituted for the purpose of reversing an order of the district court setting aside a sheriff's sale. The proceeding might properly be dismissed from this court, for the reason that the plaintiffs in error have not made Hoag, the defendant below, a party in this court. Of course, we would not reverse the order of the court below without first giving the defendant below an opportunity to be heard. But as we expect to affirm the order of the court below, we shall do so without prejudice to his rights.

The facts of the case are substantially as follows: On the 7th of January 1878, a judgment was rendered in a justice's court in favor of Thomas Harrison and Frank Willis, partners as Harrison & Willis, and against George S. Hoag, for the sum of \$231.50 debt, and \$3 costs. On the 1st of March following, an abstract of this judgment was docketed in the district court of said county. On the 5th of June 1875, two deeds of conveyance were recorded in the office of the register of deeds of said county, as follows: one of said deeds purported to convey two certain forty-acre tracts of land situated in said county from Lindley M. Andrews and Elizabeth W. Andrews to George S. Hoag, and was dated 24th May 1875; the other deed purported to convey the same land from George S. Hoag to Elizabeth W. Andrews, and was dated June 5th 1875. Both of said deeds purported to have been acknowledged before Thomas Harrison, a justice of the peace of said county. On the 12th of October 1875, an execution was issued on said judgment and placed in the hands of the sheriff of said county. The sheriff levied the same on one of

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said forty-acre tracts, to-wit, the S.E. $\frac{1}{4}$ of the S.E. $\frac{1}{4}$ of section 31, township 32, range 16 east. This piece of land upon which the sheriff levied was "appraised at \$1,000, being \$25 per acre." The sheriff sold the north twenty acres of said land to said Harrison & Willis for the sum of \$833.34. He did not sell the rest of said land. Whether the twenty acres sold was worth more or less than the other twenty acres levied on and not sold, is not shown. The twenty acres sold may have been worth \$700, and the other twenty acres may have not been worth more than \$300. The two twenty-acre pieces taken together, or the whole forty-acre tract, was worth \$1,000. At the next term of the court a motion was made to confirm said sale, and while said motion was pending Elizabeth W. Andrews appeared and moved the court to set aside said sale. The grounds upon which she made her motion were, that the land which was sold belonged to her, and did not belong to George S. Hoag. The motion to set aside said sale was heard upon the affidavits of Elizabeth W. Andrews, George S. Hoag, Thomas Harrison, and the aforementioned deeds. The court below set aside said sale, and the said Harrison & Willis excepted, and now bring the case to this court for review.

It has already been decided by this court, that where land has been sold on execution, any person claiming to be the owner thereof, and interested in defeating the sale, may, although he may not be a party to the suit, move the court to set aside such sale. (*White-Crow v. White-Wing*, 3 Kas. 276; Gen. Stat. 734, §532.) We shall follow that decision in this case; for this case clearly falls within the rule enunciated in that decision. It was not only shown in this case that Mrs. Andrews was the owner of the land, but it was also shown that except for parol evidence her land was apparently subject to the payment of said judgment, and therefore that a sheriff's deed for the land executed in pursuance of a regular sheriff-sale under such judgment would cast a cloud upon her title. In fact, the holder of the sheriff's deed would, if he were an innocent *bona fide* purchaser, procure the whole of the estate in the land, and wholly defeat

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aside sheriff
sale.

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Mrs. Andrews' title. Apparently, from the public records and said deeds, which was all the written evidence there was applicable to the subject, Hoag obtained a good title to the land on May 24th 1875. Apparently, the judgment-lien then attached to the land; (*Babcock v. Jones*, 15 Kas. 296;) and apparently, Mrs. Andrews obtained her title to said land on June 5th, subject to said judgment-lien. It will therefore be seen that it was necessary for Mrs. Andrews to introduce parol evi-

2. Parol evi-
dence of title. dence in order to show that her said land was not subject to said judgment-lien. The plaintiffs in error claim that this could not be done on a motion to set aside a sheriff's sale. We would answer that it may be done, subject to an extensive discretion in the court hearing the motion to allow or disallow it. (*White-Crow v. White-Wing*, 8 Kas. 276, 280, 281.) But the final decision of the court upon the motion in such a case would not be conclusive upon either

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motion, not
conclusive.

party as to the ultimate rights of the parties. (*Trep-tow v. Buse*, 10 Kas. 170, 179, 180.) Of course, such parol evidence should be competent and material, and such as would be admissible under the rules of evidence in other cases. The parol evidence introduced by Mrs. Andrews in this case was embodied in the affidavits of herself and said Hoag. There is no objection to the evidence because it was embodied in affidavits, for proper and competent parol evidence may be embodied in affidavits on the hearing of a motion. Said affidavits show substantially as follows: Said land was originally purchased, and the improvements made thereon, with the money of Mrs. Andrews, and it was at the time said deeds were made, and still continues to be the home-
stead of herself and her husband and children. The title to the land was taken in the name of her husband (said Lindley M. Andrews,) but he agreed that he would transfer the title to her. In pursuance of such agreement they asked said Hoag, a single man, if he would receive the title from them, and then transfer the title to Mrs. Andrews. He agreed that he would. In pursuance of this agreement, Andrews and his wife on said

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May 24th, made out and signed said first-mentioned deed, and took it to Independence, where they met said Thomas Harrison, an attorney-at-law and justice of the peace. Mrs. Andrews testifies that Andrews then told Harrison, in her presence, what they had come for, and made Harrison acquainted with all the facts, "and that said Harrison then said that the method of transferring title, as by Mrs. Andrews suggested, was proper, and was only doing justice to this affiant, [Mrs. Andrews,] and that thereupon said deed to said Hoag was acknowledged." Harrison took the acknowledgment as a justice of the peace. Mrs. Andrews kept the deed. Her husband left Kansas to go to Illinois the next day. On June 5th, Mrs. Andrews and Hoag went to Independence to Harrison's office, and there Hoag was made acquainted with the contents of both deeds. He then executed the second deed, and acknowledged the same before Harrison, who took the acknowledgment as a justice of the peace. Mrs. Andrews then handed both deeds to Hoag, and gave him money to get them recorded in the county register's office, and he immediately had them so recorded. The first deed was not delivered to Hoag until after he had executed the second deed. Hoag never had possession of the said land, and never claimed to own it. But on the contrary, the land has all the time been in the possession of Mrs. Andrews and her family, as their homestead, and she has all the time claimed to own it. Mrs. Andrews was present at said sheriff's sale, and forbade the sale, and informed said Harrison & Willis that she owned said land, and that Hoag never had any such interest therein as could be taken in payment of their judgment. Harrison in his affidavit admits that he took the acknowledgment of said deeds, but denies that he was ever informed, prior to their execution or at the time of their execution, for what purpose they were executed. He also denies that he had any knowledge of their contents, or what land they conveyed, or to whom they conveyed it. *All that he knew about them was, that they were instruments in writing which the parties wished to acknowledge.*

We think the court below did not err in setting aside said sheriff's sale. It is possible that Mrs. Andrews was in equity the real owner of said lands before either of said deeds was executed, and that her husband held only the mere naked legal title thereto. (*Franklin v. Colley*, 10 Kas. 260; Gen. Stat. 1097, §8.) But it is certain that Hoag never had any such interest in said land as could be sold on execution.

4. Deed — inoperative until delivered.

A deed has no force or effect until it is delivered. And the proof of the delivery rests entirely in parol. A deed dated May 24th, may be shown by parol evidence not to have been delivered until June 5th. Indeed, such a deed or any deed, might be shown by parol evidence never to have been delivered at all. Such evidence does not contradict or vary any of the terms of the written instrument. The delivery of the deed is a fact outside of the writing, and in the nature of things must be subsequent to its execution. The deed is first completed, and then it is delivered, and it may be delivered long after its completion, and long after its date. Hence the delivery of the deed must be proved by evidence outside of the deed itself. And as the deed from Andrews and wife to Hoag was shown in this case not to have been delivered until June 5th, it therefore had no force or effect until that time. Indeed, it had no force or effect until the deed from Hoag to Mrs. Andrews took effect. That is, the two deeds were delivered simultaneously, and took effect simultaneously. They were executed and delivered as parts and portions of one single contract, taking effect at the same time; and they must be considered as merely parts and portions of one single contract. They must be considered as though the two instruments were attached together, and formed but one single instrument. The estate therefore in the land did not stop a single moment in the hands of Hoag. There was not a single instant of time when it could be said that the land belonged to him. And in such cases it is held that a judgment-lien cannot attach. (*Scott v. Warren*, 21 Georgia, 408.) But if any estate did ever stop for a sufficient length of time in the hands of Hoag for a judgment-lien to attach, it was a mere

5. Judgment-lien — when it does not attach.

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naked legal estate, as contradistinguished from an equitable estate. The whole equitable estate was clearly in the hands of Mrs. Andrews; and in such cases it is held that the judgment-lien does not attach. (*Lounsbury v. Purdy*, 11 Barbour, 490; *Thomas v. Kennedy*, 24 Iowa, 398.) That is, it is held that the judgment-lien cannot attach to a mere naked legal estate, when the entire equitable estate is vested in some third person. And in no case will the judgment-lien attach to any interest greater than the judgment-debtor himself possesses in the land. *Swarts v. Stees*, 2 Kas. 236; *Blankenship v. Douglas*, 26 Texas, 225; *Tallman v. Farley*, 1 Barb. 280; *Averill v. Loucks*, 6 Barb. 20, 26, 27; *Ells v. Tousley*, 1 Paige Ch. 280; *Keirsted v. Avery*, 4 Paige Ch. 9; *Dunlap v. Burnett*, 18 Miss. (5 S. & M.) 702; *Walker v. Gilbert*, 1 Freeman Ch. (Miss.) 85; *Jenkins v. Bodley*, 1 Smedes & Marsh. Ch. (Miss.) 388. The judgment-lien attaches merely to the interest of the judgment-debtor in the land, and to nothing more. (Gen. Stat. 708, §419.) Every equity belonging to other persons will be protected by the courts. A judgment-creditor is never considered as a *bona fide* purchaser, or even as a purchaser at all. (*Swarts v. Stees*, 2 Kas. 241.) In the present case however, the plaintiffs claim both as judgment-creditors, and as purchasers. But they cannot claim as *bona fide* purchasers. For, saying nothing about Harrison's knowledge of the execution of said deeds, the plaintiffs were informed on the day of sale, and before they purchased the property, that it belonged to Mrs. Andrews. Besides, Mrs. Andrews was at the time in the possession of the property, occupying the same as the homestead of herself and family, and claiming it as her own, while Hoag never had the possession of the property, and never claimed to have any interest therein. As purchasers therefore, the plaintiffs could not take any greater interest in the land than Hoag himself possessed.

The order of the district court setting aside said sheriff's sale will be affirmed.

All the Justices concurring.

L. L. TODD v. JOHN W. ALLEN.

EVIDENCE; ISSUE; WRITTEN CONTRACT; Parol Proof of Acts Performed. Where the two members of a copartnership enter into a written contract for the dissolution of their copartnership and for a sale, at some future and indefinite time, of all their partnership assets, and afterward a sale is made of such assets, one of the partners becoming the purchaser, the other partner in an action between the two partners, may show by parol evidence that said sale was not made in exact accordance with the terms of the written contract; and such evidence cannot be excluded on the ground that it would contradict or vary the terms of said written contract. [*Pemberton v. Hoosier*, 1-108; 1 D. 108; *Rose v. Madden*, 1-447; *Logan v. Hartwell*, 5-849; *Shelton v. Dunn*, 6-128; *Ferguson v. Tuttle*, 8-870; *Simpson v. Kimberlin*, 12-579; *Babcock v. Deford*, 14-408; *Shepard v. Haas*, 14-443; *Weeks v. Medler*, 20-57.]

Error from Atchison District Court.

Todd sued Allen, to recover certain moneys alleged to have been collected and received by Allen for the use of Todd. The district court gave judgment in favor of Allen, at the November Term 1875, and Todd brings the case here.

Everest & Waggener, for plaintiff.

D. Martin, for defendant.

The opinion of the court was delivered by

VALENTINE, J.: The plaintiff Todd and the defendant Allen were formerly partners in the drug business, under the name of Allen & Todd. On 17th June 1874 they entered into a written executory contract to dissolve their copartnership, and to sell their partnership business, including all their partnership property and good-will, to the partner who would pay the most therefor. Afterward they made an estimate of their assets and liabilities, and on June 18th or 19th sold said business and all their assets, except certain accounts denominated

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"worthless accounts," and perhaps those too, to said Allen. Whether said accounts were in fact so sold or not, was the principal question attempted to be litigated in the court below. The plaintiff Todd claimed that said accounts were not so sold, but were reserved from said sale with the agreement that whatever portion of them might be collected by Allen should be equally divided between the parties, and whatever portion of them might be collected by Todd should be divided, one-third to Allen and two-thirds to Todd. On the other hand, Allen claimed that all of said accounts, as well as all the other property belonging to the firm, were included in said sale, and therefore that all were sold to him, and all belonged to him exclusively. By the terms of said written contract said accounts were to be included in the sale to be made under said contract; and therefore it was contended by the defendant in the court below, that no other sale or kind of sale could have in fact been made by the parties; or at least, it was claimed that the plaintiff had no right to show on the trial, by any kind of evidence, that the terms of said sale as specified in said written contract were afterward in any manner varied or modified by the parties. On the other hand, the plaintiff claimed that said written contract was not in fact strictly followed, if followed at all, in making said sale, and that he had a right to show by parol evidence just how the sale was in fact made, notwithstanding said written contract. Upon this question the court below ruled in favor of the defendant. That is, the court below ruled that the written contract did not become a complete and binding contract until the sale was completed under it, and therefore that no sale of any kind could be shown except the one contemplated in said contract; for, the court held, to show a sale different from the one contemplated in said contract would be to contradict and vary the terms of the contract. The court held that no other contract, written or parol, made prior to said sale, could be shown; but that any contract, written or parol, made subsequently to said sale, might be shown.

It is well settled, that the terms of a written contract cannot

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be varied by any previously executed contract, written or parol, nor by any contemporaneous parol contract. It is equally well settled, that the terms of a written contract may be varied, modified, waived, annulled, or wholly set aside, by any subsequently executed contract, whether such subsequently executed contract be in writing or in parol. Now was said sale to Allen made subsequently to the execution of said written contract, or was it made contemporaneously therewith? Unquestionably the sale was made subsequently, and at least one day thereafter. The contract was executed June 17th. That is, the instrument constituting the contract was executed on that day, and became a completed contract on that day. But the things stipulated to be performed under such contract were not however executed on that day, and some of them probably never were executed in exact accordance with the terms of such contract. The stipulations with regard to said sale were certainly not executed at the time of the execution of the instrument, but were certainly all merely executory. The contract did not create a sale, or constitute a sale. It merely provided for a sale *to be made* at some indefinite time in the future. And who would be the purchaser, or who the seller, or what the price would be, no one could tell from the contract. Each partner was to bid, and each was to bid alternately, until his bid should be accepted by the other partner. The sale actually transpired on the 18th, or 19th, of June, and Allen was the purchaser; but by the terms of the contract it might have transpired at any other time after the contract was made, and Todd might have been the purchaser. And according to the evidence the sale was not conducted strictly in accordance with the contract. Allen was the only bidder, and said accounts were not included in the sale. We think the court below erred in excluding evidence tending to show that said accounts were not included in said sale, and that the plaintiff was to have one-half of whatever Allen might collect of them.

After the plaintiff rested his case, the defendant demurred to the evidence, and the court below sustained the demurrer,

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and refused to submit the case to the jury. Now upon the defendant's theory of the case, this was right; but upon the plaintiff's theory of the case, it was wrong. If the plaintiff had no right to show a sale different from the one contemplated in said written contract, then there was no sufficient evidence to go to the jury. But if the plaintiff had a right to show that the sale was such as he claimed that it was, and that said accounts were excluded from the sale, and that he was to have one-half of what Allen collected thereon, then there was evidence sufficient to go to the jury. It is immaterial however whether there was sufficient evidence or not to go to the jury; for, because of the said error in excluding evidence, the judgment of the court below must be reversed.

BREWER, J., concurring.

HORTON, C. J., not sitting, having been of counsel in the court below.

ST. LOUIS, LAWRENCE & WESTERN RAILWAY CO. v. J. E. MADDOX.

1. EVIDENCE; HEARSAY; *Letter-Press Copies of Reports*. Where M. had a contract with the St. Louis, Lawrence & Western railway company, to act as its agent at Wichita to influence the shipment of cattle over its railroad from Carbondale to Chicago and St. Louis, and was to receive as compensation for his services a certain stated sum for every car-load of cattle shipped by the way of Carbondale in cars over said road, and in an action against such railway company to recover his compensation under the contract, he proved the number of cars shipped from Wichita by the Atchison, Topeka & Santa Fé railroad, billed to Chicago and St. Louis, via Carbondale and the said St. Louis, L. & W. railway, by a book of record of the A. T. & Santa Fé railroad company containing the letter-press copies of quarterly reports of the shipment of live stock from Wichita, made by an agent of the A. T. & Santa Fé railroad company to

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the general freight agent of said last-named company, from dray tickets, which were all on file, and said book not being a book of original entries, nor an account book, *held*, that such evidence was clearly incompetent, as coming within the definition of hearsay evidence.

2. **CONTRACTS; AGREEMENTS; Partly Written, and Partly in Parol.** A contract which is not required by statute to be in writing, may be partly expressed in writing and partly in an unwritten understanding between the parties; and if so, such understanding may be proved by parol.

Error from Sedgwick District Court.

MADDOX sued the *Railway Company*, and recovered judgment at the September Term 1875, of the district court. The *Railway Company* brings the case here. All necessary facts are stated in the opinion.

J. P. Usher, for plaintiff in error.

H. C. Shuss, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: The petition filed in the court below in this case alleged that the railway company was duly incorporated, and was in 1874 engaged in operating a railroad from Carbondale, in Osage county, to Lawrence, in Douglas county; that said railway company in its capacity as common carrier was engaged in transporting live stock from Wichita, in Sedgwick county, Kansas, to St. Louis, Mo.; that J. M. Webster was the general agent and manager of the railway company; that on the 6th of June 1874, the railway company by Webster its agent agreed with J. E. Maddox, and employed him to act as the agent of the company in procuring live stock to be shipped from Wichita, by and with said railway company, and over the line of railroad by the way of the town of Carbondale to St. Louis; that the railway company agreed to pay said Maddox \$8 for each and every car-load of live stock which should be shipped over the defendant's line of railway to the National stock-yards, at the city of St. Louis, during the shipping season of 1874, and pay a drawback to said Maddox of all the

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money over the sum of \$80 per car which defendant should charge and collect of shippers of live stock over the St. Louis, L. & W. railway to the said National stock-yards, and to pay said Maddox \$2 per car-load of live stock which should be shipped over said railway to Chicago, Ill., during the said shipping season, and pay Maddox a drawback of all money over \$93 per car which said railway company should charge and receive from shippers of said live stock over its railway to Chicago; that to evidence the amount of compensation so to be paid to Maddox, and the rates at which the railway company was to contract the shipment of cattle and other live stock, a memorandum thereof was reduced to writing, a copy of which is as follows:

“WICHITA, KAS., 26th, 6, 1874.

“Agreement by and between J. M. Webster, of Lawrence, Kas., and J. E. Maddox, viz.: for every car-load of cattle or live stock shipped by the way of Carbondale, Kas., to Chicago, Ill., \$2.00 per car to be paid to said J. E. Maddox, and if said live stock is sold at St. Louis, then \$3.00 per car-load will be paid. To be paid on shipment of each 100 car-loads. Rate to Chicago, \$95. Rate to St. Louis, \$75. Rate to National yards, \$80.

JNO. E. MADDOX.
J. M. W.”

The petition further averred, that said Maddox spent his time in procuring live stock to be shipped in the season of 1874 from the city of Wichita over the said St. Louis, L. & W. railway to St. Louis and Chicago; that there were shipped from Wichita over said railway to the said National stock-yards in the said city of St. Louis, during the shipping season between July 1st 1874, and November 10th 1874, 306 cars of live stock; and to Chicago there were shipped two cars; that the said railway company received \$85 per car for stock to the National stock-yards, and \$110 per car for stock shipped to Chicago; that the said railway company had not paid Maddox except \$123, and demanded judgment for \$2,349.00.

The railway company filed an answer containing a general denial, and setting up accord and satisfaction by the payment of the \$123. Maddox replied with a general denial, and that

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he did not sign the receipt pleaded. Upon the issues, the jury returned a verdict for Maddox for \$758, and judgment was duly entered therefor. The errors relied on for the reversal of the judgment are—that there was no evidence to justify the verdict; that the court erred in the admission of testimony offered by the plaintiff, and that the court erred in the rejection of testimony offered by defendant.

The main question for our consideration is, whether the court below committed substantial error in the admission of evidence against the objections of the plaintiff in error. If such error was committed, the judgment must be reversed. A verdict based upon improper testimony, prejudicial to the rights of a party to an action properly excepting thereto, cannot be justified. At the trial of the case, the defendant in error, to prove the number of car-loads of cattle or live stock shipped from Wichita to Chicago and St. Louis *via* Carbondale and the St. Louis, Lawrence & Western railway during the shipping season of 1874, produced and read in evidence, against valid exceptions, a book of record of the Atchison, Topeka & Santa Fé railroad company, kept at Wichita, and purporting to relate to the shipment of stock over that road from Wichita in 1874, and billed to St. Louis and Chicago *via* Carbondale and the St. Louis, L. & W. railway. It appears from the evidence that such book was the letter-press copies of quarterly reports of the shipment of live stock from Wichita station, made by an agent of the A. T. & Santa Fé railroad company to the general freight agent of the said company. The statements on the originals were made from dray tickets, which were all on file. From examination, it seems the book, or rather the letter-press copies therein inserted, contained the date of shipment, number of the manifest, number of cars, names of consignor and consignee, number of station manifested to, destination, kind, whether cattle or hogs, number of head, rate per car, and amount. It must necessarily have been made at intervals of three months, of the previous three months' transactions of the A. T. & Santa Fé railroad company, made up in such manner and form, that by reference to

the manifests, each of which were numbered, approaching one hundred in all, the whole transaction would appear. It was not a book of original entries, nor an account book, and clearly comes within the definition of hearsay evidence. It was incompetent to be received, and should have been rejected by the court on the objections of the plaintiff in error. Such records would have been competent evidence in an action against the A. T. & Santa Fé railroad company to charge it with the shipment of cattle therein entered; but as to such book, the plaintiff in error was a stranger, and could not be bound in any way thereby. The original records in the hands of the general freight-agent of the A. T. & Santa Fé railroad company could not have been used, if they had been produced, in place of the press copies. It is urged that because the defendant in error was the agent of the St. Louis, L. & W. railway at Wichita, and the A. T. & Santa Fé railroad was a connecting line with the St. Louis, L. & W. railway, that the A. T. & Santa Fé railroad company was the agent of the St. Louis, L. & W. railway company, and therefore an admission which would be good against the A. T. & Santa Fé railroad company would be equally binding in the same matter upon the St. Louis, L. & W. railway company. But neither by the pleadings, written memorandum, or the evidence of the contract, does it in any way appear that the A. T. & Santa Fé railroad company occupied any such relation with the St. Louis, L. & W. railway company. On the other hand, it does distinctly appear that the purpose of the agreement, oral and written, between the parties to this action, was, that the defendant in error should use his influence to ship cattle over the St. Louis, L. & W. railway to Chicago and St. Louis, for certain compensation agreed upon; and if the cattle had been driven from Wichita to Carbondale, instead of being conveyed in cars, and then shipped in accordance with the contract, the defendant in error would have been entitled to compensation. The evidence thus improperly admitted was very prejudicial to the plaintiff in error. It was the only definite testimony offered by him to support the allegation in the petition as to the num-

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ber of cars shipped during the season of 1874 under his contract. In the absence of this proof, he must have failed in the trial. The judgment of the district court was therefore erroneous.

In view of a new trial, and the many objections to the petition in this case, made by the plaintiff in error, and of the questions raised as to the written memorandum, it is proper that we should state, that a contract which is not required by statute to be in writing may be partly expressed in writing, and partly in an unwritten understanding between the parties; and if so, such understanding may be proved by parol. As it cannot be contended that the memorandum copied in the petition contained all the terms of the contract, and as it appears from the evidence that it was merely incidental and subordinate to the principal contract, and as its expressions are so obscure and indefinite, that without oral testimony, its meaning cannot be understood, the court below properly allowed extrinsic evidence to explain its terms, and to supply all omissions. *Shepard v. Haas*, 14 Kas. 448; *Hope v. Balen*, 58 N. Y. 380.

The judgment of the district court will be reversed, and the case remanded for further proceedings in accordance with this opinion.

All the Justices concurring.

ALBERT PERRY v. N. N. JONES.

1. **AMENDMENT, ON TRIAL; Terms; Continuance.** The court below, after the jury was impaneled, and after the plaintiff stated his case, granted leave to the defendant to verify his answer by affidavit, upon the condition that the plaintiff might if he chose continue the case till the next term of court at defendant's cost; *held*, no error as against the plaintiff.
2. **AGENT; Power to Bind Principal, Limited to Subject-Matter of His Agency.** A., who claimed to act as the agent of J., employed P. to assist as an attorney-at-law in the defense of an action wherein H. was plaintiff and S. was defendant. A. however had no express authority to so employ counsel, nor any authority from J. except a general authority to manage certain property belonging to J. J. was not a party to said suit, nor interested therein, except that the decision of some of the legal questions involved therein might as a precedent affect some of the legal rights of J. to certain property of J. not involved in said controversy. P. assisted in the defense of said suit, but J. in no manner ever ratified his employment. *Held*, That J. is not liable to P. for his said services; that a general authority given to manage the property of J. cannot be considered as an authority to employ counsel in a case concerning some other person's property.

Error from Doniphan District Court.

ACTION by Perry, as plaintiff. Trial, and judgment in favor of Jones, at September Term 1875 of the district court. The plaintiff brings the case here. The opinion will show all necessary facts.

Price & Heatley, for plaintiff.

W. D. Webb, for defendant.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by Albert Perry against N. N. Jones, for attorney-fees. The plaintiff's petition sufficiently stated a cause of action, alleging among other things that the plaintiff was employed by the defendant, "by his agent John H. Jones, who, as such agent of the defendant, had full authority so to do." The defendant answered to this petition by filing a general denial, without any verification.

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Upon the pleadings as thus made up, the parties proceeded to trial. A jury was impaneled, and the plaintiff stated his case to the jury. The defendant then asked the court for leave to verify his answer by affidavit so far as the same denied the said agency of said John H. Jones. The court granted such leave upon the condition that plaintiff might if he chose continue the case till the next term of the court, at the defendant's costs. The plaintiff however declined to continue the case, and excepted to the ruling of the court. The answer was then verified as permitted by the court, and the parties then proceeded with the trial.

We think there was no error in the above ruling of the court. The verdict and judgment finally rendered in the case were for the defendant, and this we think was also right, whether any error intervened during the trial or not. There was a total failure in the evidence, as we think, upon an essential fact in the case. The preponderance of the evidence, as we think, shows that the plaintiff was employed to assist in the defense, as an attorney-and-counselor-at-law in the case of O. C. Hyatt against X. K. Stout, and that he was so employed by John H. Jones; but there was no evidence tending to prove that John H. Jones had any authority from the defendant N. N. Jones to make such employment. The action in which the plaintiff was then employed was one for the recovery of certain real estate. The defendant was not a party to the suit, and had no interest in the property involved in the controversy. Nor could it make any possible difference to him, which was adjudged to own the land, Hyatt, or Stout. It is true, the defendant had an interest in the legal questions involved in the controversy, for he had land which he held by a title almost precisely like the title by which Stout claimed the land in controversy. That is, the decision of the legal question involved in the Stout case, might be used as precedents in the decisions of questions affecting the title to land which the defendant owned, not involved in the Hyatt-Stout controversy. But in no other way was the defendant interested in the Hyatt-Stout controversy. The decision in

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the Stout case could not directly affect any of the defendant's legal rights; nor could the judgment to be rendered in that case be used as evidence for or against him. As the defendant was interested in the legal questions involved in the case, it would of course have been very proper for him, with the consent of Stout, to have employed counsel to assist Stout. But of course he could not employ counsel to assist Stout except with the consent of Stout. Stout had the absolute and exclusive right to control and manage the defense of that case, and the defendant had no right whatever in the case except with the consent of one of the parties. No inference can therefore be drawn from the mere fact that counsel were employed in the case, that the defendant employed them, or that he agreed to pay anything for their services. There is no room in such a case for implying or presuming a contract on the part of the defendant to pay any portion of the counsel-fees.

But returning to the question of the agency of John H. Jones. There was evidence showing that John H. Jones was an agent for the defendant N. N. Jones for the purpose of managing N. N. Jones' property in Doniphan county. There was a power-of-attorney introduced in evidence, showing that the defendant authorized John H. Jones "to donate to the state of Kansas all streets and alleys in the Normal addition to the town of Troy, in said state of Kansas; also to sell any lots or blocks in said Normal addition, and execute bonds for deeds; also to collect rents and other debts owing to me [N. N. Jones] in the state of Kansas." There was also evidence introduced showing that John H. Jones had the general management and control of the real estate of the defendant situated in Doniphan county; that he had previously purchased a portion of the same for the defendant; that he rented the same, and collected the rents therefrom, and paid the taxes thereon. But there was not a particle of evidence introduced or offered, that tended to show that any express authority was ever given by the defendant to John H. Jones to employ an attorney in the Hyatt-Stout case, or indeed in any other case

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instituted prior to the determination of the Hyatt-Stout case; and the said John H. Jones never did employ an attorney for the defendant in any case prior to that time. Express authority however has since that time been given to said John H. Jones to employ a particular attorney for the defendant in this and one other case, upon certain express conditions, in both of which cases the defendant was a defendant, and directly interested in the subject-matter of the litigation. And there was no evidence introduced or offered tending to show that the defendant ever ratified the employment of the plaintiff in said Hyatt-Stout case. We would therefore think, that the plaintiff wholly failed to make out his case. A general authority given to manage the *defendant's property* can hardly be considered as an authority to employ counsel in a case concerning *some other person's property*. This general authority however was not given by any express words. It is merely inferred from the acts of the parties. The only express authority shown to have ever been given was that given by said power-of-attorney.

The judgment of the court below will be affirmed.

All the Justices concurring.

SEWING MACHINE COMPANY V. JOHN S. REDFIELD.

PRACTICE; PLEADING; ISSUE; Order, Granting Leave to Answer. Plaintiff sued defendant before a justice of the peace on a bond, and filed a full statement of his cause of action in a bill of particulars, attaching thereto a copy of the bond. Defendant filed no pleading. After judgment, defendant appealed to the district court, and there, at one term, by consent an order was entered for defendant to answer in twenty days from the close of the term. At the next term, the time having elapsed, and no answer having been filed, the case was tried. Defendant offered evidence of payment, which was admitted over the objection of the plaintiff: *Held*, That the order for answer was mandatory and not permissive; that the

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defendant was in default, and that evidence of payment was inadmissible under the pleadings, and that it was substantial error to admit such evidence. [*Kuhuke v. Wright*, 22-487.]

Error from Bourbon District Court.

ACTION brought by the *Grover & Baker Sewing Machine Co.* against *Redfield*, on a bond given by one O'Conner as principal, and *Redfield* as surety, for the faithful performance by O'Conner of his duties and obligations as agent of said *Sewing Machine Co.* The proceedings in the court below, and the error complained of, fully appear in the opinion. The district court, at the December Term 1875, gave judgment in favor of *Redfield*, and the plaintiff brings the case here.

Eugene F. Ware, for plaintiff.

Hulett & McCleverty, for defendant.

The opinion of the court was delivered by

BREWER, J.: The plaintiff sued the defendant before a justice of the peace, on a bond. The defendant appeared by himself and attorney, but introduced no testimony, and judgment was rendered, 22d July 1875, in favor of the plaintiff for \$60 and costs. The defendant had not filed, and had not been required to file, any pleading in the justice's court. The defendant duly appealed on July 28th. At the September term of the district court, and on October 6th, the case was called and continued, and the following journal entry made:

(*Title.*) "By consent of parties, defendant to answer in twenty days from the rising of this term of court, and plaintiff five days to reply. This action is continued until next term."

The case was reached at the next term of court on December 24th. The defendant had filed no pleading whatever, and the twenty days had long expired. Upon the call of the case the parties announced themselves ready, and entered upon the trial, whereupon plaintiff moved for a judgment upon the

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pleadings, as for a default. The defendant interposed a verbal plea of payment, and objected. The court sustained defendant's objection, and the plaintiff excepted. The plaintiff then offered in evidence the original bond sued on, and then rested. The defendant offered the evidence of two witnesses to prove payment, to which plaintiff objected, on the ground that the defendant had not answered in the case, and that there was no issue joined, and that the evidence offered by the defendant tended to establish no issue made by the defendant, or by the pleadings in the case. The court overruled the objection, and the plaintiff duly excepted. Finding and judgment in favor of defendant. Two motions for a new trial were also overruled and excepted to.

Was there error in the ruling of the court at the trial? We are inclined to think there was, and that the error was one of sufficient importance to compel a reversal. At the time of these proceedings, cases on appeal from a justice's court to the district court were to be tried upon the original papers, unless the latter court "in furtherance of justice allow amended pleadings to be made, or new pleadings to be filed." (Laws 1870, p. 184, § 7.) The court then had power to require an answer to be filed, for though the language of the statute is "allow," yet we think this grants something more than mere authority to consent. But even if not, the order in this case was by consent of parties, and the court certainly had the power to enforce compliance with an order to the entry of which the parties had consented. It seems to us also, that it was the duty of the court to enforce the order, and that the plaintiff had a right to rely upon compliance, or take advantage of the default. We are aware that the matter of filing pleadings is largely within the discretion of the trial court, and that this court will not interfere unless that discretion appears to have been abused. In this case the court might at the time of trial have allowed an answer to be filed, although the twenty days named in the order had elapsed, though in such event the plaintiff would doubtless have been entitled to a continuance. It might too upon a proper showing have set aside this consent-

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order for pleading, and left the case to be tried upon simply the original papers. But nothing of this kind occurred. No order was made before that; no application for an order. The trial commenced upon simply the bill of particulars, with defendant in default for want of answer. Even on the trial no leave was sought or given to file answer, nor was any motion made to set aside the order for pleading. In short, the court ruled as though no answer were necessary, and no order had ever been made to answer. This ruling was erroneous. There was no exercise of discretion as to filing pleadings, but a direct ruling upon the legal rights of parties under existing pleading and order. It is precisely the same as though a petition had been originally filed in the district court, and the defendant had failed to answer. It would then clearly be error for the court upon trial to permit defendant to prove payment; and it would be none the less error because of the power of the court to permit defendant to file an answer alleging payment.

For this error the judgment must be reversed, and the case remanded for a new trial.

All the Justices concurring.

THOMAS BUTCHER V. TAYLOR, WILSON & Co.

APPEAL; Final Judgment; Order Dissolving Attachment. An order of a justice of the peace, dissolving an attachment under section 53 of the justices act, is not a "final judgment" within the meaning of section 120 of the justices act relating to appeals; and therefore no appeal will lie from such an order to the district court. [*Boston v. Wright*, 3-227.]

Error from Atchison District Court.

THE only question here, is whether an appeal will lie from an order of a justice of the peace dissolving an attachment. Such appeal was dismissed by the district court, at the No-

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venber Term 1875. *Butcher*, plaintiff, and appellant, brings the case here on error.

F. D. Mills, for plaintiff.

Everest & Waggener, for defendants.

The opinion of the court was delivered by

VALENTINE, J.: The plaintiff in error commenced an action in a justice's court against the defendants in error for the rent of a certain stone building, and also at the same time procured an order of attachment to be issued against the property of the defendants. Afterward the defendants filed an affidavit denying the grounds upon which said order of attachment was procured, and moved the court to dissolve the attachment under section 53 of the justices act. That section reads as follows:

"SEC. 53. If the defendant shall, before the trial is commenced, file an affidavit denying the grounds laid for the attachment in the plaintiff's affidavit, the justice shall, on reasonable notice in writing being given to the opposite party, proceed to examine into the truth of the grounds laid for such attachment, and shall hear such evidence as may be produced by either party; and if it appear that such grounds are not sustained by the evidence, the justice shall discharge the attachment." (Gen. Stat. 787.)

A hearing was afterward had as to the truth of the grounds for said attachment—both parties appearing, and the plaintiff introducing evidence—and on such hearing the justice dissolved the attachment, and adjudged the costs of the attachment against the plaintiff. Afterward a trial was had upon the merits of the action, which resulted in favor of the plaintiff. Afterward the plaintiff took an appeal to the district court from the decision of the justice on said attachment-proceedings, but did not pretend to take any appeal from the judgment of the justice on the merits of the action. In the district court the defendants moved to dismiss the appeal on the ground, among others, that such appeal was null and void. The court thereupon sustained said motion, and dismissed said

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appeal, and the plaintiff excepted, and now brings the case to this court for review.

The plaintiff founds his appeal on section 120 of the justices act, which reads as follows:

"SEC. 120. In all cases not otherwise specifically provided for by law, either party may appeal from the final judgment of any justice of the peace to the district court of the county where the judgment was rendered." (Gen. Stat. 800.)

It will be noticed that this section authorizes an appeal only from a "final judgment." Now was the order of the justice discharging said attachment a final judgment? We think not. *Boston v. Wright*, 8 Kas. 227; *Davis v. Perry*, 46 Mo. 449; *Anderson v. Moberly*, 46 Mo. 191; *Walser v. Haley*, 61 Mo. 445; *Jones v. Snodgrass*, 54 Mo. 597; *Bray v. Laird*, 44 Ala. 295; *Harrison v. Thurston*, 11 Fla. 307; *Abbott v. Zeigler*, 9 Ind. 512; *Cutter v. Gumberts*, 8 Ark. 449. "A judgment is the final determination of the rights of the parties in an action." (Gen. Stat. p. 704, § 895; id. p. 814, § 185.) And a final judgment is not less final than a mere judgment. The order taxing costs on discharging an attachment, is not final, but may be reëxamined and modified by the same court at any time up to the final taxation of costs in the action. In this very action the order taxing costs in the attachment-proceedings was modified by the justice after the final judgment on the merits of the action was rendered.

The judgment of the court below dismissing the plaintiff's appeal will be affirmed.

BREWER, J., concurring.

HORTON, C. J., not sitting in the case, having been of counsel in the court below.

JOHN HANNON v. HENRY H. HOUSTON.

1. **AGENT, AND AGENCY; Powers of Agent, Limited by Letter of Appointment.** H. owned certain county bonds and coupons issued by the county of Leavenworth, and payable at the Metropolitan National Bank of New York. These bonds had long been over-due and dishonored, and their negotiability destroyed. H. resided in Philadelphia, and sent said bonds in a letter to M., who resided in Leavenworth county, stating in said letter as follows: "I send you the following bonds and coupons of the county of Leavenworth which you will please do the best you can in *settlement*; treat them the same as you would if they were your own," (giving a description of the bonds, and then:) "We had the bonds and coupons that were due presented for payment at the Metropolitan Bank, New York. They said there was no money to meet them, and had not been for some years. Hoping you may be able to *make a settlement*," etc. *Held*, That said letter did not give to M. any power to sell said bonds to a third person, or any power to authorize any other person to do so.
2. ——— **Unauthorized Sale, is Void.** Afterward M. delivered said bonds to S., an attorney-at-law and business agent, though not a dealer in bonds, for the purpose that S. should collect the amount thereof from the county in money or new bonds, or in both; but S., in violation of his duty, sold said bonds to J. H., a third person, for a valuable consideration. *Held*, That such a sale was void. [*Eggen v. Briggs*, 23-710, 716.]
3. **ESTOPPEL; What Facts held No Estoppel.** S. had said bonds in his possession about three weeks from the time he received them until he sold them. At first he informed J. H. and others that he had them for collection, but afterward he offered them for sale to several persons. M. at one time, on the request of S., consented that S. might receive offers for said bonds for the purpose of sending such offers to H.; but M. never authorized S. to offer said bonds for sale, and neither M. nor H. ever knew until after the sale that S. ever did offer the same for sale. S. reported two offers for the bonds to M., and M. reported one of such offers to H., who declined the offer. *Held*, That, taking all of the facts of this case together, they did not authorize S. to make said sale, and they do not estop H. from denying the authority of S. to make the sale.

Error from Leavenworth District Court.

ACTION by Henry H. Houston, against John Hannon, and the Board of County Commissioners of Leavenworth county, to recover the moneys due on four certain bonds issued by said county of Leavenworth on the 1st of August 1865. Plaintiff alleged that the bonds belonged to him, and that they had

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been unlawfully converted by the defendants. The facts are fully stated in the opinion, *infra*. The district court, at the March Term 1876, gave judgment in favor of *Houston* and against the *Board of County Commissioners*, for \$3,038, and costs, and in said judgment it was determined that defendant *Hannon* was personally liable for \$910 of the whole sum found due. Defendant *Hannon* appeals, and brings the record here by petition in error, joining plaintiff *Houston* and the *Board of County Commissioners*, as defendants in error.

Stillings & Fenlon, for Hannon, plaintiff in error, contended, that the bonds in suit had, through the agency of Houston's friend and his agent, been hawked about the streets for sale for two or three weeks, until Hannon was induced to purchase them and part with \$960, the price paid for them. Hannon had a right to have the question of the power, actual or constructive, of Martin or Spry, to dispose of these bonds submitted to a jury, and whether the plaintiff below could recover either the bonds or their price without tendering or offering back the money paid, a part of which Spry had, and a part of which was returned to the credit of Martin. The principle of law is a familiar one, and one which this court has applied in the case of *Malony v. Clark*, 6 Kas. 82, that if one of two innocent persons must suffer by the act of a third, he who enabled that third party to do the injury must bear the loss. (4 Ohio St. 529; 34 N. Y. 59; 63 Penn. St. 87; Story on Agency, §§ 56, 93, 94; 42 Iowa, 118.) There can be little doubt that the acts of Houston in placing his bonds in the hands of a friend, with instructions to treat them as his own, and allowing them to be hawked about the streets for offers, resulted in deceiving the plaintiff in error into buying the bonds and paying the money for them. It is the same in principle as that of a man who sends his servant to a horse-market with his horse, in which case if the servant wrongfully sell the horse, the owner is bound, because by his acts the apparent authority is given to the servant to sell. These bonds were negotiable, and transferable by delivery; and the conduct of the principal induced

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the agent himself, though as well a lawyer as commission agent, to think he had power to sell. But the plaintiff in error is told by the court below, that, although the manner in which Houston conducted this affair, induced Spry to believe he could sell, and Hannon to purchase and place the \$960 in possession of Spry in place of the bonds, yet that Houston can repudiate the action of Spry without tendering back the money or any part of it. We submit that such is not the law.

M. L. Goddard, J. W. Taylor, and J. C. Douglass, for the county of Leavenworth, submitted, that the county board, although a defendant in error upon the record, was in fact in the position of a complaining party, and could properly object and complain of the judgment of the district court. The county cannot be a party to a conspiracy; it is bound only by the lawful and authorized acts of its board of commissioners. To make the county liable, the plaintiff relies on the alleged illegal and fraudulent acts of certain officers. The acts of Ashby the chairman, of Diefendorf the clerk, and of Hannon the chairman of the committee of ways-and-means, he alleges to be unauthorized and unlawful. If so, the county was not affected thereby; 19 Pick. 511; 81 Ala. 469; 3 Col. 205. But the four bonds mentioned, if otherwise valid, were at the time of the commencement of the action, barred by the statute of limitations. The payment to Spry was an unlawful and unauthorized act of the treasurer, and was made upon outlawed coupons, detached from the bonds. Such payment was made without the knowledge or sanction of the board. By subsequently approving of the treasurer's account, it cannot be held to have intended to ratify such illegal acts, when, as a matter of fact, it had no knowledge it had been done. The county is not estopped from questioning the allowance of an illegal claim by the board of commissioners; 76 Ill. 545; 4 Wend. 455. If the commissioners can by payment of interest, or acknowledgment in writing, prevent the statute from running, such payments should certainly be made with

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a view of accomplishing that end, and not inadvertently, as in this case; 32 Ill. 382, 386. The only member of the board who had knowledge that the payment of these coupons had been made at the time the treasurer's account was approved was Hannon, the party that the plaintiff charges with fraud, and upon whose fraudulent actions he based his right to recover, and notice to him should not be considered notice to the board.

Clough & Wheat, for Houston, plaintiff below, as to the statute of limitations set up in the answer of the county, contended, that the payment to Spry and Hannon of interest on the bonds, and the fact that such payments were approved, and credit therefor given to the county treasurer, by the county board, and the fact that taxes were levied by the county for interest on said bonds in 1871, 1873, 1874 and 1875, and particularly the paying of interest to Spry in May 1875, saved the case from being barred by the five-years' limitation law, even if but for such payment the action against the county would have been barred. And further in this connection, as to the effect of the payment of interest, we refer to 49 N. Y. 155; 21 La. An. 423; 51 Mo. 31. But the four bonds were overdue when Houston first in March 1875 sent them to Martin, and they had for years been overdue at the time Hannon claims he bought them from Spry. And as Houston did not authorize any person to sell the bonds, and has not ratified any pretended sale thereof, therefore, even if Hannon had *bona fide* purchased the bonds from Spry, without the notice that Spry had them for collection only, Hannon would not have acquired any right to the bonds, and any payment of interest or principal thereon to Hannon would not avail the county as a payment as against Houston. An overdue note or bill is, as to a sale or transfer thereof by a person not authorized to sell or transfer the same, governed by the same rules as the sale of a cord of wood, or any other article of that description. The rules in relation to negotiable paper have in such case no application, so far as the question of

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right or title is concerned, even though the note, or other negotiable security be payable to bearer, or indorsed in blank.

One who buys a note, bill or other negotiable security, *bona fide*, and for value, *after it is due*, from one who has no title to it, acquires *no title* against the true owner; 6 Wallace, 492; 8 Geo. 421, 424, 428 to 435. And see also, 39 Barb. 645; 17 Conn. 511; 4 B. & C. 830; 10 E. C. L. R. 602. Hannon is liable to Houston for whatever money he received or converted to his own use on account of said bonds. As Hannon did not acquire any right to said bonds by his purchase thereof from Spry, therefore any payment to him by the county does not operate as a credit in favor of the county as against Houston, and the county remains liable to Houston for the full amount of the bonds and interest thereon from the time the same came due; Byles on Bills, p. 342; 2 Pars. Notes and Bills, 211; 2 Camp. 485; 14 Kas. 542. The county had notice that Spry had the bonds for collection only—had notice that he could not sell. The whole business in regard to the bonds was between Spry and agents and financial agents of the county; and we submit that Hannon and the county each had notice, Hannon personally, and the county by its officers, that Spry had no authority other than *to collect the bonds*; (32 Vt. 125; 27 Miss. 284;) and that was sufficient affirmative notice to render Hannon's pretended purchase a wrongful and fraudulent act; 4 Kas. 412; 2 La. An. 577, 666; 1 Freeman's Ch. (Miss.) 417; 21 Wallace, 138. An attorney-at-law, who has been employed to collect a claim, has no power to sell the claim unless by express authority from his client; 18 Ohio, 411; 5 Vt. 346; 1 Bailey (S. C.) 437; 58 Penn. St. 196; 39 Md. 486. One who has a promissory note put in his hands for collection, has no authority thereby to transfer it; 6 Ind. 216; 13 N. H. 104; 44 N. H. 354; 10 N. J. Eq. 21. An attorney cannot compromise his client's cause without his consent; 35 Tex. 711; 23 Mo. 387. An attorney clothed with no other authority than that conferred by his retainer, has no authority to compromise and discharge his client's claim; 3

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Metc. (Ky.) 488. An attorney who has a claim for collection cannot, without authority from his client, take a bond, or anything else but money, in satisfaction of the debt; 3 Md. Ch. Decis. 392; 8 Blackf. 291; 14 S. & R. 209; 8 Ind. 327. An attorney-at-law cannot bind his client by a contract entered into on his behalf without authority conferred, or subsequent ratification; 36 Maine, 149; 68 N. C. 341; 8 Blackf. 291. The power to *settle* given by Houston to Martin, did not give power to *sell*, and *general* words in Houston's letter to Martin must be construed with reference to the *special* matter; 14 Cal. 396; 38 Mo. 228; 28 Wis. 689; 10 Mich. 357. When one deals with another as an agent, he is bound to ascertain the extent of his authority; and if the agent exceeds his authority, the principal will not be bound; 12 S. & M. 398. Where an agent varies from a particular authority given him, his acts will not bind his principal; 3 Eng. 227; 11 Barb. 652. An agent cannot bind his principal by any act or declaration, which is out of the scope of his authority; 11 Eng. Law and Eq. 424; Walker, 149; 7 Wis. 419; Ware, 175; 10 Mass. 397, 403; 15 Johns. 44; 6 Vt. 334; 8 Wend. 494; 4 J. J. Marsh. 456; 18 Johns. 363; 1 Hill, (S. C.) 204. Agent deviating from his special duty—act void; 6 Monr. 577. A person is bound to know the extent of power of the agent with whom he is dealing; 9 Port. 210; 8 Kas. 297, 300.

The opinion of the court was delivered by

VALENTINE, J.: This was an action on four certain bonds issued by Leavenworth county to the Union Pacific Railway Company. These bonds are part of the same issue of bonds as those which were held to be valid and binding obligations against the county of Leavenworth in the cases of *Leavenworth County v. Miller*, 7 Kas. 479, and *Leavenworth County v. Higginbotham*, 17 Kas. 62; and nothing therefore need be said in this case with regard to their validity. The judgment rendered by the court below in this case was in favor of Houston, plaintiff below, for the sum of \$3,033. It was so rendered that

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Houston might collect the whole of the judgment from the county of Leavenworth, or might collect \$910 of the same from John Hannon, (one of the defendants below, and now plaintiff in error,) and the balance from Leavenworth county. But in case he collected the whole of the judgment from Leavenworth county, then the county was given the right to collect said \$910 from Hannon. Both Hannon and the county now claim that said judgment was erroneous, and both now seek to have the same reversed so far as it was rendered in favor of the plaintiff Houston. Both Hannon and the county will therefore be considered in this court as plaintiffs in error, upon the errors assigned by each respectively. Said bonds belonged to Houston, and were sold by one George H. Spry to Hannon; and the principal question involved in the case is, whether Spry had any authority to sell said bonds.

The facts of the case so far as it is necessary to state them, are as follows: Houston resided in Philadelphia, Pennsylvania. The other persons hereinafter mentioned resided in Leavenworth county, Kansas, and the most of them in Leavenworth city. Said bonds were for \$500 each, and were numbered respectively 38, 39, 40, and 41. Each bond had one or more interest coupons attached to it, and there were eight coupons in all. These coupons were for the semi-annual interest accruing on the bonds, and each coupon was for \$17.50. Both the bonds and the coupons were payable by the county of Leavenworth at the Metropolitan National Bank of New York. On the 2d of March 1875, Houston, who was then the owner of the bonds, with said coupons attached, sent them all to one William A. Martin at Leavenworth with the following letter, to-wit:

PHILADELPHIA, MARCH 2d, 1875.

WM. A. MARTIN, *Leavenworth*—*Dear Sir*: I send you the following bonds and coupons of the county of Leavenworth, which you will please do the best you can *in settlement*. Treat them the same as you would if they were your own. Nos. 39, 41, two bonds, series B, each \$500, due Mch. 1, 1868, with coupons for \$17.50, each. Nos. 38, 40, two bonds, series C,

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each \$500, due Mch. 1, 1869, with three coupons for \$17.50, each. Nos. 51, 56, 58, three bonds, series D, each \$1,000, due Sept. 1, 1865, with fifteen coupons for \$35 each. We had the bonds and coupons that were due presented for payment at the Metropolitan Bank, N. Y. They said there was no money to meet them, and had not been for years. Hoping you may be able to *make a settlement*, I am yours truly,

H. H. HOUSTON, (*Pr. Geo. B. B.*)

Said bonds numbered 51, 56 and 58 have nothing to do with this case. On May 3d 1875, (which was the first Monday of May,) the board of county commissioners of the county of Leavenworth were to meet in session. On that day, Martin handed said bonds and coupons to Spry to collect, or to get new bonds in their place, or partly both. Spry was at that time an attorney-at-law and business agent, but he was not at that time a dealer in bonds. If he ever was or had been a dealer in bonds, it is not shown in this case. About three, or four, or five years prior to that time, he was a partner in the firm of Atwood & Russell, who were real estate agents and dealers in securities. But it is not shown in this case that Spry ever sold or offered to sell a single bond except the bonds in controversy in this case. Spry, immediately after receiving said bonds and coupons from Martin, collected so much of the interest due on said bonds as was represented by said eight coupons, amounting in the aggregate to \$140. On the next day, to-wit, May 4th, Spry presented to the county board of Leavenworth county—the board then being in session—the following petition, to-wit:

*Office of Geo. H. Spry, Attorney-at-Law, No. 315, Delaware St.,
LEAVENWORTH, KANSAS, MARCH 4th, 1875.*

To the Hon. Board of Commissioners of Leavenworth Co., Kas.

Dear Sirs: I have in my hands for collection four bonds of Leavenworth county, which were issued to the "Union Pacific Railway Company, Eastern Division." These bonds are for five hundred dollars each. *The interest coupons attached to them have all been paid*, but the interest accrued from maturity of such bonds is still due. These bonds belong to an estate in which, I understand, some minor heirs are interested, and the

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reason why they have not been previously presented for payment is because the administrator of the estate was not, for a long time after qualifying as such, aware of their existence. I am authorized to state that if the interest now due on these bonds is paid *at once*, and new bonds for the principal are given, such an arrangement will *now* be accepted. I trust that your honorable board will fully appreciate *this* matter, and beg a prompt settlement of the interest; and an issue of new bonds will indicate the honor and credit of our county.

Yours truly, GEORGE H. SPRY.

All the italics in the body of this petition, and in the foregoing letter of Houston's, except the words "at once," and "now," are ours. Said Hannon was at that time a member of the board of county commissioners of Leavenworth county, and was also chairman of the committee of ways-and-means; and Spry's petition was referred to that committee. Hannon at that time told Spry in substance, that said petition could not be allowed, that the bonds were barred, and the county under no legal obligation to pay them. No report was ever made by the committee concerning said bonds. Spry kept the bonds for about three weeks, and in the meantime offered them for sale to several persons. He received several offers for them, the highest of which was \$500. John Higginbotham offered him \$500 for them, and Herman Markson offered him \$300 for them. Prior to receiving these offers however, Spry asked Martin if the bonds were for sale. Martin answered, "that would depend on the owner, Mr. Houston." Spry then said: "Suppose I see if I can get an offer?" Martin answered: "That is all right; you can see what is offered, and I will write to Mr. Houston." Afterward Spry reported Markson's offer to Martin, and wanted Martin to write to Houston. Martin said it would be useless. Spry then said "perhaps he could get a better offer." Some days afterward Spry reported Higginbotham's offer, and then Martin consented to write to Houston. Martin did not write however, but telegraphed to Houston. Houston replied both by telegram and by letter, declining the offer. As soon as Martin received the telegram he informed Spry that Houston declined the offer. These

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two offers were the only offers that Spry ever reported to Martin. And Spry during all that time never informed Martin that he had ever offered said bonds for sale, or that he had ever entertained any intention of selling them unless he first got the consent of Houston and of Martin; and there was no evidence introduced tending to show that either Houston or Martin knew, during any of said time, that Spry was offering said bonds for sale. As before stated, Martin telegraphed to Houston Higginbotham's offer. And in answer thereto Houston returned the following telegram:

PHILADELPHIA, PENN., 5, 26, 1875.

To W. A. MARTIN: Do not feel like selling at five hundred.
Will write. H. H. HOUSTON.

Martin also received in answer the following letter from Houston, to-wit:

PHILADELPHIA, MAY 27th, 1875.

WM. A. MARTIN, Esq.—*Dear Sir:* We received your dispatch yesterday, reporting that you had an offer of \$500 for the \$2,000 Leavenworth county bonds overdue and unpaid, which we telegraphed you to decline. We understand that if suit is brought in the U. S. court for the amount of overdue bonds, it could be collected. Will you please consult Mr. Hurd, an attorney of your town, who has had experience in this matter—he having brought suit and collected moneys on these bonds for other parties. If he advises that you can collect by bringing suit, please let him do so on the bonds you hold in the name of H. H. Houston, a citizen of Philadelphia, if the name of a non-resident is required.

Yours truly, H. H. HOUSTON.

About May 20th, to 28th, 1875, Hannon borrowed \$1,000 of Thomas Leonard, and handed the same to one Patrick H. Madden, with the instructions for Madden to purchase said bonds for Hannon, and that Madden might retain all of said money that might remain after paying for said bonds. Madden purchased the bonds of Spry, paying Spry therefor \$960, and retained the other \$40. At this time said bonds had long been overdue and dishonored, and their negotiability destroyed. About this time, eight new bonds, each for \$250, with interest

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coupons attached, payable to the "Union Pacific railway company, eastern division, or bearer," were issued by W. T. Ashby, chairman, and Oliver Diefendorf clerk of said county board, in lieu of said four Houston bonds. These new bonds were delivered to Hannon. It would seem that the interest on the Houston bonds amounted on 1st March 1875 to the sum of \$910. Of this interest, \$490 had accrued prior to 1st March 1872, and \$420 afterward, and up to 1st March 1875. For the interest which accrued subsequent to 1st March 1872, overdue coupons representing the same were attached to said new bonds. But no provision was made in the new bonds for the payment of the interest which accrued prior to 1st March 1872. Hannon therefore procured one Edmund Rupert to collect said interest which had accrued on said Houston bonds prior to 1st March 1872. Rupert thereupon signed receipts for the amount thereof, to-wit, \$490, on the backs of said Houston bonds, and the county treasurer, in consideration thereof, issued to him a check for the same amount on a certain bank in which the county funds were deposited. This check was dated May 28th 1875, and was payable to "E. Rupert or order." Rupert then indorsed said check and handed it to Hannon. Hannon then delivered said check, without other indorsement, to Thomas Leonard in part payment of said \$1,000 borrowed of Leonard. Leonard then indorsed said check and drew the money thereon. This money belonged to the county; and although Leonard drew it, Hannon was the only person who is really chargeable therewith. There were six of said overdue coupons attached to each of said new bonds, or forty-eight in all. Each was for \$8.75, or for \$420 in the aggregate. These coupons, as before stated, represented the interest which had accrued on said Houston bonds subsequent to 1st March 1872 and up to 1st March 1875. For these coupons Hannon received, in June 1875, \$420 of the county funds deposited by the county in New York city. Hannon therefore received in the aggregate \$910 of the county funds (for past-due interest on said Houston bonds;) and for this amount said judgment was rendered against him.

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Martin was not informed until the 9th of June 1875 that Spry had sold said bonds of Houston. As soon as Martin was informed, he went to Spry, and to Madden, and repudiated the sale, claiming that Spry had no authority to sell the bonds, and tried to get the bonds back. Martin could not at that time ascertain for whom Madden had purchased the bonds. Although Madden admitted that he did not purchase them for himself, yet he refused to tell for whom he did purchase them. Spry testified that he (Spry) did not know at the time of the sale for whom they were purchased, but supposed they were purchased for Madden. Spry at the time of said interview, and in the presence of Madden, told Martin that he (Spry) received \$500 for the bonds, and Madden neither assented nor dissented. On that same day, June 9th, Spry deposited in the First National Bank of Leavenworth \$475 to the credit of Martin. Therefore out of the \$140 received by Spry for coupons, and \$960 received by him for the bonds, (total, \$1,100,) he kept \$625. On the next day Spry left Leavenworth and went to Minneapolis, Minnesota, where he still resides. Martin never received nor accepted any portion of said \$475, but it still remains in said bank. Afterward Martin ascertained that Hannon was the purchaser of said bonds, and in July 1875 Houston commenced this action. The county commissioners of Leavenworth county levied taxes for the years 1868, 1869, 1871, 1873, 1874, and 1875 for the purpose of raising funds to pay interest on the bonds issued to the Union Pacific Railway Company, E. D. Such funds were raised, and the county treasurer paid interest on said bonds, evidently as it was intended that he should by the county board when they raised the funds. He paid \$140. interest on the Houston bonds to Spry; he paid \$490 interest on the Houston bonds to Rupert; and he paid \$420 interest on the new bonds, which was really overdue interest on the Houston bonds, to Hannon. And this was all done in May and June 1875. The treasurer reported all of these payments to the county board, and the county board, with said coupons and other vouchers of the treasurer before them, approved the

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treasurer's report, and gave to him full credit for all of said payments. Spry also in his said petition to the county board had previously informed them that "the interest coupons attached to" said bonds had "all been paid." (In this connection see brief of counsel for Houston, and statutes and authorities there cited.)

We know of no other facts than the foregoing that would tend to show that Spry ever had any authority to sell said bonds. If Spry had any such authority it must be because such authority was given by Houston to Martin, and by Martin to Spry, or because something had transpired which would estop Houston from denying Spry's authority. Now certainly Houston never gave to Martin any such authority, nor did Martin ever give to Spry any such authority. Houston simply said to Martin concerning said bonds and coupons, "You will please do the best you can *in settlement*; treat them [in such settlement] the same as you would if they were own. * * * Hoping you may be able to *make a settlement*, I am yours," etc. There is not the remotest reference to a sale in Houston's letter. Martin at first simply authorized Spry to make a settlement with the county of Leavenworth, getting what he could in money and the balance in new bonds. Afterward Martin told Spry that he might receive offers to be sent to Houston, but Martin never authorized Spry to sell the bonds. Martin however could not have given to Spry any such authority, even if he had so desired, for he had no authority himself to sell the bonds.

Nor is there any sufficient ground for setting up any estoppel as against Houston. The bonds and coupons were all overdue and dishonored, and their negotiability destroyed long before Hannon purchased them. It was not shown that either Martin or Spry was a dealer in bonds, and the evidence would certainly show that Spry was not a dealer in bonds.

Spry did not claim to own the bonds, but on the contrary informed the county commissioners (of whom Hannon was one) that he had the bonds in his hands

Agency; powers
of agent; unsu-
thorized sales.

Estoppel, when
not created.

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merely "for collection." Neither Houston nor Martin knew anything about the sale to Hannon until some days after it occurred, and neither of them ever ratified the same. Indeed, neither of them knew that Spry was offering said bonds for sale. But Martin's knowledge or acts, whatever they might have been, would not affect Houston except so far as they were within the scope of Martin's agency, and connected with the business of the agency. A principal is often responsible for the unauthorized acts of his agent; but still he is not so responsible unless such acts are connected with the principal's business, and done within the course of the agent's employment. In this case Houston would have been responsible for all that Martin (and probably also that Spry) might have done in the settlement of his (Houston's) claim against the county; for in this they would have been acting within the scope of their authority, and their acts would have been connected with the business for which they were employed. But to sell said bonds, was wholly outside of their agency, and had no connection whatever with the business for which they were employed. If a farmer should take his horse into a blacksmith-shop to be shod, and would step out for a short time leaving the horse with the blacksmith, the blacksmith could not sell the horse. Of course, Spry did wrong in selling said bonds; but Hannon is the person who enabled him to do wrong. He did not do wrong as the agent of Houston. Of course, neither Martin nor Houston is responsible for the \$475 deposited by Spry in the First National Bank. They never had anything to do with it. They never owned the money. It was deposited there without their knowledge; and they have never ratified the act of depositing it there. We think that Hannon got no title to said bonds; and in this connection would refer to the following authorities: *Foley v. Smith*, 6 Wall. 492; *Farrington v. Park Bank*, 39 Barb. 645; *Thomas v. Kinsey*, 8 Georgia, 421. See also authorities cited in brief of counsel for Houston.

We think the court below committed no substantial error in

this case, and therefore that the judgment rendered by it was correct.

The judgment will be affirmed.

All the Justices concurring.

PHILANDER WILSON V. COMM'RS OF COWLEY COUNTY.

APPEALS, From Decision of County Board; Statutes Construed. Section 7 of the act of 1874, relating to roads and highways, does not repeal by implication or otherwise, any part of section 30 of the act of 1868, relating to counties and county officers; but both sections may and do have force and operation, and "any person feeling himself aggrieved by the award of damages made by the board of county commissioners (in establishing a road) may appeal from the decision of said board of county commissioners" under either section.

Error from Cowley District Court.

THE Board of County Commissioners of Cowley county, on the 4th day of October 1875, confirmed the report of road-viewers declaring a road through *Wilson's* land a public highway, and awarding *Wilson* \$20 for his damages by reason thereof. *Wilson* duly appealed from such decision to the district court on the 26th of said October, under and in accordance with § 30 of chapter 25, Gen. Stat., relating to counties and county officers. The county attorney appeared and filed a motion to dismiss such appeal, and the district court, at the April Term 1876, sustained said motion. *Wilson* now brings the case here, alleging that his appeal was erroneously dismissed.

Hackney & McDonald, for plaintiff in error.

A. J. Pyburn, county attorney, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: The only question involved in this case is, whether section 7 of the act of 1874, relating to roads and highways, so repeals or modifies section 30 of the act of 1868 relating to counties and county officers that no appeal can be taken under said section 30 in any case where an appeal might be taken under said section 7. Said section 30 reads as follows:

"SEC. 30. Any person who shall be aggrieved by any decision of the board of commissioners, may appeal from the decision of such board, to the district court of the same county, by causing a written notice of such appeal to be served on the clerk of such board, within thirty days after the making of such decision, and executing a bond to such county, with sufficient security, to be approved by the clerk of said board, conditioned for the faithful prosecution of such appeal, and the payment of all costs that shall be adjudged against the appellant." (Gen. Stat. 260.)

That portion of said section 7 which applies to this question reads as follows:

"SEC. 7. * * * All allowances for damages, as provided in this act, shall be subject to revision by the said board of county commissioners, and any person feeling himself aggrieved by the award of damages made by the board of county commissioners, may appeal from the decision of the said board of county commissioners to the district court upon the same terms, in the same manner, and with like effect as in appeals from judgments of justices of the peace in civil cases." (Laws of 1874, p. 168.)

The statute prescribing how appeals shall be taken from judgments of justices of the peace in civil cases provides as follows:

"SEC. 121. The party appealing shall within ten days from the rendition of the judgment, enter into an undertaking to the adverse party, with at least one good and sufficient surety, to be approved by such justice, in a sum not less than fifty dollars in any case, nor less than double the amount of the judgment and costs, conditioned, *first*, that the appellant

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will prosecute his appeal to effect, and without unnecessary delay; *second*, that if judgment be rendered against him on the appeal, he will satisfy such judgment and costs. Such undertaking need not be signed by the appellant." (Gen. Stat. 800.)

"SEC. 122. The appeal shall be complete upon filing and approval of the undertaking as provided in section 121. The said justice shall immediately make out a certified transcript of his proceedings in the cause, and shall, within twenty days from the rendition of the judgment, deliver or transmit to the clerk of the district court of the county the said transcript, the undertaking on appeal, and all the papers in the cause. All further proceedings before the justice of the peace in the case shall cease and be stayed on the filing of the undertaking with said justice. No notice of appeal shall be required to be filed or served; and the case shall be tried *de novo* in the district court upon the original papers on which the cause was tried before the justice, unless the appellate court, in furtherance of justice, allow amended pleadings to be made, or new pleadings to be filed." (Laws of 1870, p. 184, § 7, amending § 122 of the justices act.)

Before proceeding further we would say, that there is nothing to be found in any statute that in terms repeals or modifies any of the provisions of said section 30 of the act relating to counties and county officers. And the act of 1874, relating to roads and highways, does not contain that general clause, often found in statutes, repealing "all acts and parts of acts inconsistent herewith." The only question then is, simply, whether said section 7 of the act relating to roads and highways, does, of itself, and solely by implication, so repeal said section 30 that no appeal from an award of damages in a road case can be taken thereunder. Now before it can be held that said section 7 repeals said section 30, it must be held that there is an irreconcilable conflict between the two sections, or that one was unquestionably intended to take the place of the other, and be a substitute therefor, or that one includes the other, and that by giving the one having the most extended scope and operation full force and effect it would virtually render the other superfluous and nugatory. (See Sedgwick Const. & Stat. Construction, 2d ed., 97, *et seq.*,

and Pomeroy's Notes, and cases there cited; Potter's Dwarries Stat. & Const. 154, *et seq.*, and cases there cited.) Now it cannot be said that there is any conflict between said sections. Each may have force and operation. Neither purports to be exclusive. Neither purports to take the place of the other; and neither includes the other. Each simply permits an appeal to be taken, and each provides for a different mode of taking the appeal. They simply give cumulative, and not inconsistent modes for taking an appeal. (Sedgwick Stat. & Const. 100, *et seq.*; Pomeroy's Notes, and cases there cited.) Section 30 provides that "any person who shall be aggrieved by *any decision* of the board of commissioners *may* appeal from the decision of such board" in one way, while section 7 simply provides that "any person feeling himself aggrieved by the award of damages made by the board of county commissioners *may* appeal from the decision of the said board of county commissioners" in still another and an additional way. Both sections prescribe a mode for taking the appeal, but neither section provides that the mode it prescribes shall be the only mode. They each leave the appellant to exercise his option as to what mode he will adopt in taking his appeal. If he appeals under section 7 he must appeal in ten days, and must give a bond in a sum not less than fifty dollars; but in such a case he is relieved from serving any written notice on the county clerk. If however he appeals under section 30, he may do so in thirty days, and may give a bond in a sum not less than fifty dollars, provided that such sum is sufficient, but in such a case he must always serve said written notice on the county clerk. These are the principal differences between these two modes of appeal. Both are proper, and both may be held to be in force.

The decision of the court below dismissing said appeal will therefore be reversed, and cause remanded for further proceedings.

All the Justices concurring.

COMM'RS OF FRANKLIN CO. *et al.* v. SARAH A. PENNOCK.

SAC-AND-FOX INDIAN LANDS; Taxable, When Patented. The lands belonging to the mixed and half-bloods of the Sac-and-Fox Indians, residing in Kansas, but who have tribal relations with the confederated tribes in the Indian Territory, are taxable, and alienable, when the government has issued to the allottees, under amended article 17 of the treaty of February 18th 1867, patents in *fee simple* therefor. [*Clark v. Libbey*, 14-435; *Clark v. Akers*, 16-172; *Campbell v. Paramore*, 17-640; *Baldwin v. Squires*, 20-281; *Libbey v. Clark*, 25-496. See also, *Krause v. Means*, 12-335; *Maynes v. Veale*, 20-389.]

Error from Franklin District Court.

INJUNCTION, brought by Mrs. Pennock, against the Board of County Commissioners, and the county clerk of Franklin county, and the holders of certain tax-certificates, to restrain the issuing of tax-deeds for certain lands assessed and sold for taxes, and to have said assessment and sales declared illegal and void. Mrs. Pennock is a mixed, or half-blood Sac-and-Fox Indian, a member by birth and blood, and from her birth has been and now is in tribal relations with the confederated tribes of the Sacs-and-Foxes of the Mississippi. Her husband, Henry L. Pennock, is a white man, a resident of the state of Kansas, and a citizen of the United States. In the year 1870 the Sac-and-Fox tribe, under treaty stipulations with the United States, removed from their reservation in the state of Kansas to their new reservation in the Indian Territory, where they have since remained, maintaining their tribal organization. Mrs. Pennock did not remove with the tribe to the Indian Territory, but remained, and is now with her husband a resident of this state. A portion of the lands described in her petition were allotted to her under the treaty between the said tribe of Indians and the United States on the 1st of October 1859, (proclaimed 9th July 1860,) and the remainder were purchased by her from other mixed and half-blood members of the same tribe between May 7th 1867 and May 30th 1868. These lands were first assessed for taxation in 1871. The district court held that the lands were not subject to assessment and taxation, and decreed

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a perpetual injunction as prayed for, and the *Board of County Commissioners* and other defendants appeal, and bring the case here on error.

H. B. Hugbanks, and *H. C. Mechem*, for plaintiffs in error:

Mrs. Pennock contends that her lands are untaxable because they form part of the land originally in the reserve of the Sac-and-Fox tribe of Indians. There have been three treaties made, having provisions concerning these lands in them. The original creation of the Sac-and-Fox reserve in Kansas, was by the treaty of 1842, long before the territorial organization of Kansas. By it the body of land therein described, was "set apart as a perpetual home for the tribe." The title was in the condition commonly known as the "Indian title." The possessory right in the Indians—the fee in the general government. While it so remained, the territory of Kansas was organized, and in its organic act the rights of Indians then within its boundaries, and the power of the government to treat with them touching their lands, expressly saved. Of course they were untaxable, not because they were Indian lands, but because the ultimate title being yet in the United States. So they remained until the treaty of 1st October 1859. By this treaty the reserve was diminished to certain boundaries, and the remainder directed to be held in trust for the tribe and sold for its benefit. By the 10th article of the treaty it was recited that the tribe, being desirous to make some suitable provision for their mixed bloods, and such of their full-blooded women as had intermarried with white men, there should be allotted to such of them as desired it, 320 acres of the lands so cut off from the reserve. No provision was made for conveying to these assignees the title of the government, and a prohibition was laid upon them not allowing them to alienate to anybody except the general government and members of the tribe. The treaty made no provision for patents to issue, nor for any evidence of title other than the mere allotment. The title of such allottees differed from that of an ordinary Indian title only in amount,

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and in being outside the new reserve, and was equally inalienable, without regard to the prohibition. This seems to have been done in view of the probability that at some time in the future, these persons allied by blood or marriage to the whites, would abandon their tribal relations. So the land remained untaxable, not by virtue of the fact that it was an Indian allotment, but because the legal title still remained in the United States, which thus had the power to make it an Indian allotment. In 1867, the steady encroachment of the whites made it necessary for the tribe to remove to the common asylum for disinherited Indians, and they made a last and final treaty, so far as these lands were concerned, with the government, ceding to the United States a perfect and complete title to the diminished reserve, and to that portion of the old reserve which yet remained to be disposed of, excepting such grants as they therein made or rather directed the United States to make for them. The tribe were to remove beyond the state, and those who were therein provided for on the contingency of their acceptance, were to be severed from the tribe and their lot cast with the whites. They could no longer occupy their allotments and keep up their relations with the tribe. It was accordingly provided, that patents in fee simple should issue to such as had made their choice, to sever themselves from the tribe. No mere Indian title—no mere certificate or allotment, but a grant in fee simple, conveying all the title that could be conveyed. (17th Article, 15 U. S. Stat. at Large, 498.) These Indians did not take as Indians, but as donees of the Sac-and-Fox tribe. They took without any limitation, because the instrument making the grant contained none. The provision so made was undoubtedly made with a view to their remaining on these lands, and being merged in the white population about them; and of course it was necessary that their title be a fee simple, that they should be at liberty to exchange, or sell, or buy more, as Mrs. Pennock has done. The tribe has removed to the Indian Territory, and these donees of the tribe remained. They re-

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main here not as an Indian tribe, but as part of our population, as residents of Kansas, responsible to her laws, entitled to her protection, and liable to the invariable price of such privileges, taxation. If it were otherwise, what an anomalous condition would be presented—the tribe has surrendered its reserve for a new one, and has removed to it, but has left here a dozen or twenty separate reserves of 320 acres of land each, over which (if they are reserves at all) the state of Kansas has no sort of control or jurisdiction, still subject to such rules and regulations as the United States may see fit to impose, touching trade and traffic. It is not such a case as that of the Kansas Indians, (5 Wallace, 537.) There the tribe remained in the state, upon its reserve, with its council and government, in a somewhat compact body, occupying somewhat contiguous territory. Here, (if Mrs. Pennock's land is exempt from taxation,) there are as many "reserves" as there are individual grants. But this is not the worst aspect of the case. Over these reserves the power of the tribe is gone absolutely. In the final treaty they reserved no shadow of authority. The only reserve which *they* as a tribe have any control over, is in the Indian Territory. Each of these Indian owners is for all purposes, a "tribe," on his or her "reserve." But not only is the authority of the tribe gone, but the general government has surrendered the power to treat concerning these lands with anybody, by issuing its patent in fee simple, conveying to the patentee every shadow of right or claim of every kind and nature which it ever did possess. It can no more exercise control over or interfere with the rights of these persons to these lands, or do any act changing in any way the relation which these lands are unto the state of Kansas, than it can do so with the lands of their neighboring white men who hold their land by a patent not one whit more comprehensive and effectual, and exactly similar, except that theirs import a money-consideration, and these a treaty-provision. Now if these lands *are* exempt from taxation, they must forever remain so, as long at least as the present owners or their de-

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scendants occupy them. The power cannot be found to change without their consent, the nature and incidents of their title.

Again, if these lands possess any immunities or privileges, how many do they possess? If untaxable, are they not inalienable? Will not they follow the Indian law of descent, and what will that law be in the newly-fledged tribe, which in this case we may fitly designate as the Pennocks? All this may be as readily inferred from the treaty, granting these lands, as the immunity from taxation may be. There is no room to import into the treaty of 1867 the provisions of the treaties of 1842, and 1859. The purpose of the treaty of 1867 was not to change the character of the reserve, but to abolish it. Mrs. Pennock did not succeed, by her allotment, to "Indian rights," but to citizenship. Her case is exactly parallel with that of Petchico, in *Doe v. Wilson*, 23 How. 457. The treaties are in substance the same. The tribe was ceding its lands to the government, but directed that certain persons, among whom was Petchico, should receive donations, which subsequent to survey, were to be conveyed as these, by patent in fee simple. Before the survey, Petchico conveyed, and the court held the conveyance valid, saying that "the treaty converted the reserved sections (those donated to Petchico) into individual property," and this is in accordance with the decision of this court in *Krause v. Means*, 12 Kas. 385, which practically decides this case. We also refer to 9 Kas. 38, 477; 12 Kas. 82; 10 Ohio, 235; 16 Pet. 281; 4 McLean, 82; 31 Conn. 407; 10 Am. Law Reg. 493.

Benson & Parkinson, also for plaintiffs in error:

By the terms of art. 17 of the treaty between the United States and the Sac-and-Fox tribe, proclaimed 14th October 1868, (15 U. S. Stat. at Large, 495,) the restriction imposed upon the allottees under art. 10 of the treaty of 1860, was removed. The defendant in error then occupied the same relation to the lands allotted to her under the treaty of 1860, as though no such restriction had ever been in force. She then

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held those lands, and which are described in the list of lands selected by the agent under art. 10 of the treaty of 1860, in fee simple absolute, divested of all burdens and restrictions whatsoever. For more than two years before the lands had been listed for taxation, she had held them without a single restriction, and under a title that had come into her hands without a shadow of immunity from taxation by treaty stipulations. The only reference to her, or to the class to which she belonged, and the only recognition of this class in the treaty of 1860, is comprised within the terms of art. 10. But for this recognition, this desire upon the part of the tribe proper to make "some suitable provision," etc., the defendant in error would have been landless, unless entitled to an eighty-acre tract under art. 2; and this was manifestly not the intention of the tribe. The only reference to this distinct class of mixed and half-bloods, and whole-blooded women who had intermarried with white men, in the treaty of 1868, is in art. 17, by which the lands of defendant in error were freed from all restrictions. The only plea, then, for the exemption of these lands from taxation and the ordinary burdens of government is, that the white blood of the owner is tinged with that of the Sac-and-Fox Indian, and that she maintains a so-called "tribal relation" to a tribe of Indians located somewhere in the Indian Territory; and the further fact that a portion of these lands were patented to her by treaty stipulations, and the remainder purchased by her from others, who also maintained some vague and indescribable relation to the same tribe of Indians. Squaring this plea with the provisions of our constitution and statutes, and the well-settled rules of law governing the exemption of property from taxation, and how can the lands escape? The intention to exempt must, in every case, be expressed in clear and unambiguous terms. Taxation is the rule, exemption the exception. All exemptions are to be strictly construed. They embrace only what is within their terms. (Cooley on Taxation, 146.) This rule has many illustrations, and the liberal construction given to Indian treaties hardly forms an exception. The questions decided in the case

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of *The Kansas Indians*, in 5 Wallace, are not decisive of the question involved in the case at bar. Here, there is no restriction in the patent under which the defendant in error holds, that had not been removed more than two years prior to the first assessment complained of; no question of whether the patentee has but a portion of the title, the remainder being in the government, and of the other provisions, restrictions and guaranties which, in the case of the Miamis, Shawnees and Weas, were construed by the United States supreme court as evincing a purpose upon the part of the Indian to shield himself from all the burdens which a full and unrestrained proprietorship in the soil imposes, and of the government in making good its promises and pledges of protection from the effects of these burdens. In both the treaty of 1860 and of 1868, is clearly manifested the same care in protecting the ignorant Sac-and-Fox against the rapacity of his more intelligent white neighbor, as in the case of the Miamis, Shawnees and Weas, discussed in the opinion referred to in 5 Wallace. The latter occupied substantially the same relation to their respective tribes, to the state of Kansas, and to the general government, as did the Sacs-and-Foxes on the diminished reserve in their treaty of 1860. In both cases there was a manifest intention and purpose upon the part of the Indian to invoke, and of the government to grant, all the protection necessary to secure the former in the enjoyment of his lands and his property; and hence the restrictions and guaranties—restrictions and pledges prominent only for their absence in the case of the mixed and half-blood Sac-and-Fox. To grant the immunity from taxation now sought by defendant in error, would be to bestow upon her a privilege evidently not thought necessary, and hence not contemplated by either white or Indian at the making of the treaties referred to. By her subsequent conduct and property acquisitions she has demonstrated an ability not only to retain what she had, but to be ever securing more, fully justifying the confidence reposed in her. And if her co-allottees under art. 10 of the treaty of 1860, have not

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justified the confidence reposed in their shrewdness and business tact; if they were induced to part with their possessions for a song, the defendant in error ought not to complain, for as to a good portion of these lands, and which are now held and claimed by her as exempt from taxation, she was the fortunate purchaser. She has been clothed with every right, and is bound to every duty of any other citizen of the state. Her lands are as productive, and just as free from restriction in their management, or sale, and there is no reason why they should not be taxed the same as the lands of any other citizen of the state.

But if our conclusion as to the liability to taxation of the lands held by defendant in error as *an allottee*, be incorrect, still we maintain that the lands held by her as *grantee* must be subject to taxation. If there be any exemption in either case, it is by reason of a personal privilege enjoyed by Mrs. Pennock. There is no exemption attaching to the land, qualifying the estate, and inuring to the benefit of all subsequent holders; 12 Kas. 114; 29 Wis. 383.

Such of the lands, then, allotted under art. 10, of the treaty of 1860, and described in the schedule attached to the treaty of 1868, as have since the date of the latter treaty come into the hands of white men, are properly subjected to taxation. And if in the hands of white purchasers, why not of Indian or half-blood purchasers, as well? When a white man buys land of an Indian he takes it subject to the ordinary burdens of taxation, notwithstanding it may have been exempt in the hands of the former. Does a different rule prevail when an Indian is the purchaser? There is certainly no peculiar sanctity about the trade and purchase of an Indian as to work and exemption from taxation of lands coming into his possession by purchase, simply because he is an Indian. Any personal privilege he may possess as to his allotment, does not follow him, working a like effect upon lands that he may purchase. He can be compelled to pay for lands in which he may desire to invest, whatever his position in the tribe, or whether

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he resides upon a reservation or not; (*Rubideau v. Vallie*, 12 Kas. 28;) and why not to pay the taxes on them?

John W. Deford, for defendant in error:

The lands described in the petition are protected from state taxation, first, by the treaties between the Sac-and-Fox Indians and the United States, of 1842, and of 1859, and second, by the general principles of federal law governing the relations between the states and Indians resident therein. The lands in question are a part of the reserve granted to the Sac-and-Fox tribe, pursuant to the first clause of article 2 of the treaty of 1842, "for a permanent and perpetual residence for them *and their descendants*." The broad shield, thus thrown over this entire reserve, still protects the property in dispute, which is a part of it, in the hands of Mrs. Pennock, one of the descendants of this tribe. No act of congress or treaty stipulation has ever amended or annulled it. The tax laws of Kansas cannot defeat or overturn it. Mrs. Pennock, and all her descendants, so long as they shall remain members of this tribe, recognized as such by the general government, will be entitled to hold every inch of these lands, however broad, under its protection. To this the public faith of the United States and of Kansas (Act of Admission, § 1, Gen. Stat. 66) is solemnly pledged.

Again, these allotments were assigned to Mrs. Pennock and her vendors, under and by virtue of article 10 of the treaty of 1859, which provides that "the lands granted by this article shall *remain inalienable*, except to the United States, or members of the tribe," etc. This clause, if still in force, is clearly fatal to any sale of these lands for state taxes; because thereby an alienation thereof to persons (*tax purchasers*) other than the "United States, or members of the tribe," would be effected. Has it, then, been repealed? "Yes," say plaintiffs in error, "by article 17 of the treaty of 1867, which directed 'patents in fee simple' to issue to the allottees." But repeals by implication are never favored, especially in cases like this; and are not sustained in any case, except when necessary. "Again,"

says this court, in *Clark v. Libbey*, 14 Kas. 488, "it is said that patents are to be issued for these lands in fee simple, and this implies a full title, free from any restrictions upon alienation. This expression, at least when used in Indian treaties, carries no such necessary implication." Besides all this, by article 10 of the treaty of 1859, *the lands themselves* were not granted, but merely the ancient *Indian title*, or right of occupancy—the fee remained in the general government. Article 17 of the treaty of 1867 changed this into an absolute title. But article 18 declared that no sale should be made by or on behalf of the allottees, without the approval of the secretary of the interior—thus expressly perpetuating the guardianship of the federal authority over these people, and establishing a new barrier against any interference by the state with their allotments. And even if the force and effect of article 18 should be limited to the grantees named in articles 11 and 12 of the same treaty, the argument is the same, particularly as to Mrs. Pennock, who is one of the donees mentioned in article 11, (under her then name of "Sarah A. Whistler.") Article 20 of the treaty of 1867, *as it originally stood*, provided that "all treaties or parts of treaties heretofore made which conflict with the provisions of this treaty are hereby abrogated." But this entire article was afterward stricken out—a very clear indication that the makers of this treaty did not intend to alter or rescind any former treaty or part thereof, further than explicitly declared or absolutely necessary.

But even if the treaties were silent on the subject, the general principles of federal law, governing the relations between the states and Indians, would uphold the judgment of the court below. It is admitted that Mrs. Pennock is an Indian, and a member by blood, birth and descent of the Sac-and-Fox tribe, is in "*tribal relationship*," and receives annuities semi-annually from the United States. She is therefore entitled to all the privileges and immunities of an Indian, however great her ability, wealth or accomplishments. So long as the federal government shall recognize her as an Indian, the state of Kansas must treat her and her property accordingly; (3 Wall.

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407.) In the event of her decease, the probate court of Franklin county could not order a sale of a single acre of these lands, to pay the expenses even of her last sickness or burial; (15 Minn. 369.) Nor, do her rights "depend entirely upon the construction of the treaties between the United States and the Sac-and-Fox tribe of Indians." These Indians still retain their tribal organization, and national existence. As such, their property is exempt from state taxation. *The Kansas Indians*, 5 Wall. 737; *The New York Indians*, id., 761. "These decisions were placed *not simply or mainly* on treaty stipulations, but upon the broad ground, that these Indian nations were under the protection and care of the general government, were separate nations, and outside the jurisdiction of the states." (*Rly. Co. v. Morris*, 18 Kas. 315.) And see, 36 Ind. 310; 7 Yerg. 74; 1 Dillon Ct. Ct. 349; 29 Wis. 383; 23 N. Y. 420, 427.

The opinion of the court was delivered by

HORTON, C. J.: The sole question presented by the record in this case is, whether the lands belonging to the mixed or half-bloods of the Sac-and-Fox Indians residing in Kansas, but who have tribal relations with the confederated tribes of the Sacs-and-Foxes of the Mississippi, are taxable. The authorities of Franklin county assert the right, and the district court of that county having denied it, and having granted a perpetual injunction against certain tax deeds being issued embracing lands of the defendant in error, the question is properly here for consideration. The lands described in the petition were allotted to Mrs. Pennock, and her vendors, under article 10 of the treaty with the Sac-and-Fox Indians of 1st October 1859, (15 U. S. Stat. at Large, 470.) By virtue of the amended 17th article of the Sac-and-Fox treaty of 18th February 1867, (15 U. S. Stat. at Large, 498,) the lands were conveyed to the allottees by the government by patents in fee simple. It is claimed on the part of the defendant in error, that the following provisions of said article 10 of the treaty of 1859 exempts

these lands from taxes, viz.: "The lands granted by this article shall remain *inalienable*, except to the United States, or members of the tribe." This court settled this question in *Krause v. Means*, 12 Kas. 385. In that case, it was held that by virtue of said amended 17th article of the treaty of 18th February 1867, "the restraint upon the alienation, imposed by the old treaty of 1859, was abrogated." In that case, Julia Goodell, a half-breed, and a member of the same Sac-and-Fox tribe, conveyed land allotted to her to one Mary A. Means. The opinion in that case fully covers the question in dispute. If the lands are not taxable, they cannot be conveyed except subject to the limitations of article 10 of the treaty of 1859. If such article is abrogated by the amended article 17 of the treaty of 1867, the lands are both taxable and subject to sale and conveyance to any person.

We do not now care to open the question anew. Rights of property have undoubtedly been acquired by various parties since the above decision was announced, which would be disturbed by an adverse ruling, and if any error has been committed by this court, the defendant in error can be fully protected in a case of this character on a review of our decision by the supreme court of the United States. We are of the opinion that "when the rules laid down by the courts become the laws which sustain titles and contracts, they are, in general, to be sacredly adhered to." *Church v. Brown*, 21 N. Y. 385. The learned counsel for the defendant in error participated in the argument in this court in the said case of *Krause v. Means*, supra, and then insisted here that "art. 10 ceased to operate in 1867, when the treaty of that year took effect," and that "ever since the United States conveyed the property in *fee simple* to Julia Goodell, and *a fortiori*, since it belonged to Mrs. Means, it has been subject exclusively to the laws of Kansas." (See brief, 12 Kas. 386.) If the argument presented then by the counsel for the defendant in error in this cause was good law, and so this court assumed, it is equally applicable now. To him under the circumstances, the writer of this might well

reply, that sometimes "even-handed justice commends the ingredients of our poison'd chalice to our own lips." If it be claimed however, that the expression in *Clark v. Libbey*, 14 Kas. 438, that "the issuance of patents for lands in fee simple, under the terms of an Indian treaty, does not necessarily convey an implication of a full title," sustains the present argument of the counsel for defendant in error, we answer, that not merely the provision for the patents to issue to the Sac-and-Fox half-breeds, by article 17 of the treaty of 1867, but the general object and purview of the entire treaty is in conflict with any idea that after such last treaty was proclaimed the lands allotted by article 10 of the treaty of 1859, and patented under article 17 of the new treaty, were to continue to be inalienable. The purpose of the latter treaty was not to change the character of the reserve, but to abolish it as a reserve. The object of the treaty was to remove the tribe from Kansas, and to furnish them homes in the Indian country. A clause is contained in said treaty of 1867 to the effect, "that no part of the funds arising from, or due the nation, under this or previous treaty stipulations shall be paid to any band, or parts of bands, who do not permanently reside on the reservation set apart to them by the government in the Indian Territory, as provided in this treaty, except those residing in the state of Iowa." In obedience to the obligations of this treaty, the tribe, numbering about one thousand, removed in 1870 from their reservation in this state to their new reservation in the Indian Territory, where they have since lived, maintaining their tribal organization. Mrs. Pennock remained in Kansas, and is now with her husband, who is a white man, a resident of the state. There is no longer any tribal organization of these Indians in our state—there are no chiefs here—no councils, and no stated meetings of the tribe. All of this was anticipated in the treaty of 1867. In pursuance of this result, the government provided for the issuance of patents in *fee simple* to the allottees among the mixed, or half-blood Sac-and-Foxes, and by virtue of the said treaty of 1867, abrogated

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the restraint upon the alienation imposed by the old treaty. After the issuance of these patents, the lands therein conveyed were alienable, and taxable, in the full meaning these terms imply.

The judgment will be reversed, and an order will be directed to the court below to dissolve the injunction heretofore allowed, and to enter judgment in favor of plaintiffs in error for all costs.

All the Justices concurring.

THE M. K. & T. RAILWAY CO. v. JAMES N. ROACH *et al.*

CASE-MADE; SAVING EXCEPTIONS; *When Petition in Error will be Dismissed.*

Where the record discloses that on the 11th of January a motion for a new trial was overruled, and sixty days from the rising of the court given to make a case; that on the first of March following a copy of the case-made was served on the opposing counsel, and that the case was settled and signed by the trial judge, but fails to show that any amendments were suggested, or that there was any waiver thereof, or any appearance of opposing counsel, or when the case was settled and signed by the judge; *held*, that the record fails to show a case-made legally settled and signed, and that therefore, this court cannot consider any matters contained therein.

Error from Neosho District Court.

TRESPASS, brought by *Roach* and wife, to recover damages from the *Railway Company*. The defendant company constructed its railroad through the lands of *Roach*, and it was claimed that defendant unlawfully entered upon plaintiffs' premises, threw down the fences, cut down trees, dug and plowed up the soil, etc., whereby plaintiffs' crops and lands were injured. Trial at the December Term 1874. Verdict

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and judgment for plaintiffs for \$1,000 damages. The *Railway Company* brings the case here on error.

T. C. Sears, and *D. Kelso*, for plaintiff in error.

Cory & Kimball, for defendants in error.

The opinion of the court was delivered by

BREWER, J.: A motion is made by defendants in error to strike out the "case-made," and dismiss the petition in error; and it seems to us that the facts as disclosed by the record bring the case within the principles announced in the case of *Weeks v. Medler*, (ante, 425.) On January 11th 1875, the motion for a new trial was overruled, and sixty days from the rising of the court granted in which to make a case. When the court adjourned does not appear, but on the 1st of March 1875 a copy of the case-made was served on opposite counsel, as appears by their acknowledgment of service. Nothing further then appears save this certificate of the trial judge, and filing of the clerk of the court:

"Signed, settled and allowed as and for a case-made for the supreme court of Kansas, this——day of——, A. D. 18—.

JOHN R. GOODIN, Judge.

"Filed, July 19th, 1875. John D. Cory, Clerk."

Now in the case of *Weeks v. Medler*, it was held, that "the record should show affirmatively the previous steps necessary to the settlement of the case, in the absence of the appearance, or proper waiver by the opposing party." Here the record fails to show any notice to the opposite party of the time and place of the settling of the case, any appearance or waiver by such party, or the time in which the case was in fact settled. For aught the record discloses, it may have been signed and settled the very day the copy was served on opposing counsel, as in *Weeks v. Medler*, and without giving them the three days in which to suggest amendments. It nowhere appears that the judge considered any amendments, or that any were suggested, or that counsel had none to suggest, or

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that they had waived in any manner their right to suggest them.

For these reasons the motion must be sustained, and the case will be dismissed.

All the Justices concurring.

J. S. SHEDD v. ROBERT L. MCCONNELL *et al.*

1. ATTACHMENT; *Power of District Judge, at Chambers.* A judge of the district court has power, at chambers, to discharge an attachment. [*Reyburn v. Bassett*, McC.-86; *Kohn v. Justice*, 1-220; *Gillespie v. Lovell*, 7-419; 2 Dill. 324; *Wells v. Danford*, 18-490; *Keith v. Stetter*, 25-101.]
2. ——— Questions with regard to a motion to discharge an order of attachment, discussed in the opinion.
3. EVIDENCE, WHEN INCOMPETENT; *Its Effect, on Reviewing Decision.* On the hearing of a motion to discharge an attachment, it is error for the district judge or court to admit incompetent testimony offered to sustain such motion; but where nearly all the evidence introduced on the hearing of the motion is embodied in affidavits, and the supreme court has all the evidence introduced on such hearing before it, such error will not require a reversal of the decision of the judge below, provided a preponderance of the evidence is found to support the decision of the judge discharging the attachment; but where a preponderance of the evidence introduced on the hearing of said motion is against said decision, the decision must be reversed.
4. ATTACHMENT, *Where There is a Mortgage or Other Lien for Debt Sued On.* In an action on a note or mortgage, where an affidavit is filed setting forth sufficient grounds for an order of attachment to issue, and such order of attachment is issued and property is attached thereunder, and the defendant then moves to discharge the attachment, and on the hearing of the motion it is shown that the grounds for the attachment are true, and that the mortgaged property is not a sufficient security for the debt, and no sufficient ground for discharging the attachment is shown, held, that the attachment should be sustained.

Error from Lyon District Court.

FORECLOSURE of mortgage, brought by *Shedd* against *McConnell* and wife. An order of attachment sued out by the plaintiff against the property of both defendants, was afterward, and on the 21st of December 1875, on defendants' motion,

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dissolved by the district judge, at chambers. From this order dissolving the attachment, the plaintiff appeals, and brings the case here on error. The facts fully appear in the opinion.

Randolph & Sedgwick, for plaintiff, submitted, that a judge at chambers has no jurisdiction or authority to discharge an attachment. But for the fact, that the practice of the judges in so doing, has been for some time acted upon and acquiesced in, both by the judges and the bar, without the question of such jurisdiction or authority ever having been raised, we do not think this court would hesitate to say that no such power or authority exists. The only statutory provision we have been able to find under which such right can be claimed to exist is § 228 of the civil code, which reads as follows: "The defendant may, at any time before judgment, upon reasonable notice to the plaintiff, move to discharge an attachment, as to the whole or a part of the property attached;" and § 2 of ch. 28, Gen. Stat., which reads as follows: "The judges of the district courts, within their respective districts shall have * * * power in vacation to hear and determine *motions* * * * to discharge attachments," etc. Now we submit that the power is not given to the judge in vacation to discharge *an attachment* by said § 228, "for when the law authorizes or contemplates the doing of a judicial act it is and must be understood to mean that the court, in term-time, may or must do it, and not the judge at chambers, unless such right is expressly conferred by law." (McCahon's Rep. 86; 1 Kas. 220.) Then, taking this section alone, its necessary construction is, that the motion must be made in open court in term-time, and not to the judge at chambers in vacation. And we further submit that while the legislature attempted to confer such power upon judges at chambers by § 2 of ch. 28, it did not do so, because said section is void under § 16 of article 2 of the constitution. The title of the act in which said § 2 is found, is "*an act concerning district courts.*" We insist that a "district court" does not mean the judge thereof in vacation, for if it did, those decisions in Mc-

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and 1st Kansas above referred to would never have ade.

suppose we admit, for the sake of the argument, that ge has power at chambers to discharge an attachment, insist there is a material distinction between *an order* hment, and *an attachment* of property made by the y virtue of the authority vested in him by such order. *ler* of attachment is the authority given the officer to oproperty; and the *attachment* is, the seizure of or levy a property by virtue of such order. And we submit ample authority or jurisdiction is given to the judge at rs to discharge the attachment, that is, to release the y seized, or levied on by virtue of the order of attach- till there is no jurisdiction or authority given him er, to set aside the order itself before anything has ached, and if he has authority to set aside the order at an do it as well before any levy is made as he can d. And we further submit that if he has not juris- to set aside the order itself, he cannot on a motion o him to do so, disregard said motion, and discharge erty attached, any more than on an application made dge at chambers to quash a criminal complaint or in- on he could discharge the prisoner from his arrest or zance; which he could do on a *habeas corpus* brought purpose. We do not wish to be understood as mean- the court in term may not set aside an order of at- it, for it has full control of all its process; but we at the *judge in vacation* cannot do so without express y, any more than he can set aside a summons, or a sale of real property, or many other things too numer- ment, which it would be absurd to think of his The court will perceive that the motion in this case ask the judge to discharge any property; nor did it claim that any property had been attached; nor could e from any showing made to him know that any prop- l been attached until evidence was introduced on the

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hearing of the motion, over our objection. We were only notified that they wanted to set aside *the order*, and the judge did not set aside the order, but simply discharged the property, thus leaving the order in full force, with nothing to prevent the sheriff from attaching other property, by virtue of it, if it was not returned.

Again: After the plaintiff had given evidence tending to prove that the mortgage security was insufficient in value to satisfy plaintiff's claim, the defendant offered, and the court admitted irrelevant and incompetent, and hearsay testimony. The reception of said testimony by the judge was error; and the fact that he did receive it over our objection shows that he must have considered it to our prejudice.

Gillett & Forde, for defendants, contended that the judge had jurisdiction to hear the motion; 7 Kas. 422. His jurisdiction is conferred by § 2, ch. 28, Gen. Stat. It is claimed that that portion of § 2 conferring power on a district judge in vacation to *discharge attachments* is void. The title of this act is very broad, and it seems sufficiently broad to fairly include the grant of powers to judges in vacation. The powers of a judge at chambers or in vacation are so nearly related to the court itself, that conferring power on the judges at chambers, or in vacation, is not foreign to but is fairly included in the title "an act concerning district courts." For a general discussion of the subject see—18 Kas. 600; 6 Kas. 335; Cooley Const. Lim. 144; Potter's Dwarrris Stat. 100 to 104; 18 Mich. 449; 85 N. Y. 193; 88 N. Y. 494; Am. Law Reg. Dec. 1875, p. 852; Cent. Law Jour. Feb. 18, 1876, p. 117.

A distinction has been attempted by counsel between a motion to discharge and set aside *an order* of attachment, and to discharge *an attachment*. The distinction as applied to this case is altogether too highly refined to be of any practical application. It is claimed that, "admitting for the sake of argument, that the judge in vacation has power to *discharge an attachment*, still his power is confined and limited to what is expressly granted, and power being granted to *discharge an*

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attachment does not authorize the judge to set aside the *order of attachment*." We fail to see the force of the counsel's argument. A motion to discharge an attachment is one thing—and it may be granted for various reasons—as for instance: 1st, where the order of attachment is rightfully issued, but there has been an excessive levy; 2d, where the order is rightfully issued, but has been levied on exempt property; 3d, where the order of attachment has been wrongfully and unlawfully issued. Now, a motion to set aside (or more properly to *dissolve*) the *order of attachment* is in effect a motion to discharge *all the attached property*, and the power granted to a judge in vacation to *discharge attachments*, means that he is to discharge all or a part of the attached property, according to circumstances.

The testimony objected to as incompetent, and hearsay, was relevant and proper. Testimony had already been given showing that the statements of Prescott & Prescott, which were testified to by Evans, were either statements of the then owners of the note and mortgage, or were statements made by them as agents within the scope of their agency, and in reference to the subject-matter of that agency, which amount to an admission of the principal, and is admissible on either of those grounds. It is proper also as impeaching evidence. The testimony of Prescotts was taken *ex parte*, by affidavits, and it was not possible to lay any foundation for impeaching testimony. It is either competent to show in this mode that a witness had made contradictory statements at other times, or, a party, in cases tried on affidavits, is deprived of this means of impeaching a witness. But even if it were error to admit the testimony of Evans, which we deny, still it is an immaterial error, and could not prejudice the plaintiff, because it is well proved that said Prescott & Prescott made the loan and took the mortgage therefor, and this is one of the strongest evidences that they then deemed the security ample.

The amount sued for, and which plaintiff is entitled to recover, was secured by mortgages on real property. Where attachment proceedings are instituted upon a secured debt,

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the presumption is that the attachment is wrongful, and the burden is on the attaching creditor to show that his security is insufficient; (*Gillespie v. Lovell*, 7 Kas. 425.) In this case, if the motion had been made to discharge on the papers, it would have been sustained, as the affidavit for attachment did not show that the security was insufficient. The burden is on the attaching creditor to show that his mortgage security is insufficient. The average valuation of the mortgaged premises, by 32 witnesses of defendant, is \$1,837.50. The average valuation by 32 witnesses of plaintiff is \$618.75. The average between plaintiffs' and defendant's witnesses is \$1,228.12, which is pretty fair security for \$1,000. The value of the property attached as fixed by the appraisers is \$1,224.40. The motion to discharge was made on several grounds, and as the order discharging the attachment sustains such motion generally, it must appear that none of the grounds of the motion were sustained by the evidence, before this court would reverse. The same rule applies as in reviewing alleged errors in orders granting a new trial; 3 Kas. 39; 7 Kas. 209.

The opinion of the court was delivered by

VALENTINE, J.: The object of this petition in error is to reverse an order of the judge of the district court, made at chambers, discharging an attachment. It appears from the record that on the 1st of December 1875, J. S. Shedd commenced this action in the district court against Robert L. McConnell and Mary A. McConnell on a certain promissory note and mortgage, and at the same time procured an order of attachment to be issued by the clerk of said court, which order of attachment was on the 2d of December levied on certain goods and chattels belonging to the defendants. Afterward the defendants made a motion before said judge at chambers "to discharge and set aside the order of attachment issued in this cause on the 1st of December 1875, for and on account of defects appearing upon the face of the papers, and on the further ground that it appears from the affidavit upon

Statement of
the case.

which said attachment was issued that the cause of action is in the nature of an equitable action, and that it is for the foreclosure of a mortgage upon real property, and the said debt is fully secured by the said mortgaged property, and that each and every of the grounds for an attachment stated in said affidavit, upon which the said attachment issued, are false." On the hearing of this motion a small amount of oral testimony was introduced, and a vast number of affidavits were read. At the conclusion of the hearing the judge ordered, "that the said attachment be and the same is hereby discharged as to all the property so levied on." The plaintiff excepted to this ruling, and assigns error thereon.

It will be noticed that the defendants moved to discharge the order of attachment on three grounds: 1st, for defects appearing on the face of the papers; 2d, the debt was fully secured by the mortgage; 3d, the grounds stated in the plaintiff's affidavit for the attachment were all false. The second ground was really the only one relied on by the defendants on the hearing below, as would seem from the evidence introduced. And it was evidently upon that ground alone that the judge discharged the attachment. At the close of the hearing there were certainly no defects appearing on the face of the plaintiff's papers which would authorize the discharge of the attachment. Even if it devolved upon the plaintiff to show, in his original affidavit, that the mortgage was not a sufficient security for his debt, still he showed that fact so abundantly by his subsequent affidavits that the defect (if it was a defect) must be deemed to have been cured; and no other defect appearing on the face of the papers has been suggested. The defendants filed an affidavit made by themselves, possibly for the purpose of putting in issue the grounds stated in the plaintiff's original affidavit; but it certainly does not put in issue all of such grounds. For instance, the plaintiff's original affidavit stated among other things that on the 1st of December 1875, (the time when said order of attachment was issued, and one day before the defendants' property

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was seized,) "the said defendants have property and rights in action which they conceal." The defendants' affidavit states that on December 11th 1875, "they [the defendants] have no property and rights in action which they conceal;" and the affidavit does not state that on December 1st the defendants did not have any property or rights in action which they were then concealing. Both affidavits were probably true in this respect. They do not contradict each other. At least, we should think from the evidence that the plaintiff's affidavit was true. And if it was true when made, and when the order of attachment was issued, the defendants cannot have the attachment discharged merely because some ten or eleven days thereafter, and after their property had been attached, they had ceased to "have property and rights in action which they conceal." On the hearing of the motion the plaintiff introduced evidence to prove that the grounds of his affidavit were true, and the defendants did not introduce any evidence to the contrary. Hence the judge could not have found that all the grounds stated in the plaintiff's affidavit were false. As before stated, we think the judge must have discharged the attachment solely upon the ground that the plaintiff's debt was amply secured by the mortgage. It would seem from the evidence introduced, that this was the only question which the defendants desired to submit to the judge. Whether the judge decided correctly or not upon this question, we shall consider hereafter.

Hearing
of motion.

The plaintiff claims that the judge had no right to consider any of the questions raised by the motion to discharge the attachment. He claims that a judge of the district court has no power or authority in any case to discharge an attachment at chambers; and (after defining that the word "attachment" means, the seizure and holding of property by virtue of an *order* of attachment,) he then claims that, even if it should be admitted that a judge of the district court could discharge *an attachment* at chambers, still that he has no power or authority to discharge an *order* of attachment at cham-

Power of dis-
trict judge
at chambers.

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bers. And he further claims, that as the motion in this case was to discharge the *order* of attachment, and not to discharge the attachment itself, therefore the judge has no right to hear the *motion*, or to discharge the attachment upon such motion. With reference to the first claim of the plaintiff, we would say that we think that a judge of the district court has power at chambers to discharge an attachment; and without making any argument in answer to the plaintiff's argument, we would simply refer to the statutes and authorities from which such argument may be made. (Laws of 1861, p. 121, §3; Comp. Laws of 1862, p. 454, §3; Gen. Stat. of 1868, p. 804, §2; *Bowman v. Cockrill*, 6 Kas. 334, 335; *Division of Howard Co.*, 15 Kas. 195, 214, 215; *Kiser v. Sawyer*, 4 Kas. 503, 511, which holds that, "the court, the greater, includes the judge, the less." This is true of the business of the court; it includes the business done before the judge.

With reference to the second claim of the plaintiff, we would say, that, as the judge did nothing more than to discharge the attachment, (taking the plaintiff's own definition of the word "*attachment*,") the question is simply, whether the motion was sufficient. The motion was to discharge the *order* of attachment. Now would not a discharge of the order of attachment be also a discharge of the property held under the order of attachment? Whether the motion was technically correct or not, as a motion to discharge the attachment, we do not choose to decide. But we think that no material error was committed by the court in considering it sufficient. The proceedings show that the plaintiff had full notice that the defendants desired upon said motion that their property should be discharged from the attachment, and also had full notice upon what grounds the defendants so desired such discharge; and the property was discharged on one of these grounds.

On the hearing of the motion to discharge the attachment, the defendants offered to introduce the following testimony of the witness John E. Evans, to-wit: "I know the persons com-

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prising the firm of Prescott & Prescott, and had a conversation with them in Topeka, in May 1875, in their office, Incompetent testimony; effect of. in which they said they had made defendant, R. L. McConnell, a loan of \$1,000 on his place in Lyon county, and that they thought the place was a good place, and that McConnell was a fine man, and that the loan was well secured." Neither the firm of Prescott & Prescott, nor any member thereof, was a party to this suit; nor was it shown that either of them was ever authorized by the plaintiff, or by any person under whom the plaintiff claimed, to make any such statement; nor was it shown that the conversation was connected with the transaction of any business for the plaintiff, or for any person under whom the plaintiff claimed; nor was it shown that the attention of either member of said firm of Prescott & Prescott was ever called to said conversation, so as to give either of them an opportunity to explain the same. The judge permitted said testimony to be introduced over proper objections and exceptions made by the plaintiff. In this we think the judge erred. But as nearly all the evidence introduced on the hearing of the motion is embodied in affidavits, and as we have all the evidence introduced on such hearing before us, this error will not require a reversal of the decision below, provided a preponderance of the other evidence is found to support such a decision.

This then brings us to the last question in the case: Does the preponderance of the evidence sustain the decision below?

Preponderance of testimony; burden of proof. Or, for the purposes of this case, we shall state the question thus: Is such decision sustained by at least an equilibrium of the evidence? For it may be, that the burden of proof rested upon the plaintiff on the hearing of said motion, and that unless the plaintiff furnished a preponderance of the evidence the decision of the judge below must be sustained. The question whether the decision of the judge below is sustained by sufficient evidence, depends entirely upon this other question, whether said mortgage was shown to be a sufficient security for the plaintiff's debt, or not. The mortgaged property consisted of the N.E. $\frac{1}{4}$ of sec. 1, town-

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ship 17, range 12, in Lyon county, except two acres thereof which had been previously conveyed to other parties by the defendants. Such property is broken, hilly, upland prairie, cut up with ravines, and has no improvements thereon except an old, dilapidated, wooden dwelling-house, with outbuildings to correspond, and a well, and about six acres fenced and broke. It is worth about \$1,228. But no witness testified that it would sell at forced sale for that price. One witness testified that it would not sell at forced sale for \$800; and no witness testified that it would sell at forced sale for more than that sum. The sheriff of the county, who perhaps testified as intelligently upon that subject as any other witness in the case, testified that said mortgaged property would not sell for cash at sheriff's sale for \$480. Two other witnesses testified to substantially the same thing. The defendant himself did not believe that the land was worth the amount of the mortgage-debt. He was anxious that the plaintiff should take the land for the debt, and said a short time before this suit was commenced, "that if the mortgage was foreclosed, and said real estate sold at sheriff's sale, it would not bring enough to satisfy and pay off said claim and the costs of the proceedings." Soon after he mortgaged the said property he was in the county treasurer's office, and told the treasurer that he would not pay the taxes on said land for the reason that he had sold the same. A person standing by said to the defendant, that he thought that he (the defendant) had recently mortgaged the premises. And the defendant answered saying, "that said premises were devilish well sold, and that they [the mortgagees] could take them;" "that he had got one thousand dollars on said premises, and that they were devilish well sold, and that they [the mortgagees] might keep them." And the defendant did not pay the taxes on said premises, although he had agreed in the mortgage that he would do so. And the defendant also failed to make certain improvements on the land which he agreed in the mortgage to make. One of the defendant's own witnesses testifies that it is not customary for loan agents to "loan more money on land than one-third of

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the actual value thereof, in Lyon county." This tends to show that the value put upon land in Lyon county is vastly above its selling-price, and vastly above what it would be a good security for. The statutes provide that real estate sold on execution (except where appraisement is waived) must sell for at least two-thirds of its appraised value. Generally it will not sell to third persons for that amount, and the judgment-creditor has to purchase it himself at that price in order to bring about a sale at all. Now while the evidence in this case does not show that the mortgaged property would sell at sheriff's sale for two-thirds of what its value would appear to be, but on the contrary shows that it would not sell for that much, yet under the statutes we think we should presume that it would sell for that much. Now as the property is worth about \$1,228, it should sell at sheriff's sale for \$818.67. And this is all for which it can reasonably be considered as a good security. On the other hand, the mortgage is for \$1,000. There is now over \$175 of interest actually due on the note and mortgage; (the coupons show \$180;) the defendants agreed in the mortgage to pay a reasonable attorney-fee for foreclosure, and the evidence shows that a reasonable attorney-fee would be \$150. The evidence also shows that the defendants failed to pay the taxes for the years 1874 and 1875, and we suppose have failed to pay all taxes on the premises up to this time. The evidence also shows that the plaintiff has paid \$50 of taxes on the premises. The costs will probably be \$50 or \$60, and may be vastly more. All these items must be considered in rendering the judgment, and they will all be liens upon the mortgaged property. Whether any of the items can be reduced below the figures we have given, when the judgment shall be rendered, is not certain. It is possible that the attorney-fee may, though that is not certain. It is certain however that the interest will be more than we have stated, and it is probable that the taxes and costs will also be more. Now these items in the aggregate amount to \$1,425. And it will therefore be seen that the mortgaged property is not sufficient security for the judgment that will probably be

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rendered. But we will suppose that the judge below anticipated that the judgment would be rendered at as early a day as possible, and with as little trouble and expense as possible, notwithstanding the extraordinary contest that was had over this motion, and notwithstanding that the evidence of about seventy witnesses was used on the hearing of this motion. In such a case the amount of the judgment would of course be reduced below the amount at which we have placed it. But still we do not think that the amount could be reduced so low as to make the mortgaged property a sufficient security for the judgment. In fact, we do not think that the mortgaged property would be sufficient security for the mere naked principal of the debt alone, without interest, without taxes, without costs, and without attorney-fees. We do not believe from the evidence that the mortgaged property could be sold at sheriff sale for \$800. Indeed, there is only one witness who shows by his evidence that he resides near the property who says it is worth more than that sum, and he says it is worth only \$900. The most of the witnesses who show by their testimony that they reside near the property, say that it is not worth \$800, and one witness who has resided within two miles of the property for more than eighteen years, says that it is not worth more than \$400.

It would seem from the foregoing facts, that but one conclusion can be reached. In *Gillespie v. Lovell*, 7 Kas. 419, 423, which was an action to foreclose a mechanic's lien, and in which an order of attachment was issued and levied, we held that "under § 190 of the civil code the plaintiff may have an attachment in every 'civil action for the recovery of money,'" and that an action to foreclose a mechanic's lien was a civil action. In such action, and also in an action to foreclose a real-estate mortgage, where the plaintiff recovers, a personal judgment is rendered against the debtor, where such debtor is made a party defendant, as in this case. In the case cited, the defendant did not attempt to show that the property bound by the mechanic's lien was a sufficient security for the plaintiff's claim, but he did object to the plaintiff's showing that such

lien was not a sufficient security. We held that "if it had been shown that the lien itself was a sufficient security for the plaintiff's claim, it would have been the duty of the court below, or judge, to dissolve the attachment." The logical deduction from this decision is, that in an action for money in which a personal judgment may be rendered against the defendant, the plaintiff may, if sufficient cause exists, have an attachment against the property of the defendant, notwithstanding the fact that in the same action the plaintiff seeks to foreclose a lien on specific property held as security for the debt due, provided such lien is insufficient security for the plaintiff's claim; and that where in such an action an order of attachment is duly sued out and levied, and it is shown that the mortgaged property is not sufficient security for the plaintiff's claim, it is error for the district judge or district court to set aside or dissolve the attachment proceedings merely because of the existence of such specific lien. And therefore, in the present case, the order of the district judge discharging the attachment will be reversed.

All the Justices concurring.

C. W. MOORE v. E. R. CUTLER.

1. **REVIEWING ALLEGED ERRORS; Entire Record Necessary.** A party alleging error, and seeking its review, must bring up the entire record on which error is assigned, or this court will dismiss the petition in error without examination. [*Burns v. Burgett*, 19-162; *Weaver v. Hall*, 33-649; *Paul v. Whitstone*, 28-634.]
2. ——— Where the record brought to this court shows that the clerk of the court below has only certified such portions of the proceedings of the inferior court as the counsel for the plaintiff in error directed to be made out and certified, this court will not presume, in the absence of the full proceedings of the district court, that such court acted without jurisdiction of the person or property of the defendant, and upon such record so certified this court must of necessity affirm the judgment of the court below.

Error from Chautauqua District Court.

A SINGLE question of practice is decided in this case, respecting which the opinion states all necessary facts. The

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district court, at the November Term 1875, found and adjudged that *Moore* was indebted to *Cutler* in the sum of \$175.50, and decreed the sale of certain attached property. *Moore* brings the case here.

S. P. Moore, for plaintiff in error.

The opinion of the court was delivered by

HORTON, C. J.: The certificate of the clerk of the district court appended to the record in this case is as follows:

"STATE OF KANSAS, CHAUTAUQUA COUNTY, SS.:

I, Thomas N. King, clerk of the district court in and for said county, do hereby certify that the above and foregoing is a true and complete copy of the records and papers in my office in the case of *E. R. Cutler* against *C. W. Moore*, as fully and completely as the same were directed to be made out and certified by *S. P. Moore*, attorney for said defendant.

In testimony whereof, I have hereunto set my hand and affixed my official seal on this 25th of November 1875.

[SEAL.]

T. N. KING, Clerk."

The questions discussed in the brief of counsel for plaintiff in error are, that the service made upon the said plaintiff in error in the court below was defective, and that the attachment-proceedings had in said court failed to describe the property attached. It does not appear from the record in this case, that a full and complete transcript of the case in the court below has been brought to this court; and as it does affirmatively appear that the counsel for the plaintiff in error has had certified to this court only such proceedings of the district court as he has thought to his interest to present, we cannot undertake to consider the alleged error submitted to us. The certificate to the record is of such character as to forbid any review of the matters attempted to be presented to us for our determination.

The judgment of the court below will be affirmed.

All the Justices concurring.

EXTRA ANNOTATION
TO
PRECEDING VOLUME

NOTES

ON THE

KANSAS REPORTS

CASES IN 18 KANSAS

18 KAN. 9, LEMERT v. BARNES

Purchasers of Indian lands.—Cited in *McGannon v. Straightledge*, 37 Kan. 87, 14 Pac. 452, holding an act to protect purchasers of Indian lands to be inoperative until the Indian title is extinguished.

18 KAN. 16, STATE v. MULKINS

Jury—Misconduct of or affecting.—Cited in *State v. Snyder*, 20 Kan. 306, holding that the presence of an officer in the jury room was reversible error; *State v. Lantz*, 23 Kan. 728, 33 Am. Rep. 215, holding that the unauthorized examination of an atlas by the jury in the jury room was reversible error.

Cited in note in 36 Am. Rep. 441, on improper influence on jury.

Same—Admonition.—Distinguished in *Gleason v. Strauss*, 5 Kan. App. 80, 48 Pac. 881, holding that the separation of the jury without admonition is not ground for a new trial, where no injury results; *State v. Stackhouse*, 24 Kan. 445, holding that failure to admonish the jury before several short recesses was not reversible error.

18 KAN. 20, ATCHISON, T. & S. F. R. CO. v. WOODCOCK

Taxes—Limitation on use or amount.—Cited in *Kansas City, T. & W. R. Co. v. Albright*, 33 Kan. 211, 6 Pac. 276, on the statutory limitation on levies for the support of the poor; *Stewart v. Kansas Town Co.*, 50 Kan. 553, 32 Pac. 121, holding that a levy in excess of 10 mills to be paid out of the general revenue fund, was invalid; *Smith v. Haney*, 73 Kan. 506, 85 Pac. 550, holding that the commissioners of Gove County could use part of the general revenue fund to build a courthouse.

Same—Curative acts.—Cited in *National Bank v. Barber*, 24 Kan. 534, holding a statute to be void, so far as it attempted to divert a general tax to the payment of railroad bonds.

Distinguished in *State v. Pauley*, 83 Kan. 456, 112 Pac. 141, holding curative tax statutes valid.

Cited in note in 37 Am. Rep. 399, on curative acts.

18 KAN. 24, SHAMLEFFER v. COUNCIL GROVE PEERLESS MILL CO.

Water courses—Rights of riparian owners.—Cited in *City of Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265, holding that one cannot use percolating water, so as to destroy or diminish the flow of a natural stream, to the injury of a riparian owner; *Clark v. Allaman*, 71 Kan. 206, 80 Pac. 571, 70 L. R. A. 971, on the use of water for irrigation and the rights of riparian owners; *City of New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190, holding that a lower riparian owner cannot, without due compensation, be deprived of his right to the usual and undiminished flow of water.

Cited in note in 7 Am. Dec. 532, on property in water; in 43 Am. Dec. 275; 79 Am. Dec. 638—on riparian proprietor's right to use and detain water; in 41 L. R. A. 740, on correlative rights of upper and lower proprietors as to use and flow of stream.

18 KAN. 34, KANSAS CENT. RY. CO. v. FITZSIMMONS, Same case on subsequent appeal, 22 Kan. 686, 31 Am. Rep. 203

Railroad companies—What constitutes.—Cited in *Beeson v. Busenbark*, 44 Kan. 669, 25 Pac. 48, 10 L. R. A. 839, holding that a construction firm was not a railroad company within the meaning of a statute fixing the liability of railroad companies.

Same—Liability for acts or omissions of independent contractor.—Cited in *St. Louis, Ft. S. & W. R. Co. v. Willis*, 38 Kan. 330, 16 Pac. 728, holding a railroad not liable for injuries from a defective track being laid by an independent contractor and not yet accepted; *Kansas City, M. & O. R. Co. v. Loosley*, 76 Kan. 103, 90 Pac. 990, as to liability as master of an independent contractor's servants.

Distinguished in *Chicago, K. & W. R. Co. v. Watkins*, 43 Kan. 50, 22 Pac. 985, holding a railroad liable for a trespass which it procured to be committed by a contractor; *Chicago, K. & W. R. Co. v. Hutchinson*, 45 Kan. 186, 25 Pac. 576, holding that a railroad could not escape liability by showing that the want of proper cattle guards was due to the neglect of a contractor; *St. Louis & S. F. R. Co. v. Madden*, 77 Kan. 80, 93 Pac. 586, 17 L. R. A. (N. S.) 788, holding a railroad liable for damages from a fire set out by an independent contractor; *Choctaw, O. & W. Ry. Co. v. Wilker*, 16 Okl. 384, 84 Pac. 1086, 3 L. R. A. (N. S.) 595, holding that a railroad company could not escape liability for failure to perform a duty by showing that the defective work was done by independent contractors.

Cited in note in 76 Am. St. Rep. 395, 411, on liability for negligence and torts of independent contractors; in 66 L. R. A. 139, on liability for acts of independent contractor, where injuries result from nonperformance of absolute duties of employer.

Same—Liability of lessor for torts of company using road.—Cited in note in 44 L. R. A. 753, on liability of lessor of railroad for injuries caused by negligence of another company using road.

18 KAN. 42, THOMPSON v. HIGGINBOTHAM

Sheriff's return—Alder by extrinsic evidence.—Distinguished in *Evans v. Bushnell*, 59 Kan. 160, 52 Pac. 419, holding that, where the sheriff's return failed to show due notice of the sale, the error was not cured by a printer's affidavit, dissenting opinion maintaining that error was cured by the printer's affidavit.

Cited in *Price v. Citizens' State Bank of Mediapolis*, 23 Okl. 723, 102 Pac. 800, holding that evidence and affidavits bearing on the officer's return were not part of the record, and such return was conclusive. i —

Verification on information and belief.—Cited in *Pelegrielli v. McCloud River Lumber Co.*, 1 Cal. App. 598, 82 Pac. 695, holding that allegations made in an affidavit upon information and belief cannot be considered; *State v. Gleason*, 32 Kan. 245, 4 Pac. 363, holding that a complaint verified on hearsay and belief is insufficient; *Greenwell v. Moffett*, 77 Kan. 41, 98 Pac. 609, holding that an affidavit made on belief was not proof; *Salter v. State*, 2 Okl. Cr. 464, 102 Pac. 719, 139 Am. St. Rep. 985, holding an information, verified on information and belief, was insufficient; *Shanholtzer v. Thompson*, 24 Okl. 198, 103 Pac. 595, 138 Am. St. Rep. 877, holding that affidavits, verified on belief, were insufficient.

Same—Evidence concerning verification.—Distinguished in *State v. Carey*, 56 Kan. 84, 42 Pac. 871, holding that, where the complaint was verified in regular form, the justice properly excluded evidence to show that it was in fact verified on information and belief.

18 KAN. 46, McCARTHY v. CHICAGO, R. I. & P. R. CO., 26 AM. REP. 742

Wrongful death—Right of action.—Cited in *Hulbert v. City of Topeka*, 34 Fed. 510, holding that representatives of the deceased had no right of action, under Code Civ. Proc. Kan. 1879, § 420, for injuries causing death; *Atchison, T. & S. F. R. Co. v. Priest*, 50 Kan. 16, 31 Pac. 674, on instruction on measure of damages for wrongful death from a crossing accident; *City of Eureka v. Merrifield*, 53 Kan. 794, 37 Pac. 113, holding that Civ. Code 1889, §§ 422, 422a, apply exclusively when death results from a wrongful act; *Martin v. Missouri Pac. R. Co.*, 58 Kan. 475, 49 Pac. 605, holding that an action by an injured party, who dies, does not survive to his representative; *Sewell v. Atchison, T. & S. F. R. Co.*, 78 Kan. 1, 96 Pac. 1007, holding that, where deceased legally contracted away his own right of action, his widow could not sue for his wrongful death.

Criticised in *Missouri Pac. Ry. Co. v. Bennett's Estate*, 5 Kan. App. 231, 47 Pac. 183, holding that an action for personal injuries from a wrongful act does not abate with the plaintiff's death.

Cited in *Perham v. Portland Electric Co.*, 33 Or. 451, 53 Pac. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730, on the right of action by representatives for the wrongful death of the deceased.

Cited in note in 12 Am. St. Rep. 869, on action for death by negligence; in 34 L. R. A. 802, on several actions for wrongful death.

Same—What law governs.—Cited in *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439, holding that a liability imposed by state statute may, where the action is transitory, be enforced in any United States Circuit Court having jurisdiction; *Vaughn v. Bunker Hill & Sullivan Mining & Concentrating Co.*, 126 Fed. 895, holding that a statute did not give a right of action for fatal injuries inflicted in another state; *Limekiller v. Hannibal & St. J. R. Co.*, 33 Kan. 83, 5 Pac. 401, 52 Am. Rep. 523, holding that a foreign administrator could not sue for a wrongful death, where the laws of his own state prohibited his maintaining such an action; *Hamilton v. Hannibal & St. J. R. Co.*, 39 Kan. 56, 18 Pac. 57, holding that a Missouri statute giving a right of action for wrongful death could not be enforced in Kansas, where it appeared that the right of action in Missouri had been lost when the suit was begun; *Dale v. Atchison, T. & S. F. R. Co.*, 57 Kan. 601, 47 Pac. 521, holding that a penal statute of New Mexico, giving a fixed sum for death by wrongful act, could not be enforced in Kansas; *Matheson v. Kansas City, Ft. S. & M. R. Co.*, 61 Kan. 667, 60 Pac. 747, holding that the Missouri statute, authorizing a recovery for death by wrongful act, cannot be enforced in Kansas.

Cited in notes in 15 L. R. A. 583; 56 L. R. A. 194, 197, 198, 200, 201, 213; 48 Am. Dec. 641 (par. 2); 37 Am. Rep. 160; 14 Am. St. Rep. 854—on extraterritorial effect of statute giving right of action for death.

Suit by nonresident against foreign corporations.—Cited in note in 70 L. R. A. 550, 552, 553, on right of nonresidents to sue foreign corporations.

18 KAN. 53, BURGESS v. MEMPHIS, O. & N. W. R. CO.

Statutes—Repeal.—Cited in *Evans v. Adams*, 21 Kan. 119, holding that Laws 1872, c. 195, and Laws 1876, c. 133, are simply a portion of the original act of 1867 and not independent statutes; *Case v. Bartholow*, 21 Kan. 300, holding a statute relative to service of process to have been repealed by the Constitution; *Hobart v. Beers*, 26 Kan. 329, on question of repeal of statute giving lien for materials furnished railroad company.

18 KAN. 58, CHICAGO, R. I. & P. R. CO. v. DOYLE

Demurrer to evidence.—Cited in *Lee v. Ryder*, 1 Kan. App. 203, 41 Pac. 221; *Bank of Le Roy v. Harding*, 1 Kan. App. 389, 41 Pac. 680—holding overruling of demurrer not error, where there was some evidence to sustain all the material allegations; *Atchison, T. & S. F. R. Co. v. Ditmars*, 3 Kan. App. 459, 43 Pac. 833, holding that any evidence tending to sustain the material allegations will authorize the overruling of a demurrer to the evidence.

Same—Cure by subsequent testimony.—Cited in *Fidelity & Casualty Co. of New York v. Walton*, 24 Okl. 671, 104 Pac. 909, holding that the overruling of a demurrer to the evidence will not be disturbed, where the record shows sufficient evidence, when considered with that subsequently introduced; *St. Louis & S. F. R. Co. v. Loftis*, 25 Okl. 496, 106 Pac. 824, holding that error in overruling a demurrer to the evidence may be cured by subsequent testimony.

Release—Avoidance.—Cited in *Lumley v. Wabash R. Co.*, 76 Fed. 66, 22 C. C. A. 60, holding that a release should be canceled which was obtained through a dishonest opinion given by the company's surgeon; *Wagner v. National Life Ins. Co. of Montpelier, Vt.*, 90 Fed. 395, 33 C. C. A. 121, holding that a release pleaded in the answer may be avoided for fraud; *Solomon R. Co. v. Jones*, 34 Kan. 443, 8 Pac. 730, holding that receipts which a party did not read or have opportunity to read were not binding upon him; *Missouri Pac. R. Co. v. Lovelace*, 57 Kan. 195, 45 Pac. 590, holding that the execution of a release by one while mentally incapacitated is not binding; *Sanford v. Royal Ins. Co.*, 11 Wash. 653, 40 Pac. 609, holding that an action could be maintained on a fire policy without a voidable release having been first canceled by a decree in equity.

Cited in note in 39 L. R. A. 263, on morphinism and other addictions as affecting responsibility and capacity.

Same—Evidence to show incompetency.—Distinguished in *Moulton v. Aldrich*, 28 Kan. 300, holding that evidence was competent to show that it was impossible for the injured party to have entered into any release agreement.

Same—Not necessary to return money.—Cited in *Missouri Pac. R. Co. v. Goodholm*, 61 Kan. 758, 60 Pac. 1066, holding that an action for damages may be maintained though the money received pursuant to a voidable release has not been returned; *St. Louis & S. F. R. Co. v. Richards*, 23 Okl. 256, 102 Pac. 92. 23 L. R. A. (N. S.) 1032, holding that an injured party was not precluded, by his failure to tender back the consideration received, from contesting a release where it appeared that the tender would have been refused.

Cited in note in 35 L. R. A. (N. S.) 661, on return of consideration for release of claim for personal injuries set aside for fraud.

Avoidance of insurance—Tender back of premium.—Cited in *Georgin Home Ins. Co. v. Rosenfield*, 95 Fed. 358, 37 C. C. A. 96, holding that the failure of an insurance company to tender back the premium paid did not preclude it from denying liability because of overinsurance.

Negligence—Liability of master for injuries to servant.—Cited in *Missouri Pac. R. Co. v. Perego*, 36 Kan. 424, 14 Pac. 7, holding an employer liable

for the death of an unskilled apprentice from being placed in a dangerous position; *Cherokee & P. Coal & Mining Co. v. Dickson*, 10 Kan. App. 391, 61 Pac. 450, holding that proof that a pit boss had ample opportunity to learn of a miner's incompetency tended to sustain an allegation of the mining company's knowledge of such incompetency.

Cited in notes in 25 L. R. A. 717; 14 L. R. A. (N. S.) 759; 36 Am. Dec. 285—on liability of master for injuries to servant by negligence or incompetency of fellow servant; in 41 L. R. A. 50, on knowledge as element of employer's liability; in 48 L. R. A. 375, on duty of master with respect to employment of his servants.

Same—Instructions and evidence.—Cited in *Union Pac. Ry. Co. v. Harris*, 158 U. S. 326, 15 Sup. Ct. 843, 39 L. Ed. 1003—holding that the instructions in an action for negligent injury were correct; *Union Pac. R. Co. v. Young*, 19 Kan. 488, on questions relative to the testimony and instructions in a negligence case.

Same—Contributory negligence.—Cited in note in 32 Am. St. Rep. 388, on carelessness as bar to relief.

Sufficiency of evidence—Finding not disturbed.—Cited in *Missouri Pac. R. Co. v. Perego*, 36 Kan. 424, 14 Pac. 7, holding that a finding supported by some evidence would not be disturbed.

18 KAN. 68, PALMER v. MOORE

Flooding land—Liability.—Cited in note in 59 L. R. A. 837, on liability for damming back stream.

18 KAN. 72, PRYOR, IN RE, 26 AM. REP. 747

Contempt—What constitutes.—Cited in *Boyd v. Glucklich*, 116 Fed. 131, 53 C. C. A. 451, holding that a court of bankruptcy cannot punish for contempt a bankrupt who fails to deliver to the trustee property not in his possession or control; *People ex rel. Attorney General v. News-Times Pub. Co.*, 35 Colo. 253, 84 Pac. 912, on the right to punish for contempt committed through a newspaper article; *In re Dalton*, 46 Kan. 253, 26 Pac. 673, holding that criticisms made of a trial judge in a brief filed in the appellate court did not constitute contempt; *State v. Waugh*, 53 Kan. 688, 37 Pac. 165, holding that the language of a letter written to a district judge was contemptuous; *In re Charts*, 29 Nev. 110, 85 Pac. 352, 5 L. R. A. (N. S.) 916, 124 Am. St. Rep. 915, holding that certain statements in an attorney's brief constituted a contempt of the Supreme Court; *Burke v. Territory*, 2 Okl. 499, 37 Pac. 829, holding that certain statements made against a judge in a newspaper article constituted contempt.

Cited in note in 68 L. R. A. 256, on statement with respect to ended cause as contempt; in 5 L. R. A. (N. S.) 917, on attorney's statement in court concerning decisions as contempt; in 50 Am. St. Rep. 580, on contempt of court by libelous newspaper publications.

Same—Judge not disqualified.—Cited in *Lamberson v. Superior Court of Tulare County*, 151 Cal. 458, 91 Pac. 100, 11 L. R. A. (N. S.) 619, holding that a judge may sit in contempt proceedings based on a charge made against himself.

Same—Relief to person convicted.—Cited in note in 22 Am. St. Rep. 419, on relief of party convicted of contempt.

18 KAN. 78, STATE v. ROGERS, 26 AM. REP. 754

Self-defense.—Cited in *State v. Hawkins*, 18 Or. 476, 23 Pac. 475, holding the right of self-defense to not avail the party who brings on the difficulty; *State v. Shockley*, 29 Utah, 25, 80 Pac. 865, 110 Am. St. Rep. 639, on the right of an assailant to take the life of the assailed to protect his own life.

Cited in note in 10 Am. St. Rep. 294 (par. 3), on plea of self-defense; in 74

Am. St. Rep. 785, on law of self-defense; in 45 L. R. A. 688, 698, 707, 708; 109 Am. St. Rep. 810—on right of self-defense by original aggressor; 2 L. R. A. (N. S.) 62, on "retreat to the wall" in homicide.

Same—Jury question.—Cited in *State v. Hatch*, 57 Kan. 420, 48 Pac. 708, 57 Am. St. Rep. 337, holding that the court should not assume that either party was chiefly in fault when that fact is in issue; *State v. Shockley*, 29 Utah, 25. 80 Pac. 865, 110 Am. St. Rep. 639, holding that the question of the defendant's abandonment in good faith of his original felonious design and of his retreat before he killed the assailed should have been submitted to the jury.

18 KAN. 86, BEYER v. REED

18 KAN. 93, MISSOURI VAL. LIFE INS. CO. v. STURGES, 26 AM. REP. 761

Insurable interest.—Cited in *Gordon v. Ware Nat. Bank of Ware, Mass.*, 132 Fed. 444, 65 C. C. A. 580, 67 L. R. A. 550, holding that an assignment of insurance to one having no insurable interest was valid; *Russell v. Grigsby*, 168 Fed. 577, 94 C. C. A. 61, holding that an assignment of an insurance policy to one having no insurable interest did not affect the liability of the insurer; *Missouri Valley Life Ins. Co. v. McCrum*, 36 Kan. 146, 12 Pac. 517, 59 Am. Rep. 537, holding that a party cannot recover insurance which he has procured on another's life in which he has no insurable interest, and that the sale of an insurance policy by the beneficiaries during the insured's lifetime, to one who has no insurable interest, is a fraud on the insurer; *Price v. First Nat. Bank of Atchison*, 62 Kan. 743, 64 Pac. 639, holding that an unconditional assignment to a bank having no insurable interest was void; *Metropolitan Life Ins. Co. v. Elison*, 72 Kan. 199, 83 Pac. 410, 3 L. R. A. (N. S.) 934, 115 Am. St. Rep. 189, 7 Ann. Cas. 909, holding that an uncle had no insurable interest in the life of his nephew.

Cited in notes in 57 Am. Dec. 103; 27 Am. Rep. 327—on insurable interest in life of another; in 52 Am. Rep. 144, on wager policies; in 58 Am. Rep. 857; 16 Am. St. Rep. 907—on right to assign policy to one without insurable interest; in 6 L. R. A. (N. S.) 129, on validity of assignment not made as cover for wager policy of life insurance to one having no insurable interest.

Assignment of policy.—Cited in note in 87 Am. St. Rep. 508, on assignment of life insurance policies; in 3 L. R. A. (N. S.) 945, on validity of assignment of interest in life insurance to one paying premiums.

18 KAN. 98, DRAKE v. WILLIAMS

18 KAN. 104, SCHMUCKER v. SIBERT, 26 AM. REP. 765

Limitation of actions—Note and security.—Cited in *McGovney v. Gwillim*, 16 Colo. App. 284, 65 Pac. 346; *Kulp v. Kulp*, 51 Kan. 341, 32 Pac. 1118, 21 L. R. A. 550—holding that the bar of a note bars the mortgage; *City of Ft. Scott v. Schulenberg*, 22 Kan. 648, holding that, where action was barred on a bond, it was barred on the mortgage securing it; *Hubbard v. Missouri Valley Fire Ins. Co.*, 25 Kan. 172, holding on the bar of a note and mortgage by five-year limitations; *Perry v. Horack*, 63 Kan. 88, 64 Pac. 990, 88 Am. St. Rep. 225; *Kirk v. Andrew*, 78 Kan. 612, 97 Pac. 797—holding that, where limitations did not bar recovery on a note, recovery on the mortgage securing it was not barred; *Mulvane v. Sedgley*, 63 Kan. 105, 64 Pac. 1038, 55 L. R. A. 552, holding that, action against a principal being barred, action against his sureties was also barred; *Morford v. Wells*, 68 Kan. 122, 74 Pac. 615, holding that no rights were acquired by the purchase of a note and mortgage barred by limitations.

Cited in note in 21 L. R. A. 557, on effect of statutory bar of principal debt on right to foreclose mortgage or deed of trust.

Same—Revival of note.—Cited in *Clark v. Grant*, 26 Okl. 398, 109 Pac. 284, 28 L. R. A. (N. S.) 519, Ann. Cas. 1912B, 505, holding that a revival of a note revives the mortgage as to the payors; *Damon v. Leque*, 17 Wash. 573, 50 Pac. 485, 61 Am. St. Rep. 927, holding that a mortgagor cannot revive a debt to the prejudice of his grantee.

Cited in note in 55 L. R. A. 678, on extension of mortgage lien by renewal of secured debt.

Same—Acknowledgment and part payment.—Cited in *Ft. Scott v. Hickman*, 112 U. S. 150, 5 Sup. Ct. 58, 28 L. Ed. 636, holding that, for an acknowledgment to remove the bar of the statute, it must be made to the creditor or his representative; *Medina v. Phelps*, 39 Colo. 92, 88 Pac. 848, holding that the acts of a grantor in paying interest and securing an extension tolled the statute as to his grantee with constructive notice; *Du Bois v. First Nat. Bank of Denver*, 43 Colo. 400, 96 Pac. 169, holding that the grantor of a deed of trust could by acknowledging the debt toll the statute as to one subsequently acquiring an interest in the premises; *McLane v. Allison*, 60 Kan. 441, 56 Pac. 747, holding that the payment of interest tolled the statute; *Investment Securities Co. v. Bergthold*, 60 Kan. 613, 58 Pac. 469, holding that the payment of interest to the original mortgagee after he had transferred the mortgage did not toll the statute; *Skinner v. Moore*, 64 Kan. 360, 67 Pac. 827, 91 Am. St. Rep. 244, holding that recovery on a note and mortgage on the homestead was not barred by limitation, but the right was kept alive by interest payments by the husband; *King v. City of Frankfort*, 2 Kan. App. 530, 48 Pac. 983; *Kaiser v. Idleman*, 57 Or. 224, 108 Pac. 193, 28 L. R. A. (N. S.) 169; *Miller v. McDowell*, 69 Kan. 453, 77 Pac. 101—holding that payment and an admission of liability to a bank cashier tolled the statute as to the party making the payment.

Cited in note in 25 L. R. A. (N. S.) 808, on person to whom acknowledgment or new promise must be made to toll statute or remove bar of limitations; in 28 L. R. A. (N. S.) 171, 175, on effect of payment or acknowledgment by mortgagor to toll limitations as against person holding through him.

Same—Right to invoke.—Cited in *Graves v. Seifried*, 31 Utah, 203, 87 Pac. 674, holding that a third person, acquiring an interest in the mortgaged premises, may invoke the statute of limitations, though it is not available to the mortgagor.

Cited in note in 104 Am. St. Rep. 763, 767, on who may plead statute of limitations.

Same—Running against one remedy.—Cited in note in 31 Am. Rep. 41, on effect of running of limitations against one remedy.

Same—Effect of bar.—Cited in note in 95 Am. St. Rep. 670, on effect of bar of statute of limitations.

Reviver of judgment lien—Consent of owner.—Cited in *Manley v. Mayer*, 68 Kan. 877, 75 Pac. 560, holding that a judgment which could be revived only by consent could not without consent of the owner be made a lien on land to which the debtor had parted with title.

Contracts—Acceptance.—Cited in *Re Rabbitt*, 47 Kan. 382, 27 Pac. 1006, holding that a vendee is not bound by a memorandum of sale which he has neither signed nor accepted; *Harris v. Harper*, 48 Kan. 418, 29 Pac. 697, holding that a lease, signed by the lessee and accepted by the lessor, was a binding obligation; *Barhyte v. New Hampshire Real-Estate Co.*, 66 Kan. 390, 71 Pac. 887, holding that a lease, signed by the lessor and accepted by the lessee's assignee with the lessor's consent, became a contract in writing between the parties; *Brownson v. Perry*, 71 Kan. 578, 81 Pac. 197, holding that a purchaser was bound by a contract which he accepted; *Starwich v. Washington Cut Glass Co.*, 64 Wash. 42, 116 Pac. 459, holding that a lessee company was liable for rent upon accepting a lease, though it did not go into possession or sign the lease.

Same—Assumption of indebtedness.—Cited in *Stagavant v. Western Mortgage Co.*, 22 Colo. 28, 43 Pac. 144, holding that a vendee could defend against a lien which he had assumed; *Starbird v. Oranston*, 24 Colo. 20, 43 Pac. 652, holding that a mortgagee may enforce payment against a grantee who, by accepting a deed with an assumption clause, has assumed the debt; *Scott v. Morning*, 23 Kan. 253, on agreements by a grantee to pay previous existing mortgages on the property; *Holcomb v. Thompson*, 50 Kan. 598, 32 Pac. 1091, holding that a grantee, taking land subject to a mortgage, assumes no personal liability; *Stough v. Badger Lumber Co.*, 70 Kan. 713, 79 Pac. 737, holding that a grantee was not estopped from contesting the enforcement of liens which he had assumed; *Hendricks v. Brooks*, 80 Kan. 1, 101 Pac. 622, 133 Am. St. Rep. 186, holding that the acceptance of a deed subject to a mortgage, which grantee "agrees to pay," bound the grantee; *Carnahan v. Lloyd*, 4 Kan. App. 605, 46 Pac. 323, holding that a mortgage assumed by a grantee's acceptance of a deed becomes payable according to the original contract; *Windle v. Hughes*, 40 Or. 1, 65 Pac. 1058, holding that a grantee who accepts a deed specifying an incumbrance, which he agrees to pay as a part of the price, assumes the debt as a personal one.

Cited in note in 78 Am. Dec. 76, 82, 84, 85, on personal liability of grantee to pay off prior mortgage; in 126 Am. St. Rep. 360-362, on liability of grantee on covenants and conditions in deed.

Same—Revival of mortgage debt.—Cited in *Disney v. Healey*, 73 Kan. 326, 85 Pac. 287, holding that grantee's assumption of a mortgage by the acceptance of a deed revived the mortgage debt as to him.

Same—Grantee as surety.—Cited in *Roberts v. Fitzallen*, 120 Cal. 482, 52 Pac. 818, holding that as to the mortgagor, the grantee who assumes the debt becomes the principal debtor, and the mortgagor the surety; *Kuhn v. National Bank of Holton*, 74 Kan. 456, 87 Pac. 551, 118 Am. St. Rep. 332, holding that where a grantee assumed the incumbrances on the land, he became the principal debtor and his grantor became the surety.

Same—Evidence.—Cited in *Hopper v. Calhoun*, 52 Kan. 703, 35 Pac. 816, 39 Am. St. Rep. 363, holding that it was error to exclude testimony of the notary public as to insertion of the assumption clause in a deed.

Note and mortgage—Which controls.—Cited in *Hutchinson v. Benedict*, 49 Kan. 545, 31 Pac. 147, holding that the note controlled in determining the amount due on the mortgage.

18 KAN. 114, CLOUGH v. McDONALD

Cited in *Jewell v. Morse*, 21 Kan. 734, as authority for a modification ordered in the judgment.

Process—Return.—Cited in *Lanoue v. McKinnon & Co.*, 19 Kan. 408, on the point relating to service and return day of the summons; *Swerdsfeger v. State*, 21 Kan. 475, holding that a summons was not void or voidable because returnable in two days; *Miller v. Forbes*, 6 Kan. App. 617, 49 Pac. 705, holding that a default judgment was neither void nor voidable because of the sheriff's failure to return the summons until the day after the return day.

Mechanic's lien—Time for filing.—Cited in *Crawford v. Blackman*, 30 Kan. 527, 1 Pac. 136, holding that the building would be regarded as completed upon completion of the contract and subcontract; *Cunningham v. Barr*, 45 Kan. 158, 25 Pac. 583, holding that a subcontractor's statement was filed in time, when filed within 60 days after completion of the main contract.

Same—Subcontractors—Rights under principal contract.—Cited in *Jarvis v. State Bank of Ft. Morgan*, 22 Colo. 309, 45 Pac. 505, 65 Am. St. Rep. 129, on the right of a contractor by waiving his lien to cut off a subcontractor's right to a lien, without deciding the point; *Aste v. Wilson*, 14 Colo. App. 323, 59 Pac. 846, on whether subcontractors were estopped to set up their liens; *Mac-*

Donald v. Seaton, 27 Kan. 672, as authority for affirming judgment; **Sharon Town Co. v. Morris**, 39 Kan. 377, 18 Pac. 230, holding that the exclusion of evidence as to how much the owner paid other subcontractors was not material error; **Chicago Lumber Co. v. Allen**, 52 Kan. 795, 35 Pac. 781, holding a subcontractor entitled to enforce his right to a pro rata share of the contract price, though the owner has paid the full price to the contractor or other subcontractors.

Distinguished in **Fossett v. Rock Island Lumber & Mfg. Co.**, 76 Kan. 428, 92 Pac. 833, 14 L. R. A. (N. S.) 918, holding that it was not error to admit proof of payment to other subcontractors who had not filed liens.

Cited in note in 19 Am. St. Rep. 700, on stipulations in builder's contract destroying rights of subcontractors and materialmen to liens; in 20 L. R. A. 565, on payment to contractors or subcontractors as affecting liens of subordinate claimants.

18 KAN. 120, BAIRD v. TRUITT

Amendment regarded as made.—Cited in **Winter v. Shutter**, 42 Kan. 544, 22 Pac. 564, holding that it should be presumed, in order to uphold the judgment of the justice, that the defendant's answer had been amended; **Jung v. Liebert**, 44 Kan. 304, 24 Pac. 474, holding that a judgment would not be reversed because of a variance which could have been avoided by amending the bill of particulars; **Western Home Ins. Co. v. Thorp**, 48 Kan. 239, 28 Pac. 991, holding that a pleading will be treated as amended in order to uphold a judgment on review.

18 KAN. 124, ROSA v. MISSOURI, K. & T. RY. CO.

Ruling on demurrer—Effect of amendment.—Cited in **Union Pac. R. Co. v. Estes**, 37 Kan. 229, 15 Pac. 157, holding that a ruling on a demurrer to the original petition would not be reviewed where the case was tried on an amended petition and answer thereto; **Kingman & Co. v. Pixley**, 7 Okl. 351, 54 Pac. 494; **Carle v. Oklahoma Woolen Mills**, 16 Okl. 515, 86 Pac. 66; **Prescott v. Puget Sound Bridge & Dredging Co.**, 31 Wash. 177, 71 Pac. 772—holding that error in sustaining a demurrer is waived by amending the pleading demurred to.

Possession as evidence of title.—Cited in **Anderson v. Burnham**, 52 Kan. 454, 34 Pac. 1056, holding that possession may give title, though destitute of color of title.

Cited in note in 15 L. R. A. (N. S.) 1229, 1233, 1256, 1258, on necessity of color of title, not expressly made a condition by statute, in adverse possession.

18 KAN. 129, COMMISSIONERS OF WABAUNSEE COUNTY v. MUHLENBACKER

Cited in **Board of Com'rs of Chase County v. Carter**, 24 Kan. 511.

Highway proceedings—Jurisdiction to be shown by record.—Cited in **Board of Com'rs of Chase County v. Cartter**, 30 Kan. 531, 1 Pac. 314, holding that the record of proceedings to establish a road must show the jurisdiction of the board; **Hentzler v. Bradbury**, 5 Kan. App. 1, 47 Pac. 330, holding that jurisdiction of the board in highway proceedings will not be presumed, but must be shown.

Distinguished in **Howell v. Redlon**, 44 Kan. 558, 24 Pac. 1109, holding that the board could not be said to have acted without jurisdiction because its journal did not state that evidence was offered to establish the allegations of the petition.

Waiver of defects in proceedings—Errors apparent on record.—Cited in **Board of Com'rs of Woodson County v. Heed**, 33 Kan. 34, 5 Pac. 453, holding that the landowner, by presenting a claim for damages in highway proceedings, waived want of jurisdiction over his person; **Board of Com'rs of Wyandotte**

County v. Arnold, 49 Kan. 279, 30 Pac. 488, holding a final judgment reviewable as to form and substance, though not excepted to.

Distinguished in **Flagel v. Board of County Com'rs of Jackson County**, 83 Kan. 709, 112 Pac. 622, holding that the landowner, by appealing from the assessment in highway proceeding, did not waive his right to also appeal from the order establishing the road.

Cited in note in 83 Am. Dec. 457 (par. 5), on review of error apparent in final judgment.

Petition.—Cited in **Oliphant v. Commissioners of Atchison County**, 18 Kan. 386, on proof as to qualifications of petitioners for a highway; **State v. Eggleston**, 34 Kan. 714, 10 Pac. 3, holding that, where parties petitioning for the removal of a county seat, request that their names be stricken off before the petition is acted on, such request should be granted.

Same—As jurisdictional.—Cited in **Welsford v. Weidlein**, 23 Kan. 601, holding that the power to grant a license to carry on a dramshop depends upon the requisite petition being presented; **St. Louis & S. F. R. Co. v. Mossman**, 30 Kan. 336, 2 Pac. 146, holding that the legality of the names on a herd law petition would be presumed; **Shaffer v. Weech**, 34 Kan. 595, 9 Pac. 202, holding that the petition in highway proceedings is jurisdictional; **Barker v. Board of Com'rs of Wyandotte County**, 45 Kan. 681, 26 Pac. 585, holding that the county board could not establish a county road by resolution; **Barker v. Board of Com'rs of Wyandotte County**, 45 Kan. 698, 26 Pac. 591, holding that the petition in road improvenent proceedings is jurisdictional; **Steinmuller v. Kansas City**, 3 Kan. App. 45, 44 Pac. 600, holding that the presentation of a petition for grading a street was jurisdictional.

Distinguished in **Griswold v. Huffaker**, 47 Kan. 690, 28 Pac. 696, holding that the public may claim the right to use a road, based on a resolution of the county board, coupled with more than 14 years' use.

18 KAN. 133, HIGBEE v. McMILLAN

Cited in **McMillan v. Baker**, 20 Kan. 50 (related case).

Husband and wife—Competency as witnesses.—Cited in **People v. Langtree**, 64 Cal. 256, 30 Pac. 813, holding that the incompetency of a wife as a witness in a criminal case is limited to cases in which she or her husband are parties; **Van Fleet v. Stout**, 44 Kan. 523, 24 Pac. 960, holding a husband was a competent witness in a case brought by his wife as executrix, except as to communications made by one to the other during marriage; **Roesner v. Darrah**, 65 Kan. 599, 70 Pac. 597, holding that a husband, in his action for alienation and seduction, could testify except as to transactions and communications between him and his wife; **Lanning v. Gay**, 70 Kan. 353, 78 Pac. 810, 85 Pac. 407, holding that one was not disqualified to testify to the due execution of a will because his wife was a legatee; **Kansas City Investment Co. v. Fulton**, 4 Kan. App. 115, 46 Pac. 188, holding that a wife could testify as to communications made by her husband to third parties in her presence and hearing.

Cited in note in 29 Am. St. Rep. 413, on privileged communications between husband and wife.

Instruction on credibility.—Followed in **Garvin v. Jennerson**, 20 Kan. 371, holding an instruction on the credibility of witnesses to be erroneous.

Replevin—Plaintiff's right to dismiss.—Cited in **Strauss v. Smith**, 8 N. M. 391, 45 Pac. 930, holding that a plaintiff in replevin cannot, by dismissing his appeal from a justice to the district court, deprive the defendant of his right to a trial on value and damages.

Same—Proof of demand unnecessary.—Cited in **Bliss & Wood v. Couch**, 46 Kan. 400, 26 Pac. 708, holding that, where the defendant in replevin attempted to show title in himself, no proof of demand and refusal was required.

18 KAN. 140, GAFEN v. STEPHENSON

Cited in *Dougherty v. Porter*, 18 Kan. 206.

Attachment—Amendment of proceedings.—Cited in *Emerson v. Thatcher*, 6 Kan. App. 325, 51 Pac. 50, holding that the court properly permitted an order of attachment to be amended to cure an irregularity.

Cited in note in 79 Am. Dec. 172, on irregularities and defects avoiding attachment.

Trial—Time of.—Cited in *Race v. Malony*, 21 Kan. 31, holding that, where no answer or demurrer is filed, no issue arises; *Rice v. Simpson*, 26 Kan. 143; *Rice v. Hodge*, 26 Kan. 164; *City of Eureka v. Ross*, 64 Kan. 372, 67 Pac. 849—on time when issues are triable; *Bostwick v. Blair*, 2 Kan. App. 89, 43 Pac. 297, holding that it was substantial error to force a defendant to trial before the action became triable.

18 KAN. 147, BEACH v. SHOENMAKER

Vacation of judgment.—Cited in *Gille v. Emmons*, 58 Kan. 118, 48 Pac. 569, 62 Am. St. Rep. 609; *Angela v. People's Bank of Edmond*, 17 Okl. 501, 87 Pac. 660—holding that a judgment entirely outside the issues may be vacated at any time.

18 KAN. 150, KRONBERG v. ELDER

Foreign receivers.—Cited in note in 8 Am. St. Rep. 50, on territorial powers and jurisdiction of receivers; in 23 L. R. A. 56, on rights of receiver as to property outside of jurisdiction in which appointed.

Jurisdiction over nonresidents.—Cited in note in 6 Am. St. Rep. 185, on jurisdiction over nonresidents.

18 KAN. 152, BELL v. PARKS

Consideration—Relinquishment and improvements on public land.—Cited in *Lapham v. Head*, 21 Kan. 332, holding that a contract in compromise of disputed rights in land claimed by one party to be public land was not void as against public policy; *Merriman v. Blanton*, 25 Kan. 572, as authority for affirming a judgment for the recovery of improvements; *Hardesty v. Service*, 45 Kan. 614, 26 Pac. 29, holding that a relinquishment was a good consideration; *Tecumseh State Bank v. Maddox*, 4 Okl. 583, 46 Pac. 563, holding that there could be no inquiry into the sufficiency of a good consideration, and that a relinquishment and an agreement to sell improvements on public land constituted a good consideration; *Coleman v. Territory*, 5 Okl. 201, 47 Pac. 1079, holding that the forgery of an instrument dismissing a contest on public land was a public offense.

Defect of title as a defense.—Cited in *Norton v. Stroud State Bank*, 17 Okl. 295, 87 Pac. 848, holding that, in an action on a note given in consideration of a lease assigned without warranty, the assignee cannot, in the absence of fraud, set up a defect of title.

18 KAN. 154, COCKERELL v. MOLL**18 KAN. 157, JOHNSON v. CLARK**

Partnership property.—Cited in note in 98 Am. Dec. 198, on lands becoming partnership property without writing; in 27 L. R. A. 451, 487, as to when real estate will be considered partnership property.

Boundary established by acquiescence.—Cited in *Sheldon v. Atkinson*, 38 Kan. 14, 16 Pac. 68, holding that a corner and division line, acquiesced in for the limitation period, were conclusive.

Possession as evidence of title—Notice.—Cited in *School District No. 82 v. Taylor*, 19 Kan. 287, holding that the title of a school district under an unre-

corded deed was paramount to a mortgage lien; *Greer v. Higgins*, 26 Kan. 420, as authority for approving an instruction on possession as notice of title; *Tucker v. Vandermark*, 21 Kan. 263, holding that all must take notice of the title of one in possession; *Bruce v. McBee*, 23 Kan. 379, holding that possession was notice of title; *Deetjen v. Richter*, 33 Kan. 410, 6 Pac. 595, holding that possession under an unrecorded deed was notice of title; *Stough v. Badger Lumber Co.*, 70 Kan. 713, 79 Pac. 737; *Janex v. Wilkinson*, 2 Kan. App. 361, 42 Pac. 735; *Kansas City Investment Co. v. Fulton*, 4 Kan. App. 115, 46 Pac. 188—on possession as notice of title.

Distinguished in *McNeil v. Jordan*, 28 Kan. 7, holding that the rule as to possession being notice of title does not apply to a vendor remaining in possession; *Utley v. Fee*, 33 Kan. 683, 7 Pac. 555, holding that possession is not evidence of any particular kind of title.

Cited in note in 13 L. R. A. (N. S.) 51, 57, 126, on possession of land as notice of title.

18 KAN. 169, LEAVENWORTH, L. & G. R. CO. v. DOUGLAS COUNTY COM'RS

Pleading—Fraud.—Cited in *State v. Williams*, 39 Kan. 517, 18 Pac. 727; *Gleason v. Wilson*, 48 Kan. 500, 29 Pac. 698—holding that a mere general allegation of fraud presented no issue; *Le Force v. Haymes*, 25 Okl. 190, 105 Pac. 644, holding that an allegation of "irregularity on the part of plaintiffs and their attorney" was insufficient to sustain a default judgment vacating the judgment.

Distinguished in *McKee v. Eaton*, 26 Kan. 226, holding that facts showing fraud were sufficiently set forth as against a demurrer.

Motion to make pleadings certain.—Cited in *Hannibal & St. J. R. Co. v. Fox*, 31 Kan. 586, 3 Pac. 320, holding that, if the petition is indefinite or uncertain, the defendant should move to require it to be made more definite and certain by amendment.

Aid bonds—Agency of county for townships.—Cited in *Chicago, K. & W. R. Co. v. Ozark Township*, 46 Kan. 415, 26 Pac. 710, on the agency of county commissioners for townships in railroad aid bond proceedings.

Estoppel to question regularity of bonds.—Cited in *Washington County, Neb., v. Williams*, 111 Fed. 801, 49 C. C. A. 621; *Keith County, Neb., v. Citizens' Savings & Loan Ass'n*, 116 Fed. 13, 53 C. C. A. 525—holding that, by paying interest on bonds for a series of years, a municipality is estopped to question their regularity.

Findings—Necessity.—Cited in *Clay v. Hildebrand Bros. & Jones*, 34 Kan. 604, 9 Pac. 466, as authority in respect to any defect in the findings; *Crisfield v. Neal*, 36 Kan. 273, 13 Pac. 272, holding that error in failing to make a formal finding was immaterial; *Howell v. Redlon*, 44 Kan. 558, 24 Pac. 1109, holding that the omission of a finding that the petition in highway proceedings was a legal one was not reversible error; *School Dist. No. 3, Carbon County, v. Western Tube Co.*, 13 Wyo. 304, 80 Pac. 155, holding that the rendition of judgment without a formal finding was a mere irregularity, which was cured by a nunc pro tunc order.

Same—Not part of judgment.—Cited in *Butt v. Herndon*, 36 Kan. 370, 13 Pac. 580, holding that the findings or reasons stated by a justice of the peace were no part of the judgment.

Delegation of legislative power.—Cited in *State v. Hunter*, 38 Kan. 578, 17 Pac. 177, holding that the metropolitan police act is not invalid as delegating legislative power; *Smith v. Board of County Com'rs of Atchison County*, 81 Kan. 91, 105 Pac. 37, holding that a law providing extra allowance for boarding and lodging prisoners was valid, though operative only on a certain condition.

18 KAN. 186, MITCHELL v. LEAVENWORTH COUNTY COM'RS

Legislative power over counties.—Cited in note in 68 Am. Dec. 292, on mode of enforcing liability of counties and legislative power to modify or impair same.

18 KAN. 192, TOOTLE v. SAVAGE**18 KAN. 195, USHER v. HIATT, Same case on subsequent appeal, 21 Kan. 548**

Recovery for partial performance of contract.—Cited in Quigley v. Board of Com'rs of Sumner County, 24 Kan. 203, on measure of recovery for partial performance of a contract to do work.

Same—Filing to sustain recovery on quantum meruit.—Cited in Usher v. Hiatt, 21 Kan. 548, holding that under their petition plaintiffs could recover either upon special contract or upon quantum meruit.

Directing verdict.—Cited in Kelley v. Ryus, 48 Kan. 120, 29 Pac. 144, holding it error to direct a verdict for defendant, where plaintiff's evidence, if uncontradicted, was sufficient to entitle him to recover.

18 KAN. 206, DOUGHERTY v. PORTER, Same case on subsequent appeal, 22 Kan. 17

Time when actions triable.—Cited in Lanone v. McKinnon & Co., 19 Kan. 408, on time when actions are triable, and computation of time; Kansas & New Mexico Land & Cattle Co. v. Thompson, 57 Kan. 792, 48 Pac. 34, on the time when the case was triable, without deciding the point.

Computation of time.—Cited in Neltzel v. Hunter, 19 Kan. 221, holding that, where the summons was returnable March 23d, it was not error to set the answer day for April 12th; Reed v. Sexton's Adm'rs, 20 Kan. 195, holding that the requirement that the herd law order shall be published for four consecutive weeks was satisfied by insertion in four issues of a weekly newspaper; Garvin v. Jennerman, 20 Kan. 371, holding that a deposition could not be used which was not filed one clear day before trial; English v. Williamson, 34 Kan. 212, 8 Pac. 214, holding that, where the last day for redemption came on Sunday, the party could redeem on the next day; Schultz v. Hine, 39 Kan. 834, 18 Pac. 221, holding that, in computing the three days for service of a summons out of justice court, the day of service must be excluded and the day of appearance included; Leavenworth Coal Co. v. Barber, 47 Kan. 29, 27 Pac. 114, holding that a statute took effect at the precise time of its publication, and the hour could be shown; Howbert v. Heyle, 47 Kan. 58, 27 Pac. 116, holding that service on the 18th was 10 days prior to the hearing on the 28th; City of Kansas City v. Gibson, 66 Kan. 501, 72 Pac. 222, holding that in computing time the day on which an act is to be done is included.

Cited in note in 49 L. R. A. 221, on first and last days in computation of time.

18 KAN. 210, STATE v. CRISBY**18 KAN. 212, ST. LOUIS, L. & W. R. CO. v. MILLER****18 KAN. 215, KERMEYER v. KANSAS PAC. RY. CO.**

Appealable orders.—Cited in Branch v. American Nat. Bank, 57 Kan. 608, 47 Pac. 516, holding that an order setting aside approval and reopening consideration of an assignee's report was not reviewable; Shurtleff v. Board of County Com'rs of Chase County, 63 Kan. 645, 66 Pac. 645, holding that an order vacating a judgment could not be reviewed while the case was yet pending below; McMaster v. People's Bank of Edmond, 13 Okl. 326, 73 Pac. 646, holding an appeal does not lie from an order of the district court dismissing an appeal from the probate

court; *Fisk v. Henarie*, 15 Or. 89, 18 Pac. 760, holding an order granting a new trial was not appealable.

Cited in note in 60 Am. Dec. 431, on final and interlocutory judgments and decrees.

18 KAN. 216, *BRADFORD v. PAULY*

Indorsers.—Cited in *Cornett v. Hafer*, 43 Kan. 60, 22 Pac. 1015, holding that both the payee and a third person, indorsing a note before its transfer to another party, were ordinary indorsers; *Commercial Nat. Bank v. Atkinson*, 62 Kan. 775, 64 Pac. 617, holding that one whose signature appeared on the back of a note below that of the payee was an indorser.

Same—Necessity of notice.—Cited in *Bruley v. Buchanan*, 21 Kan. 274, holding that an accommodation indorser, to whom no notice was given, was discharged; *Malott v. Jewett*, 1 Kan. App. 14, 41 Pac. 674, holding petition insufficient which did not allege demand, notice of nonpayment, and protest, or state reason why not made.

Same—Blank indorsement.—Cited in note in 29 Am. Dec. 290, on blank indorsement of note by stranger.

18 KAN. 220, *LA RUE v. GILBERT*

Homestead—Abandonment.—Cited in *Brury v. Smith*, 8 Kan. App. 52, 53 Pac. 74, holding that a widow's temporary removal from the homestead, leaving her cooking utensils, was not an abandonment.

Same—Incumbrances.—Cited in *Re Bailey*, 176 Fed. 990, holding the fact that the bankrupt's homestead was mortgaged to certain creditors did not make it assets to be administered in bankruptcy; *Sproul v. Atchison Nat. Bank*, 22 Kan. 336, holding that it is not illegal to relieve the homestead by incumbering other property.

Same—Marshaling securities.—Cited in *Frick Co. v. Ketels*, 42 Kan. 527, 22 Pac. 590, 16 Am. St. Rep. 507, holding that a judgment debtor could require that a mortgage on his homestead and other property be enforced first out of the other property.

18 KAN. 223, *WATERSON v. DEVOS*

Taxation—Right to acquire tax title.—Cited in *McLaughlin v. Acom*, 58 Kan. 514, 50 Pac. 441, holding that a mortgagee may acquire a tax title to the premises; *Shrigley v. Black*, 66 Kan. 213, 71 Pac. 301, holding that a mortgagor's grantee could not defeat the mortgage by purchase at a tax sale; *Gibson v. Gilman*, 71 Kan. 320, 80 Pac. 587, holding that the grantees of the purchaser at a sheriff's sale, who failed to pay the taxes, could not take advantage of his default; *Cones v. Gibson*, 77 Kan. 425, 94 Pac. 998, 16 L. R. A. (N. S.) 121, on the right of a guarantor to purchase at a tax sale without deciding the point; *Baldwin v. Gibson*, 85 Kan. 267, 116 Pac. 827, holding that neither a mortgagee nor his assignee were precluded from taking an assignment of a tax sale certificate; *Jones v. Black*, 18 Okl. 344, 88 Pac. 1052, 90 Pac. 422, 11 Ann. Cas. 753, holding that a mortgagee may purchase the mortgaged premises at a tax sale (dissenting opinion expressing a contrary view).

Cited in notes in 15 Am. Dec. 687; 75 Am. St. Rep. 244—on who may purchase at tax sale.

Same—Void tax deed.—Cited in *Larkin v. Wilson*, 28 Kan. 513, holding that a tax deed was void which recited that the county was a competitive bidder; *Mathews v. Blake*, 16 Wyo. 116, 92 Pac. 242, 27 L. R. A. (N. S.) 839, holding that a tax deed, not acknowledged as required, was void on its face.

Same—Limitations not running.—Cited in *Coulter v. Stafford*, 56 Fed. 504, 6 C. C. A. 18; *Richards v. Thompson*, 43 Kan. 209, 23 Pac. 106; *Lowenstein v.*

Sexton, 18 Okl. 322, 90 Pac. 410; Keller v. Hawk, 19 Okl. 407, 91 Pac. 778; Redfield v. Parks, 132 U. S. 239, 10 Sup. Ct. 83, 33 L. Ed. 327—holding that limitations did not run in favor of a tax deed void on its face; **Steinmuller v. Kansas City, 8 Kan. App. 45, 44 Pac. 600**, holding that limitations do not run against an action to set aside a void assessment.

Distinguished in O'Keefe v. Willenbeck, 15 Okl. 437, 83 Pac. 540, holding that a properly acknowledged tax deed, which is not void on its face, cannot be set aside, unless action therefor be commenced within one year.

Cited in note in 8 L. R. A. (N. S.) 357, on effect of void proceedings for sale of realty to start statute running in favor of purchaser in possession; in **27 L. R. A. (N. S.) 344, 345, 348, 349, 350, 356**, as to whether void tax deed sets in motion special statutes of limitations governing actions to recover lands sold for taxes; in **88 Am. St. Rep. 727**, on color of title.

Same—Taxes on mortgaged property.—Cited in **Seaman v. Huffaker, 21 Kan. 254**, holding that a mortgagee was entitled to judgment against the land for taxes which he was compelled to pay to preserve his mortgage lien; **Kerr v. Hoskinson, 5 Kan. App. 193, 47 Pac. 172**, holding that taxes are to be first satisfied out of the proceeds of a mortgage sale.

Same—Purchase not a payment of taxes.—Cited in **Bender v. King, 111 Fed. 60**, holding that a purchase of property at delinquent tax sales was not a payment of taxes.

Same—Validity of redemption law.—Cited in **Beverly v. Barnitz, 55 Kan. 466, 42 Pac. 725, 31 L. R. A. 74, 49 Am. St. Rep. 257**, holding that the "redemption law," whether applied to existing or future contracts, does not impair the obligation of contracts.

Effect of mortgage.—Cited in **Seckler v. Delfs, 25 Kan. 159**, holding that a stipulation in a real estate mortgage for possession on conditions broken did not transfer to the mortgagee title to the rents and profits; **Southern Kansas R. Co. v. Sharpless, 62 Kan. 841, 62 Pac. 662**, holding that a mortgage did not create a lien on a vacated street not described in it.

Cross-petition in error.—Cited in **Maynes v. Veale, 20 Kan. 374**, on the necessity of filing cross-petition in error to obtain review; **Perley v. Taylor, 21 Kan. 712**, holding that, the defendants having filed no cross-petition alleging error, the judgment could not be modified so as to allow them a sum reported due them by the referee.

18 KAN. 236, ENDRESS v. ENT

Liability on bond to discharge attachment.—Cited in **Moffit v. Garrett, 23 Okl. 398, 100 Pac. 533, 32 L. R. A. (N. S.) 401, 138 Am. St. Rep. 818**, holding that an obligor on a bond to discharge an attachment was liable, regardless of whether the attachment was rightfully issued.

Distinguished in Lehman v. Berdin, Fed. Cas. No. 8,215, holding that under the laws of Arkansas there can be no recovery on defendant's bond to regain possession of the attached property, unless the attachment be sustained.

Dissolution of attachment.—Cited in note in **123 Am. St. Rep. 1050**, on proceedings to dissolve attachments.

18 KAN. 240, MUNSON v. MORRIS COUNTY COM'RS

18 KAN. 243, ABEEL v. HARRINGTON

18 KAN. 245, ATCHISON, T. & S. F. R. CO. v. RETFORD

Exceptions to instructions.—Cited in **Bard v. Elston, 31 Kan. 274, 1 Pac. 565**, holding that a general exception to "all and each" of the instructions was sufficient; **Markley v. Kirby, 6 Kan. App. 494, 50 Pac. 953**, holding that ex-

ceptions to the instructions as a whole, and to each and every instruction separately, and to each and every part thereof, were sufficient; *Dunham v. Holloway*, 3 Okl. 244, 41 Pac. 140, holding that an exception to the giving of the instructions, and each of them, was sufficient; *Rhea v. United States*, 6 Okl. 249, 50 Pac. 992, holding that where "to the giving of each and every and all of said instructions * * * the defendant excepted separately at the time and still excepts," the exception was sufficient; *Snyder v. Stribbling*, 18 Okl. 168, 89 Pac. 222, holding that an exception to "each and every one" of certain instructions was sufficient.

Review of instructions.—Cited in *Head v. Dyson*, 31 Kan. 74, 1 Pac. 258, holding that, on review of an objection that the court erred in not instructing on a special fact, the entire testimony should be presented; *Lorie v. Adams*, 51 Kan. 692, 33 Pac. 599, holding that the petition in error and brief presented errors in the instructions for review.

Instruction on credibility of witnesses.—Cited in *Garvin v. Jennerson*, 20 Kan. 371, holding erroneous an instruction to disregard the whole of the testimony of any witness intentionally testifying falsely in any material respect.

Negligence—Evidence of subsequent repairs.—Cited in *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176, holding that evidence was admissible to show that defendant enlarged the capacity of the waterway after the accident; *Atchison, T. & S. F. R. Co. v. McKee*, 37 Kan. 592, 15 Pac. 484, holding that evidence of subsequent repairs was admissible to establish the fact of the defect at the time of injury; *City of Olathe v. Mizae*, 48 Kan. 435, 29 Pac. 754, 30 Am. St. Rep. 308, holding that the admission of evidence that the city marshal placed a light in the ditch subsequent to the accident was immaterial, though the city's negligence was not in issue; *Harter v. Atchison, T. & S. F. R. Co.*, 55 Kan. 250, 38 Pac. 778, holding that there was some evidence to show that by the exercise of ordinary care the defect could have been discovered and remedied.

Cited in note in 32 L. R. A. (N. S.) 1137, on admissibility of evidence of condition before and after accident of property whose defects are alleged to have caused injury.

18 KAN. 253, *HIXON v. GEORGE*

Cited in *Drinkwater v. Sauble*, 46 Kan. 170, 26 Pac. 438.

Jury trial in equity cases.—Cited in *City of Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265, holding that the court may ordinarily decline to submit a question of fact to a jury in an injunction case; *Yeamans v. James*, 27 Kan. 195, holding that it is discretionary with the court in an equity case whether issues of fact shall be submitted to a jury; *Carpenter v. Carpenter*, 30 Kan. 712, 2 Pac. 122, 46 Am. Rep. 108, holding that refusal of a jury trial in a divorce case was not an abuse of discretion; *MacLellan v. Seim*, 57 Kan. 471, 46 Pac. 959, holding that the court may order a jury trial in an equity case.

Homestead.—Cited in *Garlinghouse v. Mulvane*, 40 Kan. 428, 19 Pac. 798, holding that an attachment of the homestead should have been dissolved; *Elwell v. Hitchcock*, 41 Kan. 130, 21 Pac. 109, holding a homestead exempt from forced sale for the owner's debts.

Same—What constitutes.—Cited in *Gilworth v. Cody*, 21 Kan. 702, holding that premises purchased and built on for use as a homestead were exempt; *First Nat. Bank v. Warner*, 22 Kan. 537, holding that leased premises were still the lessor's homestead.

Distinguished in *Mouriquand v. Hart*, 22 Kan. 594, 31 Am. Rep. 209, holding that a gristmill built upon a small part of the farm was not exempt as a part of the homestead.

Cited in note in 13 L. R. A. (N. S.) 170, on right of husband to claim homestead as exempt where title vested in wife.

Same—Abandonment.—Cited in *Hogan v. Manners*, 23 Kan. 551, 33 Am. Rep. 199, holding that the homestead character of a building was not lost by the use of one or two rooms for business purposes; *Shirack v. Shirack*, 44 Kan. 653, 24 Pac. 1107, holding that the guardian's removal of an infant and leasing of the homestead did not constitute an abandonment of the infant's homestead right; *Pitney v. Eldridge*, 58 Kan. 215, 48 Pac. 854, holding temporary nonoccupancy not an abandonment; *Withers v. Love*, 72 Kan. 140, 83 Pac. 204, 3 L. R. A. (N. S.) 514, holding that a homestead was not abandoned by the husband's imprisonment while his wife was in an asylum; *Shattuck v. Weaver*, 80 Kan. 82, 101 Pac. 649, holding that temporary absence did not constitute an abandonment.

Distinguished in *Atchison Savings Bank v. Wheeler's Adm'r*, 20 Kan. 625, holding that the acquirement of a new homestead was an abandonment of the old.

Cited in notes in 60 Am. Dec. 600; 102 Am. St. Rep. 390, 397, 400—on abandonment of homestead.

Conveyance or incumbrance of exempt property.—Cited in *Dayton v. Donart*, 22 Kan. 256, holding that a widow could sell the homestead free from ordinary debts, of the intestate; *Sproul v. Atchison National Bank*, 22 Kan. 336, holding that parties had a right to relieve their homestead by incumbering other property; *Kershaw v. Willey*, 22 Okl. 677, 98 Pac. 908, holding that the wife's act in signing a deed to the homestead was sufficient consideration for the payment to her of the proceeds of the sale.

Same—Fraud as to creditors.—Cited in *First Nat. Bank of Humboldt, Neb., v. Glass*, 79 Fed. 706, 25 U. C. A. 151, holding that it is not a fraud on creditors for a debtor to use nonexempt property to procure a homestead; *Lahrs v. Hancock*, 6 Ariz. 840, 57 Pac. 605; *Wilson v. Taylor*, 49 Kan. 774, 31 Pac. 697—holding that a creditor cannot question the conveyance of a homestead; *G. I. Mull & Son v. Jones*, 33 Kan. 112, 5 Pac. 388, holding that the sale of an exempt team was not a fraud upon creditors; *Winter v. Ritchie*, 57 Kan. 212, 45 Pac. 595, 57 Am. St. Rep. 331, holding that conveyance of a homestead was not a fraud on creditors; *Hopper v. Arnold*, 74 Kan. 250, 85 Pac. 469, holding that the conveyance of the homestead was not ground for attachment; *Merchants' Nat. Bank of Kansas City v. Kopplin*, 1 Kan. App. 599, 42 Pac. 263, holding that a creditor could not inquire into the debtor's good faith in deeding the homestead to his wife.

18 KAN. 261, LEAVENWORTH, L. & G. R. CO. v. COOK

Ruling on motion for new trial.—Cited in *Manhattan, A. & B. R. Co. v. Keeler*, 32 Kan. 163, 4 Pac. 143; *Starrett v. Shaffer*, 8 Kan. App. 793, 61 Pac. 817—holding that it is error to overrule pro forma a motion for a new trial.

Railroads—Fires.—Cited in *Manhattan, A. & B. R. Co. v. Keeler*, 32 Kan. 163, 4 Pac. 143, holding a railroad company not liable for a purely accidental fire; *St. Louis & S. F. Ry. Co. v. Hoover*, 3 Kan. App. 577, 43 Pac. 854, holding a railroad company not liable for an unavoidable escape of fire.

Cited in note in 38 Am. Dec. 70, on liability of railroad company for fires.

Same—Presumption of negligence.—Cited in note in 15 L. R. A. 41, on presumption of negligence from occurrence of accidents.

18 KAN. 266, BLAKE v. JOHNSON COUNTY COMRS

Treasurer—Collection of debts due to municipality.—Cited in *Smith v. Collins*, 42 Kan. 259, 21 Pac. 1658, on the point that the county treasurer is the proper party to collect a judgment on a forfeited recognizance; *Raff v. State*, 48 Kan. 44, 28 Pac. 986, holding that the entry, on application of the state, of an order of revivor of a judgment on a forfeited recognizance, was proper, and not in violation of an injunction granted; *Lee v. Roberts*, 3 Okl. 106, 41 Pac. 595, holding that liquor licenses are payable in money, unless otherwise provided.

Distinguished in *Bardsley v. Sternberg*, 17 Wash. 243, 49 Pac. 400, on the authority of a city treasurer.

Same—Payment of money.—Cited in note in 67 Am. Dec. 370, on what will exonerate public officers from payment of money once in their custody.

18 KAN. 271, FRETWELL v. CITY OF TROY

Licenses—Power of municipalities.—Cited in *McGrath v. City of Newton*, 29 Kan. 364, holding that an ordinance levying a license tax on more than 20 businesses was not invalid as to all; *Tulloss v. City of Sedan*, 31 Kan. 165, 1 Pac. 285, holding valid a license tax on druggists; *Yount v. Denning*, 52 Kan. 629, 35 Pac. 207, holding that an ordinance imposing a license tax on real estate agents was valid; *City of Topeka v. Jones*, 74 Kan. 164, 86 Pac. 162, 87 Pac. 1133, holding that a city ordinance imposing a license tax on express companies was valid; *City of Lebanon v. Zanditon*, 75 Kan. 273, 89 Pac. 10, holding that cities may punish a violation of an ordinance taxing transient merchants.

Distinguished in *City of Lyons v. Cooper*, 39 Kan. 324, 18 Pac. 296, holding an ordinance void which levied a license tax on druggists for destruction and not for revenue.

Same—Constitutional restrictions.—Cited in *Commissioners of Ottawa County v. Nelson*, 19 Kan. 234, 27 Am. Rep. 101, on the construction of the equal and uniform taxation clause of the Constitution; *Francis v. Atchison, T. & S. F. R. Co.*, 19 Kan. 303, holding that a statute providing for taxing railroad property in unorganized counties was valid; *City of Newton v. Atchison*, 31 Kan. 151, 1 Pac. 288, 47 Am. Rep. 486, holding that there is no constitutional inhibition on the legislative power to levy and collect license taxes, or to delegate such power to municipal corporations; *Marion & M. R. Co. v. Champlin*, 37 Kan. 682, 16 Pac. 222, holding that a statute authorizing a tax to be levied against the property of residents only was void; *Stull v. De Mattos*, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892, holding that the constitutional requirement of equality and uniformity does not apply to license taxes.

Cited in note in 129 Am. St. Rep. 260, 263, 268, 280, on constitutional limitations on power to impose license or occupation taxes.

Same—Delegation of power of Legislature.—Cited in *City of Newton v. Atchison*, 31 Kan. 151, 1 Pac. 288, 47 Am. Rep. 486, holding that the Legislature may authorize the collection of license taxes, or may delegate like authority to a municipal corporation; *In re Martin*, 62 Kan. 638, 64 Pac. 43, holding that the amount and method of imposing license taxes is left to legislative discretion.

Same—Amount.—Cited in *Re Chipchase*, 56 Kan. 357, 43 Pac. 264, holding that an annual license of \$10 and \$12 on telephones was not excessive as a matter of law; *City of Caldwell v. Prunelle*, 57 Kan. 511, 46 Pac. 949, holding that a city may exact a larger license of traveling photographers than of residents; *City of Kansas City v. Overton*, 68 Kan. 560, 75 Pac. 549, holding that a city license of \$15 on hucksters was valid; *City of Lebanon v. Zanditon*, 75 Kan. 273, 89 Pac. 10, holding that a license tax is not unjust or unreasonable, unless so excessive as to be restrictive or oppressive.

Cited in note in 30 L. R. A. 425, 435, 438, on limit of amount of license fees.

Same—Time of expiration.—Cited in *State v. Simmons*, 21 Kan. 685, holding that dramshop licenses could be made to expire on or at any time prior to the 1st of May next after being issued.

Injunction against criminal proceedings.—Cited in note in 21 L. R. A. 87, on injunction against criminal proceedings.

18 KAN. 277, HALL'S HEIRS v. DODGE

Ejectment—Right to maintain.—Cited in *Kelso v. Norton*, 65 Kan. 778, 70 Pac. 896, 93 Am. St. Rep. 308, holding that a mortgagor could not maintain ejectment against his mortgagee until the debt was paid.

Cited in note in 18 L. R. A. 782, on what title or interest will support ejectment.

Same—Pleading and proof.—Cited in *Mastin v. Gray*, 19 Kan. 458, 27 Am. Rep. 149, holding that the defendant in ejectment may plead his defense in general terms; *Clayton v. School District No. 1*, 20 Kan. 256; *Armstrong v. Brownfield*, 32 Kan. 116, 4 Pac. 185—holding that the defendant in ejectment may, under a general denial, show either legal or equitable title in himself; *Eastman v. Gurrey*, 15 Utah, 410, 49 Pac. 310, holding that, under a general denial in ejectment, the defendant may introduce any legal proof to defeat plaintiff's title.

Taxation—Sale of separate tracts.—Cited in *Emerson v. Shannon*, 23 Colo. 274, 47 Pac. 302, 58 Am. St. Rep. 232; *Mathews v. Buckingham*, 22 Kan. 106; *Long v. Wolf*, 25 Kan. 522; *Wyer v. La Roque*, 51 Kan. 710, 33 Pac. 547—holding a tax deed void which shows the sale en masse of several noncontiguous tracts for a gross sum; *Corbin v. Inslee*, 24 Kan. 154, holding a tax deed void on its face which showed the sale of an undivided interest; *Keene Syndicate v. Denney*, 9 Kan. App. 599, 58 Pac. 242, holding that the several lots of a block may be described in a deed as a block.

Distinguished in *Watkins v. Inge*, 24 Kan. 612, holding that a tax deed for several tracts was not void, where it showed separate sales, taxes, and considerations; *Cartwright v. McFadden*, 24 Kan. 662, holding that a tax deed describing several lots as sold in bulk was not void on its face; *Dodge v. Emmons*, 34 Kan. 732, 9 Pac. 951, holding that contiguous tracts used as a single tract may be sold together; *Cross v. Herman*, 74 Kan. 554, 87 Pac. 686, holding that a tax deed was not void on its face in showing the sale together of two contiguous tracts; *O'Keefe v. Dillenbeck*, 15 Okl. 437, 83 Pac. 540, holding that a tax deed was not void on its face where it did not appear that the tracts described did not adjoin each other.

Limitation of actions—Void instruments.—Cited in *De Foresta v. Gast*, 20 Colo. 307, 38 Pac. 244; *Gibson v. Kueffer*, 69 Kan. 534, 77 Pac. 282; *Lowenstein v. Sexton*, 18 Okl. 322, 90 Pac. 410—holding that limitations did not run in favor of a tax deed void on its face; *O'Keefe v. Behrens*, 73 Kan. 469, 85 Pac. 555, 8 L. R. A. (N. S.) 354, 9 Ann. Cas. 867 (dissenting opinion), holding that the statute of limitations does not apply to a void administrator's sale; *Harris v. Defenbaugh*, 82 Kan. 765, 109 Pac. 681, holding that a tax deed holder cannot invoke the aid of laches.

Cited in note in 8 L. R. A. (N. S.) 161, on applicability of statute limiting time for attack on tax sale to sale under proceedings void for jurisdictional defects, under which no possession taken; in 27 L. R. A. (N. S.) 345, 348, 355, as to whether void tax deed sets in motion special statutes of limitations governing actions to recover lands sold for taxes.

Color of title.—Cited in note in 88 Am. St. Rep. 727, on color of title.

18 KAN. 263, KANSAS INS. CO. v. CRAFT

18 KAN. 288, GROSS v. BOGARD

Property in custodia legis—Rights of third persons.—Cited in *Reiley v. Haynes*, 38 Kan. 259, 16 Pac. 440, 5 Am. St. Rep. 787, holding that a third party could maintain replevin against an officer; *United States Electric Lighting Co. v. Martin*, 43 Kan. 526, 23 Pac. 586, holding that a receiver for a company may exercise control over property taken by it in a pending action of replevin; *Karr y. Stahl*, 75 Kan. 387, 89 Pac. 660, holding that replevin would not lie to recover property taken under a void ordinance.

Distinguished in *McKinney v. Purcell*, 28 Kan. 446, holding that goods held by virtue of a replevin bond could not be attached.

Cited in note in 25 Am. St. Rep. 257, on replevin against officer; in 5 L. R. A. (N. S.) 496, on right of one not a party to original replevin to recover property

seized; in 8 L. R. A. (N. S.) 219, 220, 222, on right of one from whom property replevied to maintain similar action for its recovery.

18 KAN. 291, MAYBERRY v. SIVEY

Liability for injuries.—Cited in Mayberry v. Sivey, 21 Kan. 679, as authority for affirming plaintiff's judgment in an action for personal injuries.

Competency of witness.—Cited in Lee v. Missouri Pac. R. Co., 67 Kan. 402, 73 Pac. 110, 63 L. R. A. 271, holding that one ignorant of the meaning of an oath is not a competent witness.

18 KAN. 296, ILES v. ELLEDGE

Judgment in rem.—Cited in Smith v. Kreager, 6 Kan. App. 271, 51 Pac. 813, holding that a judgment in rem was not transformed into a judgment in personam by a subsequent appearance.

Tender as a condition precedent.—Cited in Close v. Dunn, 24 Kan. 372, as authority on necessity of tender of deed; Morrison v. Terrell, 27 Kan. 326, holding that a suit on a note and a bond for a deed and to foreclose a vendor's lien could not be maintained without a tender of conveyance; Sanford v. Bartholomew, 33 Kan. 38, 5 Pac. 429, holding that a tender of the purchase money was a condition precedent to an action for specific performance; Soper v. Gabe, 35 Kan. 646, 41 Pac. 969; Evans v. Jacobitz, 67 Kan. 249, 72 Pac. 848; Brentnall v. Marshall, 10 Kan. App. 488, 63 Pac. 93—holding that action for the purchase money could not be maintained until a tender of conveyance had been made; Berry v. Fairmount Town Co., 4 Kan. App. 432, 46 Pac. 28, as to necessity of a tender of conveyance before suit for breach of the contract; Sayre v. Mohney, 35 Or. 141, 56 Pac. 526, holding that a tender of the deed and payment are mutually dependent covenants.

Distinguished in State v. Thompson, 22 Kan. 215, holding that payment was not dependent upon the tender of a deed or patent.

18 KAN. 300, NEW YORK LIFE INS. CO. v. MCGOWAN

Estoppel to deny recitals in instrument.—Cited in Wichita Savings Bank v. Atchison, T. & S. F. R. Co., 20 Kan. 519, holding that a railroad company was estopped to deny the truth of recitals of its bill of lading to the injury of an innocent party.

Insurance—Waiver of default in payment of premiums.—Cited in Mound City Mut. Life Ins. Co. v. Twining, 19 Kan. 349, on waiver as to time for payment of insurance premiums.

Same—Acts of agents.—Cited in Hardwick v. State Ins. Co., 20 Or. 547, 26 Pac. 840, holding an insurance company responsible for the acts of its agents within the scope of their apparent authority.

18 KAN. 320, GREEN v. EMBRY

18 KAN. 324, TENNENT v. BATTEY

Creditors' bills—Conditions precedent.—Cited in Aigeltinger v. Einstein, 143 Cal. 609, 77 Pac. 669, 101 Am. St. Rep. 131; Ferguson v. Bank of Kansas City, 25 Kan. 333; Simpson v. Voss, 31 Kan. 227, 1 Pac. 601; Doggett, Bassett, Hills & Co. v. Bell & Stevens, 32 Kan. 298, 4 Pac. 292; Wafer v. Harvey County Bank, 36 Kan. 292, 18 Pac. 209; Smith v. Board of Com'rs of Bourbon County, 43 Kan. 619, 23 Pac. 642; Burlington Nat. Bank v. Beard, 55 Kan. 773, 42 Pac. 320; State Bank v. Chatten, 59 Kan. 303, 52 Pac. 893; Harrison v. Shaffer, 60 Kan. 176, 55 Pac. 881; Ellis v. L. Hays Saddlery & Leather Co., 65 Kan. 174, 69 Pac. 165; Nelson v. Stull, 65 Kan. 585, 68 Pac. 617, 70 Pac. 590; Parmenter v. Lomax, 68 Kan. 61, 74 Pac. 634; Breikreutz v. National Bank of Hol-

ton, 70 Kan. 698, 79 Pac. 686; *Taylor v. Riggs*, 8 Kan. App. 398, 87 Pac. 44; *Talbott v. Randall*, 8 N. M. 367, 5 Pac. 533—on the question as to whether equity will aid mere general creditors whose claims are not reduced to judgment.

Cited in note in 90 Am. Dec. 290, on creditors' bills and proceedings in equity in aid of execution; in 66 Am. St. Rep. 286, 288, 289, on demands which will support creditors' bill; in 23 L. R. A. (N. S.) 39, on conditions precedent to equitable remedies of creditors.

18 KAN. 381, CITY OF KANSAS v. KANSAS PAC. RY. CO.

Appeal—Effect—Dismissal.—Cited in *Kansas City, Ft. S. & G. R. Co. v. Hammond*, 25 Kan. 208; *Central B. U. P. R. Co. v. Atchison, T. & S. F. R. Co.*, 28 Kan. 453; *State v. Curtis*, 29 Kan. 394; *Boles v. City of Hutchinson*, 83 Kan. 618, 112 Pac. 129—on effect of appeal and dismissal of appeal.

Eminent domain.—Cited in note in 11 Am. Dec. 507, on corporations taking land.

Same—Right to reclaim deposit.—Cited in *Atchison, T. & S. F. R. Co. v. Wilson*, 66 Kan. 233, 69 Pac. 342, holding that a railroad company may reclaim its deposit in condemnation proceedings after abandoning its intention to take the land and giving notice thereof.

18 KAN. 336, NORTHERN KANSAS TOWN CO. v. OSWALD

Consideration—Presumption.—Cited in *Kansas Pac. R. Co. v. Hopkins*, 18 Kan. 494; *Electric Plaster Co. v. Blue Rapids City Township*, 77 Kan. 580, 96 Pac. 68; *Stern v. Deutsch*, 9 Kan. App. 218, 59 Pac. 687; *Olston v. Oregon Water Power & Ry. Co.*, 52 Or. 343, 96 Pac. 1095, 97 Pac. 538, 20 L. R. A. (N. S.) 915—on presumption as to consideration supporting written instrument.

18 KAN. 340, RASURE v. HART, 26 AM. REP. 772

Exemptions.—Cited in *Donmyer v. Donmyer*, 43 Kan. 444, 23 Pac. 627, holding that the widow and children could hold as exempt the wagon, plows, and harrow, in addition to "other farming utensils . . . not exceeding in value \$300"; *Brady v. Banta*, 46 Kan. 131, 26 Pac. 441; *Rockwood v. St. John's Estate*, 10 Okl. 476, 62 Pac. 277—holding that exemption laws are to be liberally construed; *Naill v. Kansas Farmers' Fire Ins. Co.*, 47 Kan. 223, 27 Pac. 854, holding that an insurance company's property, which was specifically appropriated by statute for the payment of a certain class of claims, was exempt from levy for the payment of other claims; *Williams v. Vincent*, 70 Kan. 593, 79 Pac. 121, 68 L. R. A. 634, 109 Am. St. Rep. 469, holding a bowling alley not exempt.

Cited in note in 32 Am. Rep. 30, on who is a "householder" or "head of family."

18 KAN. 345, SHELLABARGER v. BINNS

Application of payments.—Cited in *Schuelenburg & Boeckler v. Martin*, 2 Fed. 747, holding that, in the absence of any direction, the chancellor could apply a payment to the unsecured portion of the account; *Doolittle v. Atchison, T. & S. F. R. Co.*, 20 Kan. 329, on doctrine of application of payments; *Fox v. Bank of Kansas City*, 30 Kan. 441, 1 Pac. 789, holding that money drawn out by a depositor was a payment of the oldest deposits and discounts; *King v. Sutton*, 42 Kan. 600, 22 Pac. 695, holding that, in the absence of any direction, the creditor could apply the payment to an individual debt rather than to a firm debt; *Gilbert v. Board of Education of the City of Newton*, 45 Kan. 31, 25 Pac. 226, 23 Am. St. Rep. 700, holding that certain deposits made in a bank operated in payment of the first deficit in the school fund; *State v. United States Fidelity & Guaranty Co.*, 81 Kan. 660, 106 Pac. 1040, 26 L. R. A. (N. S.) 865, as to application of payments to secured and unsecured debts.

18 KAN. 353, MARCY v. FRIES**18 KAN. 356, JENKS v. SCHOOL DIST.**

Suretyship obligations—Parties in actions.—Cited in *Hays v. Closon*, 20 Kan. 120, holding that failure to serve the principal on a stay bond in forcible detainer proceedings was no objection to a judgment against the sureties; *Swerdfeger v. State*, 21 Kan. 475, holding that a surety may be sued alone on a recognizance; *Kirkpatrick v. Gray*, 48 Kan. 434, 23 Pac. 633, holding that the holder of a note could sue the surety alone; *Schilling v. Black*, 49 Kan. 552, 31 Pac. 143, holding that the constable and his sureties were properly joined in an action on his bond.

Cited in note in 43 L. R. A. 170, on effect of judgment in action against part of obligors on joint or joint and several contract upon liability of others.

Bill of exceptions.—Cited in *Evans v. Stettinisch*, 149 U. S. 605, 13 Sup. Ct. 931, 37 L. Ed. 866, holding that an affidavit not incorporated in the bill of exceptions was not part of the record; *Madden v. Riedel*, 71 Kan. 176, 80 Pac. 45, on what is required to be included in the bill of exceptions to a justice's ruling on a motion to quash; *Bruce v. Casey-Swasey Co.*, 13 Okl. 554, 75 Pac. 280, holding that affidavits are not part of the record, unless made part of the bill of exceptions or included in the case-made.

18 KAN. 361, REYNOLDS v. QUAELY

Substitution of parties.—Cited in *Fischer v. Sheldley*, 78 Kan. 610, 97 Pac. 800, holding that the proceeds of a judgment were held by an administrator of the deceased plaintiff in trust for plaintiff's assignee; *Smith v. Harrington*, 3 Wyo. 503, 27 Pac. 803, holding that the court had discretion to determine whether a transferee's application to be substituted as a party should be granted.

Time of foreclosure sale.—Cited in *Pierce v. Butters*, 21 Kan. 124, holding that a judgment ordering immediate sale was erroneous, where the mortgage stated "appraisement waived"; *Bashor & Marx v. Nordyke & Marmon Co.*, 25 Kan. 222, holding that, where the foreclosure judgment ordered sale without appraisement, it was error to direct an execution within six months; *Hancock v. Youree*, 25 Okl. 460, 106 Pac. 841, holding that a mortgage foreclosure sale before six months without appraisement was void.

18 KAN. 365, FIELDS v. SHERRILL

Subrogation of surety.—Cited in *Keel v. Levy*, 19 Or. 450, 24 Pac. 253, holding that, where a surety pays the debt, he is subrogated to the creditor's rights.

18 KAN. 369, BARTLETT v. CHOUTEAU INS. CO.

Foreign corporation—Subscription to stock.—Cited in note in 29 L. R. A. (N. S.) 92, 93, on enforceability of subscription to stock of foreign corporation that has not complied with local laws.

18 KAN. 371, POWELL v. POWELL, 26 AM. REP. 774

Divorce—Impotency.—Cited in *Bunger v. Bunger*, 85 Kan. 564, 117 Pac. 1017, holding on impotency as ground for divorce.

Cited in note in 116 Am. St. Rep. 242, on impotency as ground for divorce.

Same—Insanity.—Cited in note in 34 L. R. A. 161, 164, on divorce for insanity.

Same—Alimony—Void marriage.—Cited in *Fuller v. Fuller*, 33 Kan. 532, 7 Pac. 241, on question of right to alimony where marriage is void.

Same—Effect of valid decree.—Cited in note in 65 Am. Dec. 355, on effect of valid decree of divorce.

Same—Cruelty.—Cited in note in 73 Am. Dec. 628, on cruelty as ground for divorce.

Void marriage.—Cited in notes in 2 Am. St. Rep. 293; 79 Am. St. Rep. 376, 377; 96 Am. St. Rep. 268—on void marriages.

Annulment of marriage.—Cited in note in 25 L. R. A. 801, on jurisdiction of chancery to decree nullity or dissolution of marriage.

Insanity—Effect.—Cited in *Gribben v. Maxwell*, 34 Kan. 8, 7 Pac. 584, 55 Am. Rep. 233, holding that a deed by a person not known to be insane could not be avoided by him, though insane, without a return of the consideration; *New England Loan & Trust Co. v. Spitler*, 54 Kan. 560, 38 Pac. 799; *Bethany Hospital Co. v. Philippi*, 82 Kan. 64, 107 Pac. 530, 30 L. R. A. (N. S.) 194—holding a deed by an insane person is void.

Cited in note in 40 L. R. A. 737, 744, on marriage when insane.

18 KAN. 362, *ORT v. PATRICK*

Review dependent on contents of record.—Cited in *Mastin v. Graham*, 20 Kan. 304, holding that, in the absence of the pleadings or any statement of their contents in the record, it could not be said that there was any substantial error; *Briggs v. Latham*, 36 Kan. 205, 13 Pac. 129, on failure to bring up the evidence.

18 KAN. 383, *MOHON v. HARKREADER*

Courts—Places of holding and equipment.—Cited in note in 22 L. R. A. 399, on power of courts to provide necessary places and equipment for their business; in 41 L. R. A. 564, on validity of proceedings in course of a trial outside of courtroom.

Officers—Territorial limitation of authority.—Cited in note in 33 L. R. A. 88, on power of officials to act, as determined by place of performance.

18 KAN. 386, *OLIPHANT v. ATCHISON COUNTY COM'RS*

Highways—Injunction to restrain opening.—Cited in *Carbon Coal & Mining Co. v. Drake*, 26 Kan. 345; *Hanselman v. Born*, 71 Kan. 573, 31 Pac. 192—holding that injunction would lie to restrain the unlawful opening of a road.

Cited in note in 7 L. R. A. (N. S.) 58, on injunctive relief as to fences or gates.

Same—Prescription—Homestead.—Cited in *Griswold v. Huffaker*, 47 Kan. 690, 28 Pac. 696, as to homestead right in a tract divided by a highway created by prescription.

Findings.—Cited in *State v. Eggleston*, 34 Kan. 714, 10 Pac. 3, holding that the finding of the board of commissioners upon a petition for removal of a county seat was not conclusive.

Jurisdiction to be shown by record.—Cited in *Asbell v. Edwards*, 63 Kan. 610, 66 Pac. 641, holding that the record must show the jurisdiction of the live stock sanitary commission to issue a quarantine order; *Hentzler v. Bradbury*, 5 Kan. App. 1, 47 Pac. 330, holding that the jurisdiction of the board of supervisors to lay out a road must be shown.

18 KAN. 399, *SCARBOROUGH v. SMITH*, Same case on subsequent appeal, 23 Kan. 65

Cited in *Smith v. Auld*, 31 Kan. 262, 1 Pac. 626 (appeal in related case); *Ritchie v. Will*, 9 Kan. App. 367, 58 Pac. 118.

Joinder of causes of action.—Cited in *Bradley v. Parkhurst*, 20 Kan. 462, holding that the question of adverse and paramount title may be litigated in an action to foreclose a mortgage; *Black v. Drake*, 28 Kan. 482, holding that causes of action for ejectment and for rents and profits may be joined; *Scantlin v. Allison*, 32 Kan. 376, 4 Pac. 618, holding that causes of action for rents and

profits and for ejectment may be united with one for partition; *Delehmutt v. Parrent*, 39 Kan. 548, 18 Pac. 712, as to the right to join an action for partition and one for possession; *Henry v. McKittrick*, 42 Kan. 485, 22 Pac. 576, holding that a petition for specific performance of a contract and for damages for refusal to perform, and praying for such relief in the alternative, stated but one cause of action; *Denton v. Fyfe*, 65 Kan. 1, 68 Pac. 1074, 93 Am. St. Rep. 272, holding that a joint tenant or tenant in common out of possession could not maintain partition against his cotenants without joining a cause for possession; *Union Pac. Ry. Co. v. Barnard & Leas Mfg. Co.*, 1 Kan. App. 23, 41 Pac. 201, as to settling in one action the entire controversy in respect to all parties interested; *Edde v. Pashpaho*, 5 Kan. App. 115, 48 Pac. 884, holding that actions for partition and for rents and profits may be joined; *Tootle v. Kent*, 12 Okl. 674, 73 Pac. 310, holding that causes of action for dissolution of a partnership and for damages could be joined, where they arose out of the same transactions connected with the subject of the action; *Aylesbury Mercantile Co. v. Fitch*, 22 Okl. 475, 99 Pac. 1089, 23 L. R. A. (N. S.) 573, holding that causes of action in tort and in contract could be joined.

Cited in note in 89 Am. Dec. 433, 434, on actions in which title to realty may be tried or questioned.

Partition—Who may maintain.—Cited in *Chandler v. Richardson*, 65 Kan. 152, 60 Pac. 168, holding that one out of possession could not maintain partition against one claiming title, unless he claimed title and right of possession to a portion or joined a cause of action for possession with his action for partition; *Howard v. Carter*, 71 Kan. 85, 80 Pac. 61, as to the right of one out of possession to maintain partition incidental to a suit to set aside deeds fraudulently obtained; *Johnson v. Brown*, 74 Kan. 348, 86 Pac. 503, holding that partition could be maintained by an owner of a half interest in fee simple against the owner of a life interest in the other half.

Cited in note in 67 Am. Dec. 707, on who may compel partition; in 20 L. R. A. 628, on right of one out of possession to partition.

Sufficiency of petition to state cause of action.—Cited in *Curtis v. Parker*, 29 Kan. 130, as authority for holding the petition in partition to be sufficient; *Hiatt v. Parker*, 29 Kan. 765, holding a petition not demurrable in failing to state the amount for which the plaintiff prayed judgment.

18 KAN. 410, GILLETT v. LYON COUNTY COM'RS

Liabilities of counties—Actions.—Cited in *Nichols v. Board of Com'rs of Shawnee County*, 76 Kan. 266, 91 Pac. 79, holding that a county attorney could recover for representing the county in a United States court though it was sitting in the same county; *Board of Com'rs of Finney County v. Board of Com'rs of Gray County*, 8 Kan. App. 745, 54 Pac. 1100, holding one county liable to another for money paid for keeping a prisoner; *Lockard v. Board of Com'rs of Decatur County*, 10 Kan. App. 310, 62 Pac. 547, holding that an action may be maintained against a board of county commissioners upon a domestic judgment against such board.

Same—Presentation of claim.—Cited in *Skinner v. Board of County Com'rs of Cowley County*, 63 Kan. 557, 66 Pac. 635, holding that plaintiff was not required to plead or prove presentation of his claim against the county.

Cited in note in 68 Am. Dec. 296, on mode of enforcing liability of counties and legislative power to modify or impair same.

Records—Entry, correction, and conclusiveness—Evidence aliunde.—Cited in *Kansas City, Ft. S. & G. R. Co. v. Tonta*, 29 Kan. 460, holding it proper to enter a nunc pro tunc order after six months to cure an irregularity in the entry of a tax levy; *State v. Eggleston*, 34 Kan. 714, 10 Pac. 8, holding that the finding of the county board on a petition for an election on the removal of the county seat was not so conclusive that it could not be attached in an in-

junction proceeding commenced prior to the holding of the election; *Chicago, K. & W. R. Co. v. Board of Com'rs of Stafford County*, 38 Kan. 121, 12 Pac. 598, holding that evidence was admissible to prove that the county clerk was directed by the county board to subscribe for railroad stock; *State v. Board of Com'rs of Pratt County*, 42 Kan. 641, 22 Pac. 722, holding that failure to enter of record an order calling an election did not invalidate the election; *Rock Creek Tp. v. Coddling*, 42 Kan. 649, 22 Pac. 741, holding parol evidence admissible to supplement the record of the proceedings of a township board; *Columbus Water-works Co. v. City of Columbus*, 46 Kan. 606, 26 Pac. 1046, holding that the correction of the minutes of a council meeting at which was passed an ordinance requiring a tax levy could be compelled by mandamus; *Stout v. Yamhill County*, 31 Or. 314, 51 Pac. 442, holding parol evidence admissible to supplement the records of the county court; *Long v. Pierce County*, 22 Wash. 330, 61 Pac. 142, holding that a contract with the board of county commissioners, waiving certain conditions in a building contract, could be proved by parol; *Nickens v. Lewis County*, 23 Wash. 125, 62 Pac. 763, holding that unrecorded proceedings of the county commissioners may be proved aliunde the record.

18 KAN. 415, *PLUMB v. BAY*

Remedies to prevent sale of property on execution.—Cited in *Bowling v. Garrett*, 49 Kan. 504, 31 Pac. 135, 33 Am. St. Rep. 377; *Poole v. French*, 71 Kan. 391, 80 Pac. 997; *Kuhn v. National Bank of Holton*, 74 Kan. 456, 87 Pac. 551, 118 Am. St. Rep. 332—on remedy for protection of interest in property against sale on execution.

Cited in note in 109 Am. St. Rep. 436, on mortgagee's right of action against third persons for invasion of their rights; in 30 L. R. A. 125, on injunctions against execution sales or other proceedings under final process.

18 KAN. 419, *GIBBS v. GIBBS*

Conclusiveness of findings.—Cited in *Winstead v. Standeford*, 21 Kan. 270; *Greer v. Greer*, 24 Kan. 101; *Wilson v. Lightbody*, 29 Kan. 446; *Carpenter v. Carpenter*, 30 Kan. 712, 2 Pac. 122, 46 Am. Rep. 108; *Stout v. Townsend*, 32 Kan. 423, 4 Pac. 805; *Victor B. Buck & Co. v. J. G. Panabaker & Co.*, 32 Kan. 466, 4 Pac. 829; *Marbourg v. Lewis Cook Mfg. Co.*, 32 Kan. 629, 5 Pac. 181; *Hargrove v. Woolf*, 34 Kan. 101, 8 Pac. 192; *Elerick v. Braden*, 38 Kan. 88, 15 Pac. 887; *Kneeland v. Renner*, 2 Kan. App. 451, 43 Pac. 95; *Darlington-Miller Lumber Co. v. Lobsitz*, 4 Okl. 355; 46 Pac. 481; *Tootle v. Brown*, 4 Okl. 612, 46 Pac. 556; *McCann v. McCann*, 24 Okl. 264, 103 Pac. 694—on review of findings of fact based on conflicting evidence.

Divorce—Extreme cruelty.—Cited in *Carpenter v. Carpenter*, 30 Kan. 712, 2 Pac. 122, 46 Am. Rep. 106, holding that acts of plaintiff's wife in sending anonymous letters to various persons charging plaintiff with criminal intimacy with another woman constituted extreme cruelty.

Distinguished in *Rowe v. Rowe*, 84 Kan. 696, 115 Pac. 553, holding occasional outbursts, followed by demonstrative affection and forbearance not to constitute extreme cruelty.

Cited in note in 73 Am. Dec. 622, on cruelty as ground for divorce; in 18 L. R. A. (N. S.) 314, on making charges of adultery as ground for divorce.

18 KAN. 425, *WEEKS v. MEDLER*, Same case on subsequent appeal, 20 Kan. 57

Case-made—Dismissal for defects.—Cited in *Wood v. Metropolitan Building & Loan Association*, 18 Kan. 429; *Garvin v. Jennersón*, 20 Kan. 371, as authority for dismissal of petition in error for defects as to settlement and signing of case-made; *Shadwell v. Hamilton*, 24 Kan. 266, as authority for affirming the judgment.

Same—Service.—Cited in *Gimbel & Floresheim v. Turner*, 36 Kan. 679, 14 Pac. 255, holding that the judge could not settle a case-made not served within the time allowed; *Burlington, K. & S. W. R. Co. v. Gillen*, 38 Kan. 673, 17 Pac. 334, affirming the judgment below, where service of the case-made was not made or waived.

Same—Authority to settle and sign.—Cited in *Parrault v. Marsant*, 9 Kan. App. 419, 58 Pac. 1027, holding that a case-made could not be settled and signed by a successor of a deceased judge who tried the case; *Barnes v. Lynch*, 9 Okl. 11, 59 Pac. 905, as to the right of a judge to settle and sign a case-made after expiration of his term of office, though the time therefor had not been fixed at the expiration of his term.

Same—Time for settlement.—Cited in *St. Louis & S. F. R. Co. v. Corser*, 31 Kan. 705, 3 Pac. 569; *Stoddard Mfg. Co. v. Columbia Mfg. Co.*, 8 Kan. App. 690, 57 Pac. 136—holding that a district judge could not settle and sign the case after the time allowed and after his term of office had expired; *Tripp & Moore Boot & Shoe Co. v. Martin*, 45 Kan. 765, 26 Pac. 424, as to whether a case-made, signed and settled before the expiration of the time allowed for suggesting amendments, could be considered; *Waterfield v. Hutchinson Nat. Bank*, 6 Kan. App. 743, 50 Pac. 971, holding a case-made invalid which was settled by a judge *pro tem.* after time-expired.

Same—Extension of time for service and settlement.—Cited in *Ætna Life Ins. Co. v. Koons*, 26 Kan. 215, holding that the parties could not by stipulation between themselves extend the time for making the case; *Robertson v. Curtis*, 68 Kan. 814, 74 Pac. 156, holding that the time for serving a case-made could not be extended after expiration of the time allowed; *Chicago, B. & Q. R. Co. v. Guild*, 8 Kan. App. 368, 55 Pac. 555, holding that an order extending the time for making a case did not extend the time for serving the same.

Same—Necessity of notice.—Cited in *Safford v. Turner*, 53 Kan. 723, 37 Pac. 121; *Missouri, K. & T. Ry. Co. v. Greenwood*, 1 Kan. App. 330, 41 Pac. 225; *Rhoades v. Rhoades*, 6 Kan. App. 739, 50 Pac. 972; *Ft. Smith & W. R. Co. v. State Nat. Bank of Shawnee*, 25 Okl. 128, 105 Pac. 647; *Harrison v. Penny*, 28 Okl. 523, 114 Pac. 734—holding that a case settled without notice, waiver of notice, or appearance of the opposite party, was a nullity.

Distinguished in *Kansas Farmers' Mut. Fire Ins. Co. v. Amick*, 36 Kan. 99, 12 Pac. 338, holding that the petition in error should not be dismissed for want of notice, where service of the case-made was acknowledged and amendments suggested.

Same—Showing by record.—Cited in *Missouri, K. & T. R. Co. v. Roach*, 18 Kan. 592, dismissing the petition in error, where the record failed to show that the case-made was legally settled and signed; *Phillips v. Love*, 4 Kan. App. 443, 46 Pac. 55, dismissing the case where the case-made did not show that it was settled by the trial judge as required by the Code.

Same—Estoppel.—Cited in *Atkins v. Nordyke-Marmen Co.*, 60 Kan. 354, 56 Pac. 533, holding that by appearing and arguing a case on appeal a party was not estopped to complain that the case was not served in time.

18 KAN. 429, WOOD v. METROPOLITAN BUILDING & LOAN ASS'n

18 KAN. 430, GEORGE v. MYERS

Verdict on conflicting evidence.—Cited in *City of Fort Scott v. Brothers*, 20 Kan. 455; *Radway v. Ellis*, 37 Kan. 256, 15 Pac. 220—holding that a verdict on conflicting evidence would not be disturbed.

18 KAN. 433, SEATON v. SCOVILL, 21 AM. REP. 212, NOTE, 26 AM. REP. 779

Negotiable instruments.—Cited in *Howenstein v. Barnes*, Fed. Cas. No. 6,786; *Farmers' Nat. Bank of Valparaiso, Ind., v. Sutton Mfg. Co.*, 52 Fed. 191, 3 C. C. A. 1, 17 L. R. A. 595; *Cudahy Packing Co. v. State Nat. Bank of St. Louis, Mo.*, 134 Fed. 538, 67 C. C. A. 662; *Cowing v. Cloud*, 16 Colo. App. 326, 65 Pac. 417; *Benn v. Kutzachan*, 24 Or. 28, 32 Pac. 763—holding that a stipulation for attorney's fees did not destroy the negotiability of a note; *De Hass v. Roberts*, 59 Fed. 853, holding that a note with interest at 8 per cent. was not nonnegotiable because it provided that it should draw 12 per cent. interest after maturity; *Parker v. Plymell*, 23 Kan. 402, holding that a stipulation that a note should bear 12 per cent. interest from date, if not paid at maturity, did not render it nonnegotiable; *Gilmore v. Hirst*, 56 Kan. 626, 44 Pac. 606, holding that a stipulation for the payment of reasonable costs of collection, including attorney's fees, did not render a note nonnegotiable; *Clark v. Skeen*, 61 Kan. 526, 60 Pac. 327, 49 L. R. A. 190, 78 Am. St. Rep. 337, holding that a note was not rendered nonnegotiable by a stipulation that upon default in interest payments the whole amount might be declared due and draw a greater rate of interest.

Distinguished in *Merchants' Nat. Bank v. Sevier*, 14 Fed. 662, holding that a stipulation in a note for an attorney fee of 10 per cent. in case of suit was for a penalty and was void; *Killam v. Schoeps*, 26 Kan. 310, 40 Am. Rep. 313, holding that stipulations concerning matters other than the payment of money rendered a note nonnegotiable.

Cited in note in 14 Am. Dec. 423, on what instruments are negotiable; in 21 Am. Rep. 212; 29 Am. Rep. 407—on effect of agreement in note to pay attorney's fee; in 125 Am. St. Rep. 209, on agreements and conditions destroying negotiability.

Attorney's fee—Enforcement of stipulation for.—Cited in *Broadbent v. Brumback*, 2 Idaho, 366, 16 Pac. 555, holding that a stipulation in a mortgage for an attorney's fee will be enforced only for a reasonable amount.

Notice of protest.—Cited in *Bank of Lindsborg v. Ober & Hageman*, 31 Kan. 599, 3 Pac. 324, holding that a notary public cannot in his official capacity give notice of the nonpayment of a note; *C. C. Thompson & Walkup Co. v. Appleby*, 5 Kan. App. 680, 48 Pac. 933, holding that notice of dishonor must be given to the indorser personally, or by leaving it at his domicile or place of business; *Stockton v. Montgomery*, 9 Kan. App. 104, 57 Pac. 1059, as authority for holding that notice of dishonor was given to the indorser of a check in proper time.

Pleading.—Cited in *Chase v. Atchison, T. & S. F. R. Co.*, 70 Kan. 546, 79 Pac. 153, holding that a petition, not objected to while plaintiff could amend, should be sustained, if it stated any cause of action.

18 KAN. 440, COMMISSIONERS OF SALINE COUNTY v. YOUNG

Public lands—Vesting of title in locator.—Cited in *Leonard v. Ross*, 23 Kan. 292, holding that the homestead is not exempt from the payment of debts contracted after payment of commutation money until a patent has issued; *Kohn v. Barr*, 52 Kan. 269, 34 Pac. 880, holding that, where a certificate of entry was canceled because procured on a forged assignment of a warrant, it did not give the locator any equity as against the government.

Cited in note in 35 L. R. A. (N. S.) 671, on property granted with reservation of title or lien in favor of public, as subject of taxation.

Limitation of action to recover taxes paid.—Cited in *Richards v. Board of Com'rs of Wyandotte County*, 28 Kan. 326, as to the time of accrual of a cause of action for the refund of taxes; *Rork v. Board of Com'rs of Douglas County*, 46 Kan. 175, 26 Pac. 391, as to the running of limitations in bar of enforcing a refund of taxes.

Distinguished in *Richards v. Board of Com'rs of Wyandotte County*, 28 Kan. 326, holding that an action to recover taxes paid was barred by limitations.

Same—Void tax certificates.—Cited in *Jarvis-Conklin Mortgage Trust Co. v. Board of Com'rs of Gray County*, 7 Kan. App. 712, 52 Pac. 107, on the application of limitations to void tax certificates.

Sufficiency of petition for recovery of taxes paid.—Cited in *Topeka Commercial Security Co. v. Board of Com'rs of Harper County*, 63 Kan. 851, 65 Pac. 930, holding the petition sufficient to state a cause of action entitling plaintiff to a refunding of the taxes and charges paid, with interest thereon.

18 KAN. 446, OWENS v. HASTINGS

Passage of title to goods sold.—Cited in note in 26 L. R. A. (N. S.) 23, on sufficiency of selection or designation of goods sold out of larger lot.

18 KAN. 449, HAAS v. LEES

Appearance—Requisites and effect.—Cited in *Dickson v. Randal*, 19 Kan. 212, holding that by taking an appeal defendant waived his right to object that no sufficient replevin bond and affidavit had been filed before the justice; *Freeman v. Waynant*, 25 Kan. 279, holding that a general appearance on appeal from a justice of the peace gave the district court jurisdiction of the parties; *Atchison, T. & S. F. R. Co. v. Patch*, 28 Kan. 470, holding that a landowner by taking an appeal entered her appearance in condemnation proceedings; *Board of Com'rs of Woodson County v. Heed*, 33 Kan. 34, 5 Pac. 453, holding that want of jurisdiction over the person of a landowner was cured by his presentation of a claim for damages for the opening of the road; *Limerick v. Gorham*, 37 Kan. 739, 15 Pac. 909, holding that, where defendant went to trial in the district court without objection, he could not object that such court had no jurisdiction; *Scott v. Kreamer*, 37 Kan. 753, 16 Pac. 123, holding that defendant, by appealing on the second trial, waived his right to question the justice's jurisdiction to grant a new trial; *Chicago, K. & W. R. Co. v. Abilene Town-Site Co.*, 42 Kan. 97, 104, 21 Pac. 1112, holding that the district court acquired jurisdiction of an appeal from the award in condemnation proceedings, though the bond was not double the award; *Missouri Pac. R. Co. v. Lea*, 47 Kan. 268, 27 Pac. 987, holding that defendant, by answering the amended petition filed on appeal from a justice, waived its right to object to the district court's want of jurisdiction; *Freeman v. Wyandotte Loan & Trust Co.*, 6 Kan. App. 86, 49 Pac. 673, holding that defendant, by appearing to contest a motion to reinstate a dismissed action, gave the justice jurisdiction over his person; *Gulf Pipe Line Co. v. Vanderberg*, 28 Okl. 637, 115 Pac. 782, 34 L. R. A. (N. S.) 661, holding that appeal from a justice waived all irregularities in the issuance and service of summons.

Distinguished in *H. Parker Grain Co. v. Chicago, R. I. & P. R. Co.*, 70 Kan. 168, 78 Pac. 406, holding that an appeal did not confer jurisdiction over the subject-matter; *Hoffman v. Forslund*, 6 Kan. App. 352, 51 Pac. 816, holding that the filing of a void appeal bond was not a waiver of the right to question jurisdiction.

Cited in note in 34 L. R. A. (N. S.) 662, on waiver of failure of, or defects in, service by appeal to courts where trial must be de novo.

Appeal—Right.—Cited in *Fenton v. White*, 4 Okl. 472, 47 Pac. 472, holding that an appeal will lie to the district court from an order of the probate court amercing a sheriff.

Same—Sufficiency of bond.—Cited in *Smith v. Neacatunga Town Co.*, 36 Kan. 758, 14 Pac. 246, holding an appeal bond not insufficient for failure of the sureties to qualify.

Same—Amending transcript.—Cited in *Queens Ins. Co. of America v. Cotney*, 25 Okl. 125, 105 Pac. 651, holding that on timely application, the district court should permit a transcript from the probate court to be corrected.

18 KAN. 455, WHITFORD v. HORN

Gift—Revocation.—Cited in note in 32 L. R. A. (N. S.) 222, on retention or resumption of possession by donor as affecting gift.

18 KAN. 458, ATLANTIC & P. R. CO. v. REISNER

Principal and agent—Power of agent to bind principal.—Cited in Robinson, McLeod & Co. v. Memphis & C. R. Co., 9 Fed. 129, holding that a freight agent had no authority to sign a bill of lading before the cotton was delivered to the railroad company; Great West Mining Co. v. Woodmas of Alston Mining Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204, holding that service of process on a foreman was insufficient to bind a mining corporation; Pacific R. Co. v. Thomas, 19 Kan. 256, holding that the evidence sustained a finding that a railroad division superintendent ratified the employment of a physician by a master mechanic; Central Branch R. Co. v. Ingram, 20 Kan. 66, holding that a demand upon the general superintendent of a railway company for damages for stock killed was sufficient; St. Louis, Ft. S. & W. R. Co. v. Grove, 39 Kan. 731, 18 Pac. 958, holding that the general manager of a railroad company had authority to direct the employment of an attorney; City of Kansas City v. Cullinan, 65 Kan. 68, 68 Pac. 1009, holding that the general manager of a town-site company will be presumed to have authority to sign a paving petition for the company; Karns v. State Bank & Trust Co., 31 Nev. 170, 101 Pac. 564, holding that service of process on an assistant bank cashier was not sufficient.

Distinguished in Union Pac. R. Co. v. Beatty, 35 Kan. 265, 10 Pac. 845, 57 Am. Rep. 160, holding that it was error to instruct that a railroad division superintendent would be presumed to have authority to contract for medical attention to injured passengers until the contrary appeared; Spelman v. Gold Coin Mining & Milling Co., 26 Mont. 76, 66 Pac. 597, 55 L. R. A. 640, 91 Am. St. Rep. 402, as to whether the secretary and general manager of a mining corporation may bind the corporation by a contract for medical attendance on injured employes; Baines v. Coos Bay Navigation Co., 45 Or. 807, 77 Pac. 400, holding a corporation not liable on notes executed by its general manager without authority.

Cited in note in 20 L. R. A. 606, on authority to employ medical services for employé or other person.

Same—Ratification by principal.—Cited in West v. Washington Ry. Co., 49 Or. 486, 90 Pac. 666, holding that a corporation, by retaining the consideration and not objecting, ratified a contract made by its general manager.

Medical assistance to injured servant.—Cited in note in 4 L. R. A. (N. S.) 53, 57, 59, 61, on duty to provide medical assistance for servant.

18 KAN. 462, HOPKINS v. KANSAS PAC. RY. CO.

Liability for stock killed upon unfenced railroad track.—Cited in Atchison & N. R. Co. v. Harper, 19 Kan. 529; Missouri Pac. R. Co. v. Leggett, 27 Kan. 323—holding a railroad company not liable for injury to stock which went upon the track at a public crossing and then strayed down the track to a place where it could have been fenced, but was unfenced.

Limited in Central Branch R. Co. v. Lea, 20 Kan. 353, holding that where a cow, running at large in violation of the night herd law, strayed upon an unfenced railroad track and was killed, the owner could not recover.

Cited in note in 49 Am. Dec. 269, on liability for injuries to cattle trespassing on railroad track.

Same—Contributory negligence no defense.—Cited in Atchison, T. & S. F. R. Co. v. Paxton, 75 Kan. 197, 88 Pac. 1082, holding contributory negligence not a defense in an action for injury to stock upon an unfenced right of way.

Constitutionality of statutes.—Cited in note in 25 L. K. A. 163, on constitutionality of statutes making railroads absolutely liable for fires set out or stock killed; in 31 L. R. A. (N. S.) 863, on constitutionality of statutes requiring railroad to fence tracks and build cattle guards.

Private action for violation of statute.—Cited in note in 9 L. R. A. (N. S.) 354, on private action for violation of statute not expressly conferring it.

18 KAN. 465, PATEE v. PARKINSON

Agreed facts—Necessity of bill of exceptions.—Cited in *State v. Bohan*, 19 Kan. 28, holding that an agreed statement of counsel as to what occurred at the trial could not supply the place of a bill of exceptions; *Cooper v. Ludington*, 21 Kan. 466, as authority for affirming the case; *Woolverton v. Johnson*, 69 Kan. 708, 77 Pac. 559, holding that an agreed statement of facts was not made part of the record by a recital in the journal entry that the court made such statement its findings of fact; *Zindars v. Erie Gas & Mineral Co.*, 74 Kan. 870, 87 Pac. 188, holding that an agreed statement was not part of the record, when not made so by a bill of exceptions.

18 KAN. 467, VOSS v. UNION SCHOOL DIST. NO. 11

Actions affecting public matters—Necessary parties.—Cited in *Cassatt v. Board of Com'rs of Barber County*, 39 Kan. 505, 18 Pac. 517, holding that a school district was a necessary party to an action of mandamus to compel a levy of taxes to pay interest on school district bonds; *Union Terminal R. Co. v. Board of Railroad Com'rs*, 52 Kan. 680, 35 Pac. 224, holding that injunction would not lie to restrain acts of the railroad commissioners without the railroad companies, the real parties in interest, being made parties; *City of Anthony v. State*, 49 Kan. 246, 30 Pac. 488, holding that the bondholders were necessary parties to an action to perpetually enjoin the levying of taxes to pay interest on certain city bonds and to have the bonds declared void.

De facto municipal corporations.—Cited in *School District No. 25 v. State*, 29 Kan. 57, holding that bonds issued by a school district de facto were binding; *Ritchie v. Mulvane*, 39 Kan. 241, 17 Pac. 830, as to the validity of taxes levied by a city upon territory which was de facto, but not de jure, a part of the city.

Attack on corporate existence of municipalities.—Cited in *Miller v. Perris Irr. Dist.*, 92 Fed. 263, holding that the legal existence of an irrigation district could not be attacked by an individual; *Atchison, T. & S. F. R. Co. v. Wilson*, 33 Kan. 223, 6 Pac. 281, holding that the validity of the organization of a school district could not be questioned in a taxpayer's action to enjoin the collection of a tax; *In re Short*, 47 Kan. 250, 27 Pac. 1005, holding that the corporate existence of a county could not be collaterally attacked by private parties; *City of Topeka v. Dwyer*, 70 Kan. 244, 78 Pac. 417, 3 Ann. Cas. 239, holding that completed proceedings for enlarging the corporate area of a city could not be questioned collaterally; *Kansas Town & Land Co. v. City of Kensington*, 6 Kan. App. 247, 51 Pac. 804, holding that the validity of a city's corporate existence could not be attacked in a proceeding to enjoin the collection of a tax; *School Dist. No. 115 v. School Dist.*, 34 Or. 97, 55 Pac. 98, holding that the legal existence of a school district could not be collaterally attacked.

Same—Right to attack.—Cited in *Kuhn v. City of Port Townsend*, 12 Wash. 605, 41 Pac. 923, 29 L. R. A. 445, 50 Am. St. Rep. 911, holding that a private citizen cannot question the right of a municipal corporation to collect taxes.

18 KAN. 473, CITY OF WATERVILLE v. HUGHAN

Secondary evidence.—Cited in *Central B. U. P. R. Co. v. Walters*, 24 Kan. 504, holding that it was error to admit in evidence a copy of a written demand made under the stock killing law, without foundation being first laid for the in-

roduction of secondary evidence; *West v. Cameron*, 39 Kan. 736, 18 Pac. 804, holding it error to permit plaintiff's attorney to introduce a record copy of a deed which plaintiff had in his possession outside the state.

18 KAN. 476, CENTER v. McQUESTEN, Same case on former appeal, 24 Kan. 480

Referred to in *Center v. McQuesten*, 24 Kan. 480.

Contract for benefit of third person—Statute of frauds.—Cited in *Wilson v. Lunt*, 11 Colo. App. 56, 52 Pac. 296, holding that a landlord could sue one who, as assignee of the lease, agreed to pay the rent; *Floyd v. Ort*, 20 Kan. 162, holding that one could adopt and sue upon a contract made for his benefit, though not originally a party to it; *Strong v. Marcy*, 33 Kan. 109, 5 Pac. 366, holding that a child could sue on a contract made for her support by defendant with the child's father; *Plano Mfg. Co. v. Burrows*, 40 Kan. 861, 19 Pac. 809, holding that a parol contract to pay a debt to a third person as the purchase price of property bought is enforceable; *Neiswanger v. McClellan*, 45 Kan. 599, 26 Pac. 18, holding a purchaser liable for a mortgage debt, which he assumes by the acceptance of a deed with an assumption clause; *Fisher v. Spillman*, 85 Kan. 552, 118 Pac. 65, holding that neither a purchaser's promise to pay a debt nor the creditor's acceptance of the purchaser as his debtor was required to be in writing; *Ryan v. Phillips*, 3 Kan. App. 704, 44 Pac. 909, holding that the beneficiary of a trust could sue to compel its execution, though she was not specifically named.

Distinguished in *Burton v. Larkin*, 36 Kan. 246, 13 Pac. 398, 59 Am. Rep. 541, holding that one who furnished goods to C. could not sue on B.'s contract to furnish money to pay C.'s expenses; *Rickman v. Miller*, 39 Kan. 362, 18 Pac. 304, holding that purchasers who agreed to pay their grantor's debt became debtors, and not merely agents of the grantor for payment of the debt.

Ownership of money in agent's hands.—Cited in *Brockmeyer v. Washington Nat. Bank*, 40 Kan. 376, 19 Pac. 855, holding that money paid by a debtor bank to another bank to be used in paying a debt to a third party, remained the property of the debtor until accepted by the creditor.

18 KAN. 481, WICKERSHAM v. CHICAGO ZINC CO., 26 AM. REP. 784

Knowledge of agent imputable to principal.—Cited in *Lindsey v. Lambert Bldg. & Loan Ass'n*, 4 Fed. 48, holding that a corporation was not chargeable with knowledge of the insolvency of its treasurer at the time he made a bank deposit in its favor; *Thomson-Houston Electric Co. v. Capitol Electric Co.*, 56 Fed. 849, holding that a principal was not chargeable with its agent's knowledge of defenses to bonds fraudulently put in circulation by the agent while acting adversely to the principal; *Hatch v. Ferguson*, 68 Fed. 668, 14 O. C. A. 41, holding that, where the president of a corporation conveyed property to a party who sold it to the corporation, the corporation was not chargeable with its president's notice of an infirmity in the title; *Whittle v. Vanderbilt Min. & Mill. Co.*, 83 Fed. 48, holding that a corporation purchaser was not chargeable with the knowledge of a grantor, though he was a stockholder; *School Dist. of City of Sedalia v. De Weese*, 100 Fed. 705, holding that a bank was not chargeable with notice of misappropriation of money by its cashier while acting in his individual capacity; *Bank of Overton v. Thompson*, 118 Fed. 798, 56 C. O. A. 554, holding that a bank was not chargeable with knowledge that a third party had an interest in a deposit made by its cashier to his own credit; *McDonald v. Randall*, 129 Cal. 246, 72 Pac. 997, holding that where a bank president, acting solely in his own behalf, procured the purchase of a note by the bank, the bank was not chargeable with his knowledge of defenses; *Burlington Waterworks Co. v. City of Burlington*, 43 Kan. 725, 23 Pac. 1068, holding a corpora-

tion not chargeable with the knowledge and fraud of a party because he afterwards became its general agent; *First Nat. Bank v. Northrup*, 82 Kan. 638, 109 Pac. 672, 136 Am. St. Rep. 119, holding that a bank which loaned money to a corporation on the procurement of its cashier, who was also president of the corporation, was not chargeable with its cashier's knowledge that corporate stock had been issued at a discount; *First Nat. Bank of Arkansas City v. Skinner*, 10 Kan. App. 517, 62 Pac. 705, holding that a corporation is not chargeable with the knowledge acquired by an officer while acting solely for himself; *Stanford v. Coram*, 26 Mont. 285, 67 Pac. 1005, holding that a principal was not chargeable with the knowledge of an agent who was acting openly and avowedly for himself.

Distinguished in *Dight v. Chapman*, 44 Or. 265, 75 Pac. 585, 65 L. R. A. 793, holding that notice of bankruptcy to one who represented two corporations having claims was binding upon both corporations.

Cited in note in 36 Am. Dec. 192, on imputing to corporation notice to officer or agent; in 24 Am. St. Rep. 233, on notice to agent as notice to principal; in 2 L. R. A. (N. S.) 994, on imputing to corporation knowledge of managing officer engaged in illegal act.

Constructive notice.—Record of defective instrument.—Cited in *Meskimen v. Day*, 35 Kan. 46, 10 Pac. 14, holding that the record of a deed in which the notary's seal was omitted from the acknowledgment could not be received in evidence; *Fisher v. Cowles*, 41 Kan. 413, 21 Pac. 228; *Wiscomb v. Cubberly*, 51 Kan. 580, 33 Pac. 320—holding that the recording of an unacknowledged assignment of a mortgage did not impart constructive notice of the assignment; *Banister v. Fallis*, 85 Kan. 320, 116 Pac. 822, holding that the record of an unacknowledged instrument was not notice.

18 KAN. 489, SCOTT v. MORNING

Cited in *White v. Gemeny*, 47 Kan. 741, 28 Pac. 1011, 27 Am. St. Rep. 320.

Want of reply.—Cited in *Babcock v. Farmers' & Drovers' Bank*, 46 Kan. 548, 26 Pac. 1037, holding that defendants were entitled to judgment on the pleadings, where they answered that the entire consideration for the note sued on was usurious and plaintiffs filed no reply; *Baker v. L. C. Van Ness & Co.*, 25 Okl. 34, 105 Pac. 660, holding that where the allegations of new matter constituted a complete defense, and no reply was filed, a judgment for plaintiffs was contrary to law.

18 KAN. 494, KANSAS PAC. RY. CO. v. HOPKINS

Validity of railroad bonus note.—Cited in *Southard v. Arkansas Valley & W. Ry. Co.*, 24 Okl. 408, 108 Pac. 750, holding that a railroad bonus note was not void as against public policy.

Contract for benefit of third person.—Cited in *Floyd v. Ort*, 20 Kan. 162, holding a creditor could sue upon a party's promise made to the debtor that he would pay the debt; *Strong v. Marcy*, 33 Kan. 109, 5 Pac. 363, holding that a child could sue upon a contract made with her father for her support; *Burton v. Larkin*, 36 Kan. 248, 13 Pac. 393, 59 Am. Rep. 541, holding that one for whose benefit a contract is made may sue the promisor; *Piano Mfg. Co. v. Burrows*, 40 Kan. 361, 19 Pac. 809, holding that an agreement to pay the purchase price by paying a debt due a third party may be enforced by the third party; *Rouse v. Bartholomew*, 51 Kan. 425, 32 Pac. 1068, holding that a mortgage could enforce payment against a grantee who had assumed the debt; *Hardesty v. Cox*, 53 Kan. 618, 36 Pac. 985, holding that one who was subrogated to the rights of a party to an arbitration could sue a surety of the other party upon the arbitration bond.

Condemnation proceedings.—Injunction.—Cited in *Harvey v. Kansas, N. & D. R. Co.*, 45 Kan. 228, 25 Pac. 578, holding that it was proper to tempo-

rarily enjoin the owner from prosecuting his condemnation proceedings until the railroad's application for a permanent injunction could be heard on its merits.

18 KAN. 500, GAUSS v. HOBBS

18 KAN. 505, AVERY v. EASTES

Preference of creditors.—Cited in *Priest v. Brown*, 100 Cal. 626, 35 Pac. 323, holding that a debtor could sell all his property to pay certain creditors to the exclusion of others; *Campbell v. Warner*, 22 Kan. 604, holding that it was not ground for attachment that a debtor sold all his property to pay certain creditors to the exclusion of others; *Randall v. Shaw*, 28 Kan. 419; *Farlin v. Sook*, 30 Kan. 401, 1 Pac. 123, 46 Am. Rep. 100—holding that a debtor may prefer one creditor over another; *Tootle, Hosea & Co. v. Coldwell*, 30 Kan. 125, 1 Pac. 329; *Bliss & Wood v. Couch*, 46 Kan. 400, 26 Pac. 706; *H. Hauaner & Co. v. Leebrick*, 51 Kan. 591, 33 Pac. 375; *Hadley v. Adait*, 3 Kan. App. 122, 42 Pac. 836—holding that an insolvent debtor could prefer a creditor by giving him a chattel mortgage; *Smith-McCord Dry Goods Co. v. Carson*, 59 Kan. 295, 52 Pac. 890, as to the right of an insolvent debtor to prefer creditors.

Cited in note in 30 L. R. A. 484, on what intent to defraud will sustain attachment.

18 KAN. 508, WICKS v. SMITH, Same case on subsequent appeal, 21 Kan. 412, 30 Am. Rep. 433

Ejectment.—Cited in *Kelso v. Norton*, 65 Kan. 778, 70 Pac. 896, 93 Am. St. Rep. 308, holding that ejectment would not lie against a mortgagee in possession.

• Cited in note in 18 L. R. A. 782, on what title or interest will support ejectment.

Same—Proof admissible under general denial.—Cited in *Clayton v. School District No. 1*, 20 Kan. 256, holding that, under a general denial in ejectment, the defendant could prove a paramount title in himself; *Armstrong v. Brownfield*, 32 Kan. 116, 4 Pac. 185, holding that evidence to show defendant's ownership was admissible in ejectment under a general denial; *Taylor v. Danley*, 83 Kan. 646, 112 Pac. 595, 21 Ann. Cas. 1241, holding that in ejectment the bar of limitations could be proven under a general denial; *Anderson v. Canter*, 10 Kan. App. 167, 63 Pac. 285, holding that parol evidence of a compromise settlement of a controversy as to the land was admissible in ejectment under a general denial.

Statute of frauds.—Cited in *Bogle v. Jarvis*, 58 Kan. 76, 48 Pac. 558, holding that the vendee need only comply with the written terms of the vendor's offer or contract of sale.

18 KAN. 516, GREENO v. BARNARD

Homestead—Liens and improvements.—Cited in *Dean v. McAdams*, 22 Kan. 544, holding that a judgment is no lien on a homestead sold prior to the first day of the term of court at which the judgment is rendered; *Tyler v. Johnson*, 47 Kan. 410, 28 Pac. 198, holding a mechanic's lien enforceable against the homestead for material furnished for a building thereon; *Hurd v. G. C. Hixon & Co.*, 27 Kan. 722, holding that there is no homestead exemption as against obligations contracted for the erection of improvements on a homestead.

Cited in notes in 99 Am. Dec. 574, 575; 86 Am. St. Rep. 174, 175—on lien for purchase money of homesteads.

Exhaustion of personalty before levy on realty.—Cited in note in 83 Am. Dec. 457 (par. 6), on exhausting personal property before levying on realty.

Waiver of exemption.—Cited in *Hoisington v. Huff*, 24 Kan. 879, holding that, where a tenant in his lease waived the benefit of the exemption laws, he was bound by such waiver.

Vendor's lien.—Cited in *Fuller v. Irvin*, 1 Kan. App. 248, 42 Pac. 1094, holding that a recital in a note that it was given in part purchase of certain described real estate did not create a vendor's lien; *Trustees' Executors' & Securities Ins. Corporation v. Bowling*, 2 Kan. App. 770, 44 Pac. 42; *Smith v. Allen*, 18 Wash. 1, 50 Pac. 783, 39 L. R. A. 82, 63 Am. St. Rep. 864—holding that a vendor's lien is not recognized in Kansas, in the absence of a special agreement therefor.

18 KAN. 523, KANSAS PAC. RY. CO. v. KESSLER

Exemplary damages.—Cited in *Hefley v. Baker*, 19 Kan. 9, holding that exemplary damages were recoverable for herding cattle on plaintiff's premises and refusing to permit them to be driven off; *City of Parsons v. Lindsay*, 26 Kan. 426, holding that exemplary damages could not be recovered, where the negligence was not so gross as to amount to wantonness; *Wheeler & Wilson Mfg. Co. v. Boyce*, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571, holding that exemplary damages may be recovered against a corporation for false imprisonment caused by its servants; *Southern Kansas R. Co. v. Rice*, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766; *Atchison, T. & S. F. R. Co. v. Long*, 5 Kan. App. 644, 47 Pac. 993—holding that a passenger may recover exemplary damages for an eviction through gross negligence of the trainmen; *Atchison, T. & S. F. R. Co. v. Gants*, 38 Kan. 608, 17 Pac. 54, 5 Am. St. Rep. 780, holding that a trespasser cannot recover exemplary damages for the use of unnecessary force in evicting him from a train, where such force is not wantonly, willfully, or maliciously used; *Kansas Pac. R. Co. v. Whipple*, 39 Kan. 531, 18 Pac. 730, as to right to recover exemplary damages in case of gross negligence; *Western Union Tel. Co. v. Lawson*, 66 Kan. 660, 72 Pac. 233, holding exemplary damages recoverable for the nondelivery of a telegram occasioned by gross negligence; *Potter v. Stamfi*, 2 Kan. App. 788, 44 Pac. 46, holding that exemplary damages could not be recovered, where the petition did not state that the wrongful act was wanton, willful, or malicious.

Cited in note in 50 Am. Dec. 768, on allowance of exemplary damages; in 59 Am. St. Rep. 597, 598, on exemplary damages against corporations.

Passengers—Reasonable regulation by carrier.—Cited in *Brown v. Kansas City, Ft. S. & G. R. Co.*, 38 Kan. 634, 16 Pac. 942, holding it a reasonable regulation to require passengers to procure tickets before taking passage on freight trains.

Cited in note in 41 Am. Dec. 478, on regulations by carrier as to passengers and others.

Authority of ticket agent.—Cited in note in 31 L. R. A. (N. S.) 233, on extent of ticket or passenger agent's implied authority.

18 KAN. 529, ROACH v. KARR, 26 AM. REP. 778

Principal and agent—Knowledge of agent.—Cited in *Topliff v. Shadwell*, 38 Kan. 317, 74 Pac. 1120, holding that, for an agent's knowledge to affect his principal with notice, the matter known must be within the scope of the agency; *Pennoyer v. Willis*, 26 Or. 1, 36 Pac. 568, 46 Am. St. Rep. 594, as to what notice to an agent will bind his principal.

Cited in note in 24 Am. St. Rep. 228, 233, on notice to agent as notice to principal.

Same—Power to bind principal.—Cited in *Despain v. Pacific Mut. Life Ins. Co.*, 81 Kan. 722, 106 Pac. 1027, on the authority of a soliciting agent to bind an insurance company by a waiver.

Avoidance of contract signed without reading.—Cited in *Wagner v. National Life Ins. Co.*, 90 Fed. 395, 33 C. C. A. 121, holding that a beneficiary could not avoid a release because, at the instance of the insured, she signed the

same without reading it and in the belief that it was a receipt; *Buchanan v. Gibbs*, 26 Kan. 277, holding that a party claiming ignorance of the contents of a contract, which she had signed, could not have the contract declared invalid without proof of such ignorance; *Atchison, T. & S. F. R. Co. v. Vanordstrand*, 67 Kan. 386, 73 Pac. 113, holding a party bound by a release which he signed without reading because he was "somewhat hurried."

Distinguished in *Shook v. Puritan Mfg. Co.*, 75 Kan. 301, 89 Pac. 653, 8 L. R. A. (N. S.) 1043, holding that, as between the original parties, the party who was induced by fraud to sign a contract without reading it, was not precluded from defending against it.

Cited in note in 36 Am. Rep. 165, on negligence in execution of release; in 41 Am. Rep. 608, on negligence in learning contents of contract entered into; in 11 Am. St. Rep. 319, on negotiable instruments mistakenly executed under false representations; in 37 Am. St. Rep. 459, on fraud in procuring delivery of negotiable instruments; in 138 Am. St. Rep. 811, 814, on signing contracts in ignorance of their contents; in 36 L. R. A. (N. S.) 541, on right, as against subsequent bona fide purchaser, to avoid deed because of deception as to contents or character of paper signed.

Mortgage on homestead.—Distinguished in *Warden v. Reser*, 38 Kan. 86, 16 Pac. 60, holding that the wife's signature and acknowledgment to a mortgage on the homestead was void, where procured through fraud by the party to be benefited.

18 KAN. 535, HARRISON v. ANDREWS

Motions—Who may make.—Cited in *Green v. McMurtry*, 20 Kan. 189, holding that irregular proceedings could be set aside on motion of a party aggrieved, though he was not legally a party to the action; *Long Bros. v. Murphy*, 27 Kan. 375, holding that a person claiming the land attached could move to discharge the attachment, though not a party to the original action; *Cowdin v. Cowdin*, 31 Kan. 528, 3 Pac. 369, holding that a purchaser at a sheriff's sale could move to confirm the sale or maintain proceedings in error to reverse an order refusing confirmation and setting aside the sale; *Wichita Wholesale Grocery Co. v. Records*, 40 Kan. 119, 19 Pac. 346, holding that an assignee in possession of the property when it was attached could move to discharge the attachment; *Boyd v. Huffaker*, 40 Kan. 634, 20 Pac. 459, holding that the sureties on the redelivery bond had a right to have their interests protected in the replevin action; *Knight v. Rhoades*, 10 Kan. App. 38, 61 Pac. 869, holding that a stranger to the suit, who held title to the land attached, could move to release the land, even after judgment and sale; *Crist v. Cosby*, 11 Okl. 635, 69 Pac. 885, holding that a party claiming property levied on may move for its release; *Sparks v. City Nat. Bank of Lawton*, 21 Okl. 827, 97 Pac. 575, holding that one claiming land sold under execution could move to set aside the sale, though not a party to the action.

Same—Conclusiveness of orders.—Cited in *Capital Bank v. Huntton*, 35 Kan. 577, 11 Pac. 369, holding that the confirmation of a sheriff's sale is not conclusive on appeal as to matters which are not mere irregularities or form no part of the sale proceedings; *Mills v. Pettigrew*, 45 Kan. 573, 26 Pac. 33, holding that the overruling of a motion to set aside a judicial sale was not conclusive of the rights of the party making the motion; *Pratt v. First Nat. Bank*, 8 Kan. App. 1, 53 Pac. 891, holding that the decision on a motion to set aside a judicial sale is not conclusive as to the ultimate rights of the parties; *Havens v. Pope*, 10 Kan. App. 299, 62 Pac. 538, holding that an order confirming a judicial sale does not conclude the parties as to title under the sheriff's deed; *Sparks v. City Nat. Bank of Lawton*, 21 Okl. 827, 97 Pac. 575, holding that the court's decision on a motion to set aside a judicial sale was not conclusive as to the ultimate rights of either party; *Shelby v. Ziegler*, 22 Okl. 799, 98 Pac. 989, holding that

the decision on a motion to discharge an attachment was not *res judicata* in a subsequent direct proceeding.

Distinguished in *Board of Com'rs of Wilson County v. McIntosh*, 30 Kan. 234, 1 Pac. 572, holding that a motion to retax costs could not be relitigated without a showing and leave to renew.

Delivery of instrument—Time of taking effect.—Cited in *Walker v. Newlin*, 22 Kan. 108, holding that an assignment for the benefit of creditors did not take effect until delivered; *Green v. Green*, 84 Kan. 740, 10 Pac. 156, 55 Am. Rep. 256, holding that a deed in fraud of marital rights, and not delivered until after marriage, was invalid, though executed before marriage.

Property subject to judgment lien or to attachment.—Cited in *Ransom v. Sargent*, 22 Kan. 516, holding that no judgment lien attached to property deeded to the debtor merely to enable him to secure a loan, where he executed a mortgage and a deed back at the same time as he received the deed; *Holden v. Garrett*, 23 Kan. 96, holding that a judgment lien extended only to the actual interest of the judgment debtor, regardless of his record title; *English v. Law*, 27 Kan. 242, holding that land to which the husband held the legal title in trust for his wife was not subject to attachment for the husband's debts; *Burke v. Johnson*, 37 Kan. 337, 15 Pac. 204, 1 Am. St. Rep. 252; *Good v. Williams*, 81 Kan. 388, 105 Pac. 433, 135 Am. St. Rep. 392—holding that land was not subject to attachment where the debtor held only the naked legal title, and the equitable title was in another; *Emporia Mut. Loan & Savings Association v. Watson*, 45 Kan. 132, 25 Pac. 586, holding that a judgment lien did not attach to land purchased and used as a homestead; *Bowling v. Garrett*, 49 Kan. 504, 31 Pac. 135, 33 Am. St. Rep. 377, holding that a judgment lien cannot attach to any greater interest than the judgment debtor possesses; *Polley v. Johnson*, 52 Kan. 478, 35 Pac. 8, 23 L. R. A. 258, as to the right of a grantor's creditors to attach property conveyed in trust for his wife; *Winter v. Ritchie*, 57 Kan. 212, 45 Pac. 595, 57 Am. St. Rep. 331, holding that where the debtor traded his homestead for land to be used in buying a new homestead, and in order to avoid judgment liens took title in his son's name, the transaction was not a fraud on judgment creditors.

Distinguished in *Hawley v. Smeiding*, 3 Kan. App. 159, 42 Pac. 841, holding that where a debtor, in order to hinder and delay his creditors, caused land purchased by him to be conveyed to a third person, a judgment previously rendered against such third person created a lien upon the land; *Love v. Cavett*, 26 Okl. 179, 109 Pac. 553, holding that injunction would lie to restrain a sale of land under an execution sued out on a judgment exerting no lien on the land.

Cited in note in 117 Am. St. Rep. 782, on estates and interests to which judgment liens attach; in 85 Am. Dec. 590, on equities to which judgment lien is subject.

Judicial sale—Title conveyed.—Cited in *Markley v. Carbondale Inv. Co.*, 67 Kan. 535, 73 Pac. 96, holding that the purchaser of land sold under attachment takes only such interest as the debtor possessed; *McCalla v. Knight Inv. Co.*, 77 Kan. 770, 94 Pac. 126, 14 L. R. A. (N. S.) 1258, holding that an execution sale conveyed only such title as the judgment debtor had.

Rights of attaching creditor.—Cited in *Bush v. T. G. Bush & Co.*, 38 Kan. 556, 6 Pac. 794, holding that attaching creditors could not successfully object to the reformation of a mortgage.

18 KAN. 543, TODD v. ALLEN

Parol evidence.—Cited in *Hill v. Maxwell*, 71 Kan. 72, 79 Pac. 1068, holding parol evidence admissible to show a subsequent fully executed oral agreement relating to the sale of land.

Cited in note in 56 Am. St. Rep. 682, on modification of written contract by subsequent parol agreement.

18 KAN. 546, ST. LOUIS, L. & W. RY. CO. v. MADDOX

Parol evidence affecting writings.—Cited in *Mulford v. Torrey Exploration Co.*, 45 Colo. 81, 100 Pac. 596; *Hopkins v. St. Louis & S. F. R. Co.*, 29 Kan. 544—holding parol evidence inadmissible to vary the terms of a written contract by a previous parol agreement; *Dixon v. Dixon*, 85 Kan. 379, 116 Pac. 883, holding parol evidence admissible to supplement an incomplete written contract.

18 KAN. 552, PERRY v. JONES**18 KAN. 555, SEWING MACH. CO. v. REDFIELD**

Justice's court—Default.—Cited in *Gettings v. Buchanan*, 17 Mont. 581, 44 Pac. 77, holding that where a defendant elected to plead anew to an amended complaint, and failed to do so within the time granted, a default was proper.

Distinguished in *Kuhuke v. Wright*, 22 Kan. 484, holding that a record entry on appeal from a justice that the defendant is "allowed" to answer within 20 days was permissive only, and did not put the defendant in default for failure to answer.

18 KAN. 558, BUTCHER v. TAYLOR

Appealable judgments—Finality.—Cited in *Dilley v. McGregor*, 24 Kan. 361, holding that no appeal lies from a justice's decision on a trial of the rights of property; *Roll, Thayer, Williams & Co. v. Murray*, 35 Kan. 171, 10 Pac. 472, holding that a justice's order discharging an attachment is not appealable; *Butt v. Herndon*, 36 Kan. 370, 13 Pac. 590, holding that the justice's reasons, without any judgment being entered, did not constitute a final judgment; *Becker v. Steele*, 41 Kan. 173, 21 Pac. 169 (dissenting opinion), holding that a justice's order dissolving an attachment was not a final order; *Nixon v. Johnson*, 7 Kan. App. 239, 52 Pac. 702, holding that a refusal of a justice of the peace to dissolve an attachment was res judicata before a second justice, to whom the case was transferred on a change of venue; *Ferdinand Westheimer & Sons v. Hahn*, 15 Okl. 49, 78 Pac. 378, holding that no appeal lies to the district court from an order of the probate court discharging an attachment.

Cited in note in 60 Am. Dec. 432, on final and interlocutory judgments and decrees.

18 KAN. 561, HANNON v. HOUSTON

Unauthorized sale by attorney.—Cited in *Eggan v. Briggs*, 23 Kan. 710, holding that one acquired no title in a note purchased from an attorney who had it merely for collection.

Cross-petition in error.—Cited in *Stettauer Bros. v. Carney & Stevens*, 20 Kan. 474, holding that defendants in error could file a cross-petition in error.

18 KAN. 575, WILSON v. COWLEY COUNTY COM'RS**18 KAN. 579, COMMISSIONERS OF FRANKLIN COUNTY v. PENNOCK, Affirmed in 103 U. S. 44, 26 L. Ed. 367****18 KAN. 592, MISSOURI, K. & T. RY. CO. v. BOACH**

Case-made—Sufficiency.—Cited in *Kansas Farmers' Mut. Fire Ins. Co. v. Amick*, 36 Kan. 99, 12 Pac. 338; *Burlington, K. & S. W. R. Co. v. Gillen*, 38 Kan. 673, 17 Pac. 334; *Tripp & Moore Boot & Shoe Co. v. Martin*, 45 Kan. 765, 28 Pac. 424; *Safford v. Turner*, 53 Kan. 728, 37 Pac. 121; *Phillips v. Love*, 4 Kan. App. 443, 46 Pac. 55; *Chicago, B. & Q. R. Co. v. Guild*, 8 Kan. App. 368, 55 Pac. 555; *Ft. Smith & W. R. Co. v. State Nat. Bank of Shawnee*, 25 Okl. 128, 105 Pac. 647; *Harrison v. Penny*, 28 Okl. 523, 114 Pac. 734—holding that petition in

error will be dismissed, where the case made fails to show that it was regularly served and settled.

18 KAN. 594, SHEDD v. McCONNELL

Cited in *Re Chapman*, 4 Kan. App. 49, 46 Pac. 1014.

Attachment—Power of judge at chambers.—Cited in *Wells Fargo & Co. v. Danford*, 28 Kan. 487, holding that a district judge at chambers could have permitted an attachment affidavit to be amended.

Same—Evidence on motion to dissolve.—Cited in *Keith v. Stetter*, 25 Kan. 100, as to review of affidavit or deposition filed in support of a motion to dissolve an attachment.

Same—Conclusiveness of order on motion to dissolve.—Cited in *Blair v. Anderson*, 58 Kan. 97, 48 Pac. 562, 62 Am. St. Rep. 606, holding that an order refusing to dissolve an attachment was not conclusive.

Same—Nature of action.—Cited in *Lisle v. Cheney*, 36 Kan. 578, 13 Pac. 816, holding that a personal judgment in an action to foreclose a mortgage is a lien on the debtor's real estate; *Hendrickson v. Brown*, 11 Okl. 41, 65 Pac. 935, holding that attachment may be had in an equity case, where a personal money judgment may be recovered, although other specific relief is necessary.

18 KAN. 607, MOORE v. CUTLER

Review dependent on contents of record.—Cited in *Briggs v. Latham*, 36 Kan. 205, 13 Pac. 129, as to failure to bring any portion of the pleadings to the Supreme Court; *Neiswender v. James*, 41 Kan. 463, 21 Pac. 573, holding that, when a review is based on a transcript, it must contain the complete record; *Cook v. Challiss*, 55 Kan. 363, 40 Pac. 643, dismissing the petition in error where the review was based on a transcript which did not contain the complete record.

EXTRA ANNOTATED EDITION
REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF KANSAS.

W. C. WEBB,
OFFICIAL REPORTER.

VOL. XIX.
CONTAINING CASES DECIDED AT THE JULY TERM 1877, AND
JANUARY TERM 1878.

SECOND EDITION, REVISED, CORRECTED, AND ANNOTATED
TO AND INCLUDING VOLUME XXXIV.

ST. PAUL:
WEST PUBLISHING CO.
1912.

ENTERED according to act of Congress, in the year 1878, by
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DURING THE PERIOD COVERED BY THIS VOLUME.

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* TERM commenced, January 8th, 1877.

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FOR THE YEARS 1877 AND 1878.

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*Succeeded by Hon. BENJ. F. SIMPSON, of Paola, April 8th, 1878.

† Resigned, July 19th, 1877.

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AMENDED RULES OF COURT.

THE "Rules of Practice in the Supreme Court," as revised at January Term 1871, and amended in April 1875, are published in full in 13 Kas. Rep., pp. 5 to 7. Rules 2 and 11 were amended at the January Term 1877. These two Rules, as amended, are as follows:

RULE 2. Counsel shall file a written or printed brief in each case for each Justice, and for the Reporter of the Court. In each case where printed briefs are filed, an additional copy shall be furnished for the Librarian; and hereafter, the printed briefs will be bound and indexed, and placed in the State Library. The briefs must refer specifically to the page of the transcript which counsel desires to have examined.

RULE 11. Counsel for plaintiff in error shall furnish a copy of his brief to counsel for defendant in error in each case, at least fifteen days before the time set for the argument thereof; and the counsel for defendant in error shall furnish a copy of his brief to counsel for plaintiff in error at least five days before the time set for the argument thereof. Proof of service of the briefs must be filed with the Clerk of the Court prior to the argument of the cause; and in case of a failure to comply, the court may continue the case, or affirm, or reverse the judgment.

THE volume contains 105 cases—in which opinions were written by the Justices as follows: HORTON, C. J., 40; VALENTINE, J., 33; BREWER, J., 32. Chief Justice HORTON filed a separate opinion in one case, (page 467,) and one dissenting opinion, (page 515.) Mr. Justice VALENTINE filed a separate opinion in one case, (page 495.) Mr. Justice BREWER filed two dissenting opinions, (pp. 470 and 499.)

SUPREME COURT,

STATE OF KANSAS.

JULY TERM, 1877.

PRESENT:

HON. ALBERT H. HORTON, CHIEF JUSTICE.

HON. DANIEL M. VALENTINE, } ASSOCIATE JUSTICES.
HON. DAVID J. BREWER, }

FRANCIS HEFLEY *et al.* v. GEORGE W. BAKER.

1. **TRESPASS *Quare Clausum Fregit*; Possession; Title; Damages.** An action in the nature of trespass *quare clausum fregit* may be maintained against a mere wrongdoer, by any person in the possession of the land upon which the trespass is committed, without any reference to who owns the land; and the plaintiff may in such a case recover for whatever loss he sustains, and if no actual loss is shown, he may then recover nominal damages. [*Nelson v. Mather*, 5-153; *R. R. v. Rollins*, 5-167; *Colkins v. Mathews*, 5-191; *Larkin v. Taylor*, 5-433; *Rosa v. R. R.*, 18-128.]
2. **GROWING GRASS, Part of the Realty.** Wild prairie grass growing on land is a part of the realty, and belongs to the owner of the land; and a person merely in the possession of the land, without any claim to the land, and without any license or permission from the owner of the land to use the grass, cannot recover, even in an action of trespass *quare clausum fregit*, and even from a wrongdoer, for the destruction of the grass. The owner of the land only, in such a case, can recover for its destruction. [*Powers v. Clarkson*, 17-218.]
3. **EXEMPLARY DAMAGES; When Recoverable.** Where the defendants, who were mere wrongdoers, drove their cattle onto the plaintiff's premises, and herded them there, and refused to allow the plaintiff to drive them off, and threatened to shoot the plaintiff if he attempted to do so, the plaintiff may, in an action of trespass *quare clausum fregit*, recover exemplary damages. [*Malone v. Murphy*, 2-250; *Wiley v. Keokuk*, 6-94; *R. R. v. Rice*, 10-426, 437; *Sawyer v. Sauer*, 10-466; *Titus v. Corkins*, 21-722; *Halsey v. Warden*, 25-128; *Parsons v. Lindsay*, 26-434; *R. R. v. Little*, 19-269; *Tucker v. Green*, 27-357; *Jockers v. Borgman*, 29-121; *Winstead v. Hulme*, 32-573; *News Co. v. Wilmarth*, 33-513; *R. R. v. Kessler*, 18-523, 525; *R. R. v. Phillips*, 20-12; *R. R. v. Richardson*, 25-407; *Moulton v. Aldrich*, 28-811; *R. R. v. Wilson*, 28-641; *R. R. v. Morgan*, 31-79; *R. R. v. Pierce*, 33-64; *R. R. v. Adams*, 33-430; *Powers v. Kindt*, 13-74.]

Hefley v. Baker.

[*Contra* to 8th and part of 9th lines from bottom of page 12, see 70 Ill. 496, 500; 21 Ohio St. 98; 95 Ohio (N. S.) 298; 50 Wis. 648; 1 Sutherland on Damages, 748; 68 Me. 287; 71 Ill. 242.]

Error from Wilson District Court.

ACTION of trespass, brought by *Baker* against *Francis Hefley* and *Thomas Cain*, Trial at the May Term 1875, of the district court. Verdict and judgment in favor of *Baker*, and defendants bring the case here on error. The opinion contains a sufficient statement of the facts.

J. W. Sutherland, and *Ruggles & Sterry*, for plaintiffs in error.

W. J. Yates, and *R. D. Hartshorne*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action in the nature of trespass *quare clausum fregit* brought by *Baker* for injuries done by *Hefley* and *Cain*'s cattle upon land occupied by the plaintiff. The evidence introduced on the trial shows that the plaintiff was in the possession of the land, but also shows that he did not own the same, nor claim to own it, and had no interest therein further than his mere possession thereof. The defendants did not have the slightest interest in or claim to the land. According to the plaintiff's evidence, which under the verdict must be taken as true, the defendants drove their cattle upon the plaintiff's premises, and herded them there, and would not allow the plaintiff to drive them off, but threatened "to shoot the plaintiff's brains out if he attempted to do it." A portion of the plaintiff's premises was fenced, and he resided thereon; but that portion of the premises where the trespasses were committed was not fenced.

The defendants, who are plaintiffs in error in this court, claim that upon the foregoing facts the plaintiff below cannot maintain this action at all; but that even if he can, he cannot recover more than merely nominal damages. We think the plaintiff may maintain the action. Trespass *quare clausum fregit* is a mere possessory action, and may be maintained against a mere wrongdoer by any person in the possession of the land upon which the trespass is committed,

1. Trespass, a possessory action; title.

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without any reference to who owns the land. (5 Kas. 153; 7 Kas. 42, 43; 12 Kas. 604, 605.) The action is merely for injuries to the plaintiff's possession; and where no actual injury is shown, the law presumes injury and gives nominal damages. The plaintiff may however in this action, upon proper pleadings and proof, recover for all injuries done to either his real or personal property, if done in connection with the trespass and in connection with the injury to the plaintiff's possession. With reference to the plaintiff's right to maintain the action, it can make no difference as to who may own the land, whether it be the government, or Indians, or a railroad company, or some private individual. In either case the plaintiff may maintain the action, and may recover for any loss which he may sustain. And if he shows no actual loss, then he may recover nominal damages. In the present case we suppose that the government owns the land, though it is not shown by the record who owns the same.

With reference to a person driving his cattle upon another's premises, or herding them there, see *Larkin v. Taylor*, 5 Kas. 434, 446; *Powers v. Kindt*, 13 Kas. 74, 76. We think the plaintiff is entitled to recover at least nominal damages in this case. The only damage that the defendants' cattle did in the present case was to eat up and destroy the wild prairie grass growing on the said land. This grass was a part of the realty, and belonged to the owner of the land, and not to the plaintiff. (*Powers v. Clarkson*, 17 Kas. 218.) The plaintiff does not claim to have had any permission or license from the owner to use the grass. He had no contract, and no understanding of any kind with the owner of the grass. We would therefore think that the plaintiff cannot recover for the destruction of the grass. The owner only can recover for its destruction.

The court below gave the following instruction to the jury, to-wit: "When the elements of malice, gross negligence, or oppression, thingle in the controversy, the law allows the jury to find what are termed exemplary or vindictive damages; that is, damages inflicted by way of pen-

² Growing grass,
part of realty.

³ Exemplary
damages.

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alty or punishment, given to the party injured." The plaintiffs in error complain of this instruction. We think however it is substantially correct. The decision in the case of *Wiley v. Keokuk*, 6 Kas. 94, 106, would authorize it; though the negligence that would authorize exemplary damages must be so gross as to amount to wantonness; (*L. L. & G. Rld. Co. v. Rice*, 10 Kas. 426, 437; *K. P. Rly. Co. v. Kesler*, 18 Kas. 523.) We would think that exemplary damages would be proper in this case. The plaintiff had the quiet, peaceable and exclusive possession of the property upon which the trespass was committed, and the defendants knew it. The defendants had no right whatever to the property, and this they also knew. But notwithstanding this knowledge, they drove their cattle onto the plaintiff's premises, against his known wishes and consent, and herded them there, and refused to permit the plaintiff to drive them off, and threatened to shoot him if he attempted to do it. Thus they pastured their cattle on the plaintiff's premises for about three months—driving them on every second or third day, in the morning, pasturing them on the land during the day, and driving them off in the evening. This is according to the plaintiff's evidence, which we take to be true, as the jury found for the plaintiff. The jury found in favor of the plaintiff, and against the defendants, and assessed the plaintiff's damages at \$75. This was actual damage, according to the sixth special finding of the jury. The jury gave nothing to the plaintiff as exemplary damages. This verdict was therefore erroneous, and should have been set aside. The plaintiff was not entitled to anything as actual or compensatory damages. He was only entitled to nominal damages and to such exemplary damages as the jury might think proper to give him. The court therefore erred in refusing to set said verdict aside, and in refusing to grant a new trial. The court below committed some other errors which it is not necessary to mention.

The judgment of the district court will be reversed, and cause remanded for a new trial.

All the Justices concurring.

H. J. SEIP & Co. v. MARTIN PATRIE.

1. **WEIGHT OF EVIDENCE; Province of Jury, to Determine.** A reviewing court will rarely if ever weigh the testimony upon a question of fact properly submitted to a jury, and which it was the province of the jury to determine, and disturb a judgment and verdict because not sustained by sufficient evidence, even when the preponderance would seem to be against the finding of the jury. [*R. R. v. Kunkel*, 17-145, 168, and cases cited; *Ladd v. Brewer*, 17-204; *R. R. v. Brady*, 17-380; *Hobson v. Ogden*, 16-388, and cases cited.]
2. **BURDEN OF PROOF; Conflicting Testimony; Verdict.** Where the issue is one of fact, and each party introduces evidence competent to be considered by a jury, and the court submits it for their decision, and the jury find against the party on whom is the burden of proof, and the trial court approves the verdict by refusing to grant a new trial, this court cannot reverse the judgment upon the ground merely that the verdict of the jury is against the evidence. [See cases cited above.]

Error from Washington District Court.

REPLEVIN, brought by *Seip* and two others, as partners, against *Patrie*, sheriff, etc., to recover sixty tons of stone-coal. Plaintiffs claimed as owners. The sheriff justified his taking under an execution issued to him in favor of one Carpenter against the goods and chattels of the St. Jos. & D. C. Railroad Company, and he alleged that the property belonged to said railroad company. Trial at the November Term 1875. Verdict and judgment for the defendant, and *Seip & Co.* bring the case here.

J. D. Brumbaugh, for plaintiffs.

J. W. Rector, for defendant.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by H. J. Seip & Co. against Martin Patrie, to recover the possession of certain stone-coal. The only grounds upon which the plaintiffs ask a reversal of the judgment below are, that the verdict upon which such judgment was rendered is against the evidence, and that, for that reason, the court below erred in re-

Seip v. Patrie.

fusing to set aside such verdict, and in refusing to grant a new trial. There is no claim that the court below erred in any ruling prior to overruling the plaintiff's motion for a new trial; and from anything appearing in the record, the court may have taken the same view of the law of the case that the plaintiffs did.

We cannot say that the verdict is against the evidence. We cannot say from the evidence that the plaintiffs ever owned the coal in controversy, or that they ever had the slightest right to the possession thereof. The evidence would seem to show that the plaintiffs entered into a contract with the St. Joseph & Denver City railroad company, to furnish coal to such company upon condition that the coal should remain the property of the plaintiffs until the same should be used or paid for, and that the plaintiffs furnished coal under said contract to said company at St. Joseph, Missouri. The evidence also shows that the defendant, who was sheriff of Washington county, in this state, by virtue of an execution held by him against said railroad company levied upon the coal now in controversy as the property of such railroad company, and took the same from the possession of the company at Hanover, Washington county. But the only evidence that tends to show that the coal levied upon by the defendant was ever the property of the plaintiffs, is in the testimony of H. J. Seip, one of the plaintiffs, as follows:

"This coal, levied upon by the defendant, was a portion of the coal furnished under said contract." "At the time sheriff Patrie, the defendant, levied on said coal, I was doing business at St. Joseph, Missouri, 125 miles from Hanover, Kansas." "The coal the defendant Patrie levied on was part of the coal I furnished the railroad under said contract, for 1875. The day the coal was taken I was notified he had taken sixty tons of it. It was hearsay to me. Said coal was then worth at Hanover about six dollars per ton. I know this was my coal, because sheriff Patrie told me before the first trial of this case that he had levied on my coal."

Sheriff Patrie however testifies as follows:

"I never told the plaintiff Seip I levied on his coal, or any coal at all. When I took the coal I was satisfied it really

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belonged to the railroad company, and not to Seip, or any one else, or I would not have taken it. The company then had it in their possession."

There was no other evidence showing where the railroad company got the coal upon which the defendant levied. There was no evidence showing whether the railroad company ever purchased coal from any other person, or received coal from any other source, or not. There was no evidence showing whether the railroad company ever carried coal as a common carrier or not, or whether they ever had any coal in their possession, except the coal in controversy, and the coal furnished by the plaintiffs. This lack of evidence we think is against the plaintiffs, instead of in their favor. The burden of proof rested upon the plaintiffs. It devolved upon them to show that the coal levied upon by the defendant was a part of the coal furnished by them to the railroad company, and it did not devolve upon the defendant to show that it was not such coal. There was, we think, sufficient evidence from which the jury might have found the fact of ownership in favor of the plaintiffs. But the jury found generally against the plaintiffs, and as the case is presented to this court, we must infer that the jury also found the fact of ownership against them. That is, we must infer that the jury found that the coal levied upon by the defendant was never any part of any coal furnished by the plaintiffs to the railroad company. The plaintiff Seip did not pretend to know from his own personal knowledge whether the coal levied upon by the defendant was a part of the coal furnished by the plaintiffs to the railroad company. All he knew about it, was from hearsay. He testified however that the defendant told him that the coal levied upon was his coal. This was good evidence, and sufficient if it had not been denied. But the defendant testified that he never told Seip any such thing. And we must infer from the verdict that the jury believed the defendant. Now, taking all the evidence in the case together, we cannot say, as against the verdict of the jury and the approval thereof by the district court, that the verdict

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is against the evidence. And we certainly cannot reverse the judgment of the court below on that ground.

The judgment will be affirmed.

All the Justices concurring.

SIMON ABELES V. TIMOTHY BRANSFIELD.

1. PARENT AND CHILD; *Injury to Minor; Right of Recovery.* Where a mother, who is the only surviving parent of a minor son, commences an action in her son's name, as his next friend, and sets forth in the petition a cause of action for injuries to the person of her son, and also sets forth loss of time by her son on account of such injuries, and also expenses incurred by her son in regaining his health from such injuries, and asks judgment for her son for damages accruing on account of such loss of time and expenses, compensation for such loss of time and expenses may be recovered in such action, notwithstanding it may be shown that the mother has never relinquished to her son his time or services in any manner except by the commencement and prosecution of such action.
2. ——— By reason of the commencement and prosecution of such action, it must be conclusively presumed that the mother relinquished and gave to her son all compensation for such loss of time and expenses.

Error from Douglas District Court.

At the October Term 1875, upon a verdict in favor of *Bransfield*, plaintiff, the district court gave judgment, and defendant *Abeles* appeals, and brings the case here on error.

Lucien Baker, for plaintiff in error.

Stillings & Fenlon, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: The plaintiff in error states this case as follows:

"This suit was originally commenced in the district court of Leavenworth county, by defendant in error against plaintiff

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in error, to recover five thousand dollars damages for injuries received to his right arm, in July 1874, while drawing tickets, blindfolded, from a wheel, alleged to have been revolved under the direction of the plaintiff in error, while engaged in a supposed charitable enterprise—raising funds for the purpose of erecting a building for a juvenile reform school in Leavenworth city. This suit was, on application of the plaintiff in error, sent to Douglas county for trial. The jury returned a verdict for defendant in error, of \$150, upon which judgment was rendered.”

The defendant in error states the case thus:

This action was brought by a minor, through his next friend, to recover damages for personal injuries received through the negligence and carelessness of the defendant. There is no question made as to the sufficiency of the petition. The jury found for the plaintiff, and the court rendered judgment on the verdict. The findings and verdict of the jury are as follows:

1st Question.—Were the men who were revolving the wheel at the time of the alleged accident so much under the influence of intoxicating liquor as to render them incompetent to discharge their duties properly? *Answer.*—Yes.

2d Ques.—Were the men who were revolving the wheel at the time of the alleged accident competent and proper persons for such service? *Ans.*—No.

3d Ques.—Had Mrs. Bransfield, at the time of the alleged accident to her son, relinquished her claim to his services? *Ans.*—No.

We the jury find for the plaintiff, and assess his damages at \$150.

The first point made by plaintiff in error, in his brief, is stated by his counsel as follows: “*First*—We submit that the verdict was not sustained by any evidence.” Now why is not the verdict sustained by sufficient evidence? In what particular is it not so sustained? or what part of the verdict is not sustained? What necessary fact is not proved? The plaintiff in error has failed to inform us, and we have been unable to discover why the verdict is not sustained by sufficient evidence. We cannot therefore reverse the judgment of the

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court below upon this ground. The second point made by plaintiff in error in his brief is stated by his counsel as follows:

*"Second—*The jury found that Julia Bransfield, (the only surviving parent of Timothy Bransfield,) had never released her right to the services of her son Timothy. The defendant in error, (plaintiff in the district court,) gave evidence of the value of the physician's services, and loss of time of defendant in error. The court instructed the jury that the defendant in error, a minor, who had not obtained a release of his time from his parent, was entitled to recover for medical attendance, which the parent would have to pay, and for loss of time which belonged to the parent. The defendant Abeles asked the court to instruct the jury that the plaintiff, Timothy Bransfield, could not recover for medical attendance and loss of time, unless Mrs. Bransfield had released her right to her son's services, which instruction was refused.

"This case then presents the question squarely: has a minor who brings suit by his next friend, for injuries to his person, a right to recover for loss of time and medical attendance, without showing that he is doing for himself, and that his parent or parents, as the case may be, have released their right to his services? . That in such case, loss of time and medical attendance should not be considered by the jury, without such showing, see 10 Kas. 519. In this case the jury expressly finds that the services of plaintiff, Timothy, belonged to his mother; consequently she alone was entitled to them, and responsible for the physician's services. 10 Kas. 519."

The defendant in error answers this point of the plaintiff in error as follows:

"There is nothing in the record showing that the father of the plaintiff was dead; no showing that the mother had any right to the services of her son, unless the bare fact of being the mother gave her such right, and this, as a proposition of law cannot be maintained. Section 4 of the act relating to minors, (Gen. Stat. 581,) gives the right to the minor to recover for his services, when the contract for such services was made with him alone, to the exclusion of his parent or guardian. The record shows the employment of young Bransfield by Abeles, without any intervention of a parent or guardian. It follows then, that if during such employment he was injured by the carelessness or negligence of Abeles, he is entitled to recover for his medical expenses and loss of time, and it cer-

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tainly would have been error for the court to have instructed the jury that plaintiff could not recover for loss of time and doctor's bills unless Mrs. Bransfield had released rights she never had. 'The mother is entitled to no power, but only to reverence and respect.' 1 Sharswood's Blackst. 453; *Commonwealth v. Murray*, 4 Binney, (Pa.) 487; *Whipple v. Dow*, 2 Mass. 415; *Pray v. Gorham*, 31 Me. 240; *Passenger Railway v. Stuter*, 54 Penn. St. 375; 15 N. H. 486; Gen. Stat. 580. There is nothing in this record to show that any instructions were given or refused by the court. The statement in the record is, that certain instructions were asked, and filed in the clerk's office, but no showing as to the ruling of the court on such instructions. The case in 10 Kas. 519, referred to by counsel for plaintiff in error, has no bearing on the questions in this case. The statement in plaintiff's brief, that the jury 'expressly find that the services of Timothy Bransfield belonged to his mother,' is not sustained by the record. There is no such finding."

We would also say, that the record does not show that Julia Bransfield was "the only surviving parent of Timothy Bransfield;" nor does the record show whether the father of Timothy Bransfield (if living) had released to him his time and services, or not. There was no exception taken to the introduction of any evidence by either party, and hence we cannot consider any supposed error in the reception of evidence. The instruction given by the court, and of which the plaintiff in error complains, reads as follows:

"If the jury find for the plaintiff, they shall in the assessment of his damages, take into consideration his loss of time, if any, and any expenses he may have been put to or incurred in curing the injury—such as doctor's bill, medicines, and other necessary expenses, and also the injury and the extent of the same, and the mental and physical suffering which the plaintiff may have endured by reason of the injury."

It will be noticed, that the court does not tell the jury that they may assess damages for any expenses paid or incurred by the plaintiff's father, or mother, but only for such expenses as the plaintiff himself paid or incurred. Is there anything wrong in this? But we shall consider this question, and the one with reference to the plaintiff's loss of time, hereafter. It does not appear from the record that we have all the instructions given

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by the court to the jury, and therefore we cannot consider those refused.

We have given all the findings of the jury in this case, and of course it will be seen that the jury did not expressly find that the services of the plaintiff belonged to his mother. The jury simply found that the plaintiff's mother had not, "at the time of the alleged accident," "relinquished her claim to his services." They did not find what her claim was. Now, perhaps the plaintiff's father had relinquished *his* claim to his son's services. And perhaps also his mother had, after said accident occurred, relinquished her claim to her son's services. And there is nothing in the record that shows that she ever claimed anything from the defendant for herself, for her son's loss of time and the expenses incurred in curing him. As she commenced this action in her son's name, as his next friend, and set forth in the petition said loss of time and said expenses as a part of her son's damages, and asked judgment in favor of her son for such damages, it must now be conclusively presumed that she relinquished and gave to her son all claim that she might have had for compensation for such loss of time and such expenses. Whether the jury included anything in their assessment of damages for said loss of time and said expenses, we cannot tell from the record; but for the purposes of this case we will presume that they did. We will also suppose that Mrs. Bransfield was, as is claimed by plaintiff in error, the only surviving parent of the plaintiff. We will also suppose, that she was entitled to his services, and was responsible for his support and necessary medical relief and assistance. We will also suppose that she never in any manner relinquished her right to his time and services, except so far as she did so by the commencement and prosecution of this action. And then with all these suppositions, we shall hold that by the act of commencing and prosecuting this action, Mrs. Bransfield gave to her son all her claim for compensation for his loss of time and expenses occasioned by said accident. Whether she had the power to so give the same to her son, so that he might recover for the same in his own name, is the most difficult

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question in the case. Counsel have not enlightened us upon this question. Whether there are any authorities upon the question or not, we do not know. We must therefore decide the question upon first impressions. A parent ought to have such power. By allowing the child to recover for loss of time and expenses, it avoids the necessity for two suits. If no such power exists, then the parent must sue for the loss of time and expenses, and the child must sue for the injury, the pain, suffering, etc. This would require two suits where one ought to be sufficient. The law ought to be such that both actions might be united into one. It would save a great deal of trouble and expense. And no insuperable objection can be urged against such a union, that we are aware of. Primarily, we suppose that the right to compensation for loss of time and expenses belongs to the child. It is a part of his capital with which to procure his maintenance, support and education. But as the parent, as his guardian or trustee, is responsible for all these, the parent as such guardian or trustee is allowed, in his or her own name, to recover such compensation. This is a privilege to the parent. But the parent may, as we think, waive this privilege and allow the child to recover in his own name. And where the parent commences the action for such compensation, in the name of the child, and as the next friend of the child, as Mrs. Bransfield did in this case, we think it must be conclusively presumed that the parent waives the privilege to sue for the same in his or her own name, and gives the same to his or her child, or perhaps, more properly speaking, it gives to the child the power to recover and use what really belongs to the child.

The third and last point made by the plaintiff in error as stated in his counsel's brief is as follows:

*"Third—*The plaintiff ought not to recover in this case, as both plaintiff and defendant were engaged in an undertaking in violation of law."

This point is of course not made personally by the plaintiff in error, but is made by his counsel. Now just what kind of an illegal transaction counsel means to intimate that his client

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was engaged in, we are not informed, and the record does not show. It is possible that counsel means to intimate that his client was engaged in a lottery scheme. Here however we give the testimony of his client upon the subject; it is as follows:

"My name is Simon Abeles. Timothy Bransfield was in my employ at the time of the accident, and I was proprietor of the juvenile-reform-school scheme, run by me in 1873 and 1874. This scheme was for the purpose of constructing a building to reform juveniles in Kansas, in which I was at that time deeply interested. I had no expectations or desire to obtain any pecuniary benefit from this scheme; but my sole object was to reform the juvenile delinquents of my adopted state. I had few other objects in my life than the one referred to. And the reason why the more valuable property specified in the printed schedule in the scheme were not drawn, or called for after drawn, was the lack of sympathy and want of material aid by the people of Kansas, who did not seem to have sufficient confidence in the scheme, or enough of philanthropy to aid me substantially in the scheme. The persons who turned the wheel when plaintiff was injured, were not fellow-servants of the plaintiff. He was but a boy who worked, blindfolded, under the direction of the persons selected to conduct the drawing. And I furnished the liquors which were in the hall. My purpose in so doing was to supply refreshments to the leading employes, and to keep up the excitement of the drawing."

This is all of the testimony of counsel's client. It will be seen that he does not characterize said "juvenile-reform-school scheme" as a lottery, or as an illegal transaction. Both plaintiff and defendant, in the court below, seem to have treated the defendant's undertaking as a charitable and philanthropic enterprise, and neither of them litigated the case as though it was a lottery, or an illegal adventure. But even if the defendant's "juvenile-reform-school scheme" was nothing but a lottery, still the plaintiff was only twelve years old at the time, and it cannot be presumed, in the absence of all showing to that effect, that he had knowledge of its illegal character.

The judgment of the court below will be affirmed.

HORTON, C. J., concurring.

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BREWER, J.: While concurring in the judgment, I am not prepared to say that I assent to all the views expressed by Mr. Justice VALENTINE in the opinion.

GEORGE W. E. GRIFFITH V. JAMES E. WATSON *et al.*

1. **SHARES OF STOCK, in Incorporated Company; Where Taxable.** In 1873, the Lawrence Gas, Coke & Coal Company was a corporation, located and doing business in the city of Lawrence, and was taxable and taxed therein. The plaintiff owned 115 shares of the capital-stock of said corporation, and resided in Wakarusa township, and not in the city of Lawrence. *Held*, That he was not taxable on said shares of stock in the said city of Lawrence.
2. **LISTING PERSONAL PROPERTY FOR TAXATION; Notice to Owner; Illegal Listing.** In 1873, the plaintiff listed for taxation all his personal property subject to taxation in Wakarusa township, and duly paid the taxes thereon; and all the property belonging to said corporation was also listed, and the taxes were duly paid thereon. Also, in the same year, some person or persons, without any notice to the plaintiff, or any authority from him, listed for taxation in the city of Lawrence, in his name, 115 shares of the capital-stock of said corporation, and taxes were levied on said shares against the plaintiff. *Held*, That said last-mentioned listing, and said last-mentioned levy of taxes, were and are illegal. [*Griffith v. Carter*, 8-565, 571; *Lappin v. Comm'rs*, 6-408; *R. R. v. Comm'rs Wyandotte Co.*, 18-587.]

Error from Douglas District Court.

INJUNCTION, brought by *Griffith*, against *Watson* as county treasurer, and several others, to restrain the collection of alleged illegal taxes. The district court, at the October Term 1875, gave judgment for costs in favor of the defendants, and *Griffith* appeals. All the facts are stated in the opinion.

S. O. Thacher, for plaintiff, contended, first, that the shares of stock assessed to *Griffith*, were not taxable at all as personal

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property, neither to Griffith, as owner, nor to the corporation of which he was a member, the entire property of the corporation having been already duly assessed and taxed; (Const., art. 11, § 1; 37 Mo. 265; 5 Ind. 810; 9 N. H. 428; 8 Mich. 301.) Secondly, if taxable as personal property, such shares were taxable in the township where Griffith resided, and not in the city of Lawrence where he did not reside; and third, the assessment made by defendants, without notice to plaintiff, was illegal; 8 Kas. 284; 16 Kas. 587.

Nevison & Alford, for defendants, submitted, that for the purposes of taxation there is a clear distinction between the capital-stock of a corporation, and the shares by which it is represented; Cooley on Taxation, 158, 170. That a tax on the shares of stockholders is a different thing from a tax on the corporation itself, or its stock, and may be laid irrespective of any taxation of the corporation, see Cooley on Tax. 166; 3 Wall. 173; 15 Ind. 150. The case in 5 Ind. 810, cited by plaintiff, has no application whatever, that case turning on the construction of a certain statute entirely different from our own. Again, §§ 1 and 2 of the tax law of 1868 expressly provide that shares of capital-stock shall be assessed and taxed to the owner thereof; and section 12 of said act contemplates that such stock shall be assessed to the owner thereof and taxed as other personal property in the city or township where such corporation is located and doing business. Nor was the plaintiff entitled to notice of said assessment in any event. It was not an increase of the return made by himself from Wakarusa township, for it was an assessment made in said city of Lawrence; nor can it in any sense be considered as an increase of assessment, within the meaning of the statute. Plaintiff's petition shows that this property was clearly subject to assessment and taxation in the hands of plaintiff, and as no tender or payment is alleged by plaintiff it is manifest that he was not entitled to a judgment: 10 Kas. 270; 2 Otto, 575; 3 Dil. 25; 16 Wis. 198; Amer. Law Reg. 1872, p. 208. A court of

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equity ought never to interfere to restrain the collection of a tax, unless strong equitable grounds exist for such interference, or where there is no remedy at law; 7 Kas. 281.

The opinion of the court was delivered by

VALENTINE, J.: This was an action to restrain the collection of certain taxes levied against the plaintiff on 115 shares of the capital-stock of the Lawrence Gas, Coal & Coke Company. The county treasurer, county clerk, sheriff, board of county commissioners, and city of Lawrence, were all made parties defendant. The case was tried in the court below by the court, without a jury, on the plaintiff's petition and the defendants' answers. The court found, upon the issues joined, "all the allegations of fact contained in the plaintiff's petition to be true," but nevertheless rendered judgment against the plaintiff, and in favor of the defendants. Such judgment was rendered upon the theory that the petition did not state facts sufficient to constitute a cause of action. Therefore the only question presented to us for our consideration is, whether the petition did state facts sufficient to constitute a cause of action or not. The petition stated among other things as follows: Said Lawrence Gas, Coal & Coke Company was a corporation located and doing business in the city of Lawrence, and all of its property consisted of real estate situated in said city. All said property was duly taxed for the year 1873, and the taxes thereon were duly paid. The plaintiff resided in the township of Wakarusa, and did not reside in the city of Lawrence. He owned 115 shares of capital-stock of said corporation. He listed for taxation in said Wakarusa township all his personal property subject to taxation, and has duly paid all the taxes chargeable thereon. The defendants, or some one of them, listed, or caused to be listed, in the name of the plaintiff, one hundred and fifteen shares of the capital-stock of said corporation as property of the plaintiff, subject to be listed in the city of Lawrence, notwithstanding the plaintiff was then a resident of the town of Wakarusa, and not a resident of the

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city of Lawrence. Said listing was made for the year 1873, without the knowledge or consent of the plaintiff, and without any notice to him whatever. "In such listing said stock was valued at \$1,380," although in fact it "had no value outside of the real estate owned by said company," and which real estate had already been taxed. Taxes were levied upon said shares of stock in pursuance of said listing, and the defendants were, at the commencement of this suit, attempting to collect said taxes. We do not think that it is necessary to mention any of the other facts stated in the petition. We think the court below erred.

I. If said shares of stock were taxable at all to the plaintiff, we think they were taxable to him only in Wakarusa township, where he resided, and not in the city of Lawrence, where he did not reside. (Gen. Stat. 1023, § 8, last clause; *Griffith v. Carter*, 8 Kas. 565, 571.) In 1873, all property, real and personal; belonging to a corporation such as this, including "the full amount of stock paid in and remaining as capital-stock," was taxable to the corporation itself, and not to the stock-holders. (Gen. Stat. 1024, § 12; laws 1869, p. 244, § 1.) And section 12 of the then tax law (Gen. Stat. 1024,) provides in terms, that "no person shall be required to include in the list of personal property any portion of the *capital-stock* of any company, or corporation," such as this. But it is claimed that the phrase, "capital-stock," as used in said section 12, does not mean shares of stock as held by individuals in a corporation. Now, conceding this to be true, still said shares of stock must be considered as personal property, not real estate, (Gen. Stat. 1019, 1020, § 2,) and must therefore be taxed, if taxed at all, to the holders thereof where such holders reside. To tax property in the city of Lawrence, which should have been taxed in the township of Wakarusa, would probably increase the burdens of the taxpayer, even if the property were not taxed in Wakarusa township, and would therefore under the statutes be unjust as well as illegal. But, from the allegations of the petition, we must presume that the plaintiff's said shares

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of stock were taxed to him (if taxable at all to him) in Wakarusa township. There is a conflict of authority as to whether shares of stock, and also all the property of the corporation, including its capital, can be taxed; some authorities holding that such a thing would be double taxation, and others holding otherwise.

II. After the plaintiff had listed for taxation all his personal property subject to taxation in Wakarusa township, it would have been illegal for any person, without notice to the plaintiff, to make another list, or to increase the plaintiff's list, or the amount of his assessment, even if the same had been so done for Wakarusa township. (*Leav. Co. v. Lang*, 8 Kas. 284; *K. P. Rly. Co. v. Russell*, 8 Kas. 558, 564; *K. P. Rly. Co. v. Wyandotte County*, 16 Kas. 587.) Assuming that said shares of stock were taxable to the plaintiff in Wakarusa township, then we must presume, from the allegations of the petition and the findings of the court, that the plaintiff listed them for Wakarusa township, and then that the defendants, or some of them, listed them a second time, (this time for the city of Lawrence,) and thereby increased the plaintiff's assessment to the amount of \$1,380. But, even if the plaintiff did not list them, still no other person had any right to do so without first giving notice to the plaintiff. (See cases above cited.) So, taking any view we may of said taxes levied in the city of Lawrence on said shares, such taxes are illegal. Now as the plaintiff listed for taxation all his personal property subject to taxation in Wakarusa township, where he resided, and paid all the taxes chargeable thereon, we think he is entitled to an injunction to restrain the collection of said illegal tax levied in the city of Lawrence.

The judgment of the court below will therefore be reversed, and cause remanded with the order that judgment be rendered on the findings of the court below in favor of the plaintiff.

All the Justices concurring.

THE STATE OF KANSAS v. BARNEY BOHAN.

1. **BILL OF EXCEPTIONS—Must be Regularly Settled; Agreed Statements of Counsel, and Mere Certificates of Clerk, Disregarded.** Neither the certificate of the clerk of a district court, nor the agreed statement of counsel as to what occurred at a trial, can be made to supply the place of a bill of exceptions taken in accordance with the statute; and when matter is sought to be brought into the record by such means, it will be disregarded by the supreme court. [*Gallagher v. Southwood*, 1-143; *R. R. v. Wagner*, 19-335; *Shumaker v. O'Brien*, 19-476; *Brown v. Rhodes*, 1-359; *State v. Montgomery*, 8-356; *Lovinsberry v. Rakestraw*, 14-151, 153; *Jackson v. Stoner*, 17-605; *Patee v. Parkinson*, 18-465; *Kshinka v. Cawker*, 16-65; *State v. Schonevald*, 26-288, 289; *Scott v. McKinstry*, 27-163; *Pierce v. Myers*, 28-367; *State v. Burrows*, 33-14; *Walker v. Braden*, 34-661; *Hodgden v. Comm'rs*, 10-637; *Parker v. S. M. Co.*, 24-31; *Allen v. Krueger*, 25-74, 75; *Ins. Co. v. Koons*, 26-215, 218; *Whitzell v. Forglar*, 30-525, 528; *Cohen v. Trowbridge*, 6-385.]
2. ——— **Waiver, by Counsel, and Nunc Pro Tunc Order, Void.** Where a criminal case was tried at the February term of the district court, and the regular term next after that of the trial commenced on the 29th of May following, and a bill of exceptions of the proceedings of the trial was not presented or allowed, or signed, or filed, until June 5th, and during the said May term, such bill is unauthorized by law, and no part of the record; and *held*, that a waiver by counsel of the time such bill of exceptions was taken and the manner it was made will not cure the fatal defect as to said exceptions; and *held also*, that an order of said district court of the said May term to have the said bill of exceptions entered as having been presented and allowed as of a previous term of the court, is a nullity. The court has no power, by this mode, of extending the time for the making and signing and filing a bill of exceptions beyond the term. [See cases cited above.]
3. **TERMS OF COURT; Adjournments.** Where the February term of the district court was continued to the 24th of May next thereafter, and the court did not convene on the said 24th pursuant to adjournment, the court is legally open until it adjourns *sine die*, or expires by law.
4. **CHANGE OF VENUE; Prejudice of Judge, on New Trial.** Neither unfavorable comments as to the innocence of a defendant in a criminal case, after a verdict of guilty by a jury, made by a trial judge upon the evidence introduced in the case, when passing sentence upon such defendant, nor adverse rulings, nor errors of judgment, of themselves amount to prejudice on the part of a judge so as to compel a removal of the case (upon a new trial granted by the supreme court) to the district court of some county in a different judicial district. [*Smith v. State*, 1-365; *State v. Horne*, 9-119; *Emporia v. Volmer*, 12-622; *State v. Winner*, 17-306; *State v. Adams*, 20-311; *Herbert v. Beathard*, 26-752; *State v. Furbeck*, 29-533, 536; *State v. Bohan*, 15-416.]

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5. **DRAWING JURORS; Attendance of Deputy-Sheriff.** The mere fact that a deputy-sheriff was present at the county clerk's office to attend and witness the drawing of a jury, and after such drawing signed the certificate of the drawing with the county clerk and the two justices of the peace of the county, who also attended such drawing in accordance with the act for the selection of jurors, where the names of all the jurors were drawn from the jury box by such county clerk in the presence of all of such parties, furnishes no cause to discharge or set aside the jurors so drawn. [*State v. Yordi*, 30-223.]
6. **HOMICIDE; Self-Defense; Instructions.** Upon the trial of a defendant charged with murder, where the defense is made solely on the ground that the homicide was justifiable, as having been committed in self-defense, *held*, that the instructions as to the defense are not erroneous when it clearly appears therefrom that the jury were directed that all the law demands is, that there shall be reasonable apprehensions of imminent danger, and of the reasonableness of this apprehension the jury are to be the judges, but the threats and circumstances upon which this apprehension rests must not only tend to lead to the belief of such danger, but they must force the belief upon the mind, and then the belief must be reasonable, and such as reasonable men act on. [*State v. Potter*, 13-415; *State v. Rogers*, 18-78; *State v. Scott*, 24-68; *State v. Horne*, 9-119, 120; *State v. Stackhouse*, 24-452.]

Appeal from Saline District Court.

INFORMATION for murder, charging *Bohan* with the felonious killing of Thomas Anderson, at the county of Saline, in November 1874. *Bohan* was tried at the March Term 1875 of the district court, found guilty of murder in the second degree, and sentenced to confinement in the penitentiary for twenty years. On his appeal to this court, such sentence was set aside, and a new trial granted. (15 Kas. 407 to 419.) A second trial was had at the February Term 1876 of the district court. *Bohan* was again convicted of murder in the second degree, and was sentenced to confinement in the penitentiary for the term of his natural life; and he now again appeals to this court. The errors complained of, and many of the facts, are stated and discussed in the briefs of counsel. Other questions of fact, and several questions of practice, will appear in the opinion, *infra*. The charge to the jury (upon which several errors are assigned,) is very voluminous. After defining and explaining the several degrees of felonious homi-

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cide, and defining the terms "maliciously," "purposely," "deliberately," and "premeditatedly," the court read the information, and then further instructed the jury as follows:

—To this charge so stated in the information, the defendant has pleaded "not guilty." He is therefore to be considered by you innocent, until proven guilty beyond a reasonable doubt — innocent of the crime charged, and innocent of each and every element and ingredient of such crime; innocent of the facts alleged, and innocent of any guilty intent or connection therewith. With this presumption of innocence the law has for ages wisely and properly invested all defendants charged with crime, and you should give this defendant on trial the benefit of this presumption of innocence in the outset, and let it run with him throughout the trial, until it shall be overthrown by the testimony, when applied to the law, and his guilt appears beyond a reasonable doubt. And where there is a reasonable doubt in your minds in which of two or more degrees the defendant is guilty, you can convict of the lowest degree only.

In contemplation of law, the charge against the defendant covers and includes the two degrees of murder, and the four degrees of manslaughter known to and defined by our statute; and by the law of this state you are to consider each and all of these degrees; and you can find the defendant guilty of either, or neither, of these crimes, as you may think the facts and the law will warrant. * * *

What then are excusable and justifiable homicide? These are defined by our statutes, and I quote sections 9 and 10 therefrom. [*Here the court read said sections from the statute, Gen. Stat. pp. 319, 320.*] And again, at common law homicide is excusable "when one in doing a lawful act, without any intent to hurt, unfortunately chances to kill another;" and justifiable homicide, for the purposes of this case, is covered by the foregoing statutory definitions. If then, the alleged homicide in this case was committed under such circumstances as, or in a case where, by our statute or by the common law, such homicide was justifiable, or excusable, you must return a verdict of not guilty.

Manslaughter at the common law is, "where the alleged killing happens either on a sudden quarrel, or in the commission of an unlawful act, without any deliberate intent of doing any mischief at all." * * *

The counsel for the defendant in the opening of their case

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to you, stated, among other things, that they admitted the killing, but said the defendant was justified; or in other words, that this is a case of justifiable homicide. The defendant on the stand admitted the killing, but said he did it through fear of injury. The question then, whether this was justifiable homicide, or not, seems to be the principal question in this case.

In giving you the definition of justifiable homicide, as prescribed by our statutes, I use mainly the language of section 9 of our crimes act. It is, "when committed in lawful defense" of any person, "when there shall be a reasonable cause to apprehend a design to commit a felony, or to do some great personal injury, and there shall be immediate danger of such design being accomplished." And with reference to this question our supreme court has laid down the following rule: "On a trial for murder, if the defendant relies on a supposed necessity for the killing as a justification or excuse, the rule to be applied is, that the accused must have believed that he was in immediate and actual danger of his life from the deceased, and his belief must rest on reasonable grounds, and the party from whom the danger is apprehended must be making some attempt to execute his design, or at least be in an apparent situation to do so, and thereby induce a reasonable belief that he intends to do so immediately." A defendant cannot then be excused because he thought he was justified, or thought that he was in immediate peril; but his belief must have been well founded on reasonable circumstances.

The law of self-defense rests in and is founded upon the natural right of every man to protect his own life and person against every unlawful assault upon them by another. When this defense is therefore made in any case of homicide, a jury should listen to it, and *carefully* weigh the circumstances of the killing, in connection with all the other testimony in the case. Mere apprehension that a person designs to kill another, or to commit personal injury upon him, is not sufficient to authorize such other to commence an attack, and to take life. Such an act would be murder. But in cases where a person attacks another, attempting to execute such a design upon life or person immediately, or attacks and is in an apparent situation so to do, thereby creating a reasonable belief in such other that such design is about to be accomplished immediately, then such other can take the life of such assailant, and it is justifiable homicide.

And again, another rule: When from the nature of an at-

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tack, the circumstances immediately preceding it, there is a reasonable ground for a man to believe, and he does believe, that there is a design to destroy his life, or commit any felony upon his person, the killing of the assailant will be justifiable homicide, although it should afterward appear that no felony was intended. The rule being, you should judge a defendant under the circumstances in which he was placed; and if a reasonable and judicious man would have been alike honestly mistaken as to the reality of the danger, then you should excuse him.

The law allows also an individual in defense of his person or property to use such *means* as are necessary. In the situation and use of these means, he must of necessity exercise his own judgment; but he acts at his peril, and if he goes beyond what is necessary to accomplish the object, and violates the law, he must abide the consequences. In the exercise of his judgment he must act rationally. On this question of excusable or justifiable homicide, you should carefully examine and consider all of the testimony in the case, both for the prosecution and for the defense; and then if there should remain in your minds a reasonable doubt as to whether the homicide was excusable or justifiable, and as to whether a crime had been committed or not, you should give the defendant the benefit of that doubt, and acquit.

We now draw towards the testimony in this case. In deciding the question then, as to whether this was a case of justifiable homicide or not, you should first decide the position and condition of the parties when the killing took place; what the deceased was doing; where he was; his physical condition; what dangerous weapons he had, if any; how the parties came together; what caused the shot; where the defendant got his weapon, and at what precise point of time the defendant fired that fatal shot; and in fine, as to all the circumstances of the transaction, and then apply the rules I have given you, and say if the defendant's life was then and there in immediate danger of being taken—if he thought so, and if he had reasonable grounds so to think.

It seems that a scuffle (as it has been termed) was had between the defendant and the deceased, and others, and the defendant was taken and put out of the saloon into the barber-shop. Now I say to you, that, according to the testimony, nothing had been done up to this time upon the part of the deceased that should warrant the defendant by any means to take his life; and the defendant has testified on the stand that he

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did not shoot the deceased on account of this scuffle, or any prior difficulty. You should then consider what the defendant was doing while he was out of the saloon. The testimony varies perhaps as to the time that elapsed from the time defendant was put out of the saloon until he did the shooting. Here was time for reflection, deliberation and premeditation, for the defendant to decide what he would do. And if you should believe the defendant during this time formed the intention to kill the deceased, and then in pursuance of such intention should go and kill him, whether he went back into the saloon and did so, or whether he stood on the outside, it would be murder in one of the degrees according as you might find deliberation and premeditation, as I have defined them.

The defendant had no right to return into the saloon and to renew or commence an attack on the deceased, and if he should do so he would be responsible for all that followed. No man has a right to commence an attack upon another and then, if he should kill his adversary in the fight growing out of such attack of his, to screen himself behind the plea of self-defense. But if you should believe that defendant during this time he was out of the saloon did not form any intent to kill the deceased, or to renew the attack or quarrel, then I say to you that he had the right to return into the saloon, it being his, and to remain there, about his lawful business, as proprietor or otherwise; for no man is obliged to flee from his own property; and if the deceased should attack him, either by himself, or together with his brother William, (if the defendant should so return,) and the defendant should then kill the deceased, you should then ask yourselves if it was done in self-defense; that is, if it was justifiable, and he was in the danger I have described above. But if in such a case the two brothers should attack the defendant, and the defendant was in the imminent peril that I have mentioned from the one only, then he should kill that one only, and not the other. He should go only so far as necessary, and do only such acts as were necessary for his own defense. If the two should attack him, and you should believe he killed William first, or disabled him, so he was in danger no longer from him, you should then inquire of the condition of things as between defendant and Thomas, and ask yourselves if it was necessary to kill him also. Upon this precise point the defendant testified on the stand, on the direct examination, that he shot William first; and then on cross-examination, after giving the position of Thomas with a

billiard cue in his hand, said substantially among other things, and for his reason of killing, that he shot him solely and alone because he had that billiard cue in his hand, and for the reason he was coming at him; that he had nothing against him in the world. And upon questions of his own counsel, he enlarged, and said, "The only reason I shot him was, I made up my mind I could not get away from him without his striking me, and if he hit me I was a goner. He was coming at me at the time." Now if you should believe this testimony of the defendant, and believe that the positions of the parties and circumstances at the time the shooting took place were as testified to by defendant, then you should ask yourselves, under the rules I have given you, if under those circumstances it was necessary to kill Thomas, and that defendant was justified in so doing. In whatever position you should find and believe the parties were in at the time of giving the fatal shot to Thomas, you should apply the same rules. * * *

The testimony of W. B. Tuitt as to the statements of the defendant was admitted upon the question of malice, and for the purpose only as may throw light upon the condition of the mind of the defendant at the time of the shooting, toward Thomas Anderson, and the acts defendant committed upon him. And you should remember that the malice you are to find in this case is malice in the killing of Thomas. With the killing of William, or the malice in his killing, you have nothing to do, only so far as you may think they are so intimately and instantaneously connected, that the one transaction may and does throw light upon and characterize the other.

You are the exclusive judges of the testimony, as to its weight, and the credibility of the witnesses. It is for you to say what has been proven, or disproven; and you are to try and to decide this case upon the case as made in court. You cannot under your oaths take into consideration any belief you may have had, or suppose occurrences about the transaction charged. Take the testimony in the case, and with such reason, judgment, and discretion as you have, together with such general knowledge as is common to all mankind; apply the facts to the law I have given, and make up your verdict accordingly.

In summing up the testimony upon any given question, you should not alone count witnesses. It is not always the most satisfactory, neither is it the most certain of the truth. The questions are, What did the witness swear to? How

Brief of Appellant.

much did he know? Was he positive, or uncertain and equivocating? What were his means of knowledge of the transactions or matters he testified about? What is the character of the witness for truthfulness? Is he credible? What interest has he in the result of the trial? or what friendship for either party, or ill-feeling toward the other, that would be liable to swerve him from the truth? What was the appearance and demeanor of the witness on the stand? How does his story harmonize with the main and certain facts of the case? Has he testified falsely, knowingly, upon any material point in the case; and if so, is he worthy of belief at all? And in case of the defendant, you have the right to take into consideration the great interest he has in your verdict.

It has leaked in here during the trial, in one way and another, that this defendant has been heretofore tried for the killing of Wm. N. Anderson, and acquitted, and heretofore tried in this case and convicted, and a new trial ordered. With these matters you have nothing to do. You do not know the circumstances under which those verdicts were given. The testimony may have been quite different from that before you now. For these and many other good reasons, I say to you, you should not consider them, or either of them, for a moment. Let them therefore I beseech you be stripped from your minds, and decide this case under your own judgments and consciences, on the law and testimony of this case. You would be untrue to yourselves, indeed, if you should let the opinions of others answer for you in this case, or let them bias or swerve you in the least.

Other portions of the instructions are omitted, not being complained of. The jury found the defendant guilty as charged, and he brings the case here on appeal.

Stillings & Fenton, J. G. Mohler, and J. G. Spivey, for appellant:

This is probably the most peculiar case ever tried in the courts of Kansas. On the 3d of November 1874, at Brookville, in the county of Salina, the defendant Bohan killed Thomas Anderson and William N. Anderson at the same time, and under precisely the same circumstances. At the term of said court immediately following the homicide, informations were filed, charging Bohan with the murder of both of said persons—there being two informations, charging

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two separate murders. At the same term of court, the case for the killing of Thomas Anderson was tried, and the defendant was convicted of murder in the second degree, and sentenced by the court to confinement and hard labor for twenty years. (*The State v. Bohan*, 15 Kas. 407.) At the next term of the court, March 1875, the trial of defendant for the killing of William N. Anderson was had, and he was *acquitted* of the alleged crime. The entire record of the case here, and in *The State v. Bohan*, 15 Kas. 407, shows beyond all question that the killing of the two men, Thomas and William N., was done under precisely the same circumstances. If the killing of William N. Anderson was not a crime, it is impossible that the killing of Thomas Anderson could be one; for upon the testimony it would be absurd to say, that he was guilty of a felonious homicide in the one case, and wholly innocent in the other. Of course we do not deny the proposition that on the same facts one jury might differ from another; but when we remember that the defendant shot and killed both Thomas and William N. at the same time—that he was tried a few days after the act, against his protest, and convicted for the felonious homicide of Thomas, and a few months afterward was tried in the same locality for the felonious homicide of William, and honorably acquitted, it is at least reasonable to believe that such first verdict was the result of prejudice, passion, and local and misinformed opinion. As a circumstance in the case, we have a right to assume that at the trial for the killing of William N. Anderson, the public mind had settled down to fairness and justice—was then in a condition to judge a man as he should be judged—that the passion and excitement, the frenzy, which we all know take possession of the people upon the *appearance* of a great crime, had passed away, and that on the second trial, judgment, discretion and calmness had supplanted excitement and frenzy. And we submit, that on general principles, the record of this case exhibits a state of affairs that not only justify but demand a reversal of the judgment herein; that outside of specific error, an ignorance upon the part of the jury, a prejudice on the part of the

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court, and a fear of popular opinion on his part, produced the rulings and judgment to which we object, and which by every just principle of the administration of criminal law, we demand shall be reversed. It is unparalleled in the history of judicial proceedings, that precisely the same acts, done exactly at the same time, under the same circumstances, can in law and in fact, be an innocent act, and a guilty act—a crime, and not a crime. Yet to this result have we come in this case. In view of the singular history of this case, and its surroundings, a more than ordinary fine sight should be drawn on this judgment; and yet we claim this is not necessary, for we contend that most flagrant errors have been committed.

1. When the case was called for hearing, the defendant filed his petition for a change of venue, on account of the prejudices of the presiding judge, and testimony was introduced on said application, from which it appears that the judge had previously refused to change the venue, and compelled a trial in the midst of a highly-excited state of public clamor; that he had during the trial admitted testimony against the defendant in defiance of rulings of the supreme court, which were presented to him at the time; that such ruling against the defendant was condemned by the supreme court, in 15 Kas. 411. By the fair weight of the evidence, it is shown that he had expressed his deliberate conviction in the case, prior to this trial thereof. The record shows that the substance of the testimony in this, the second trial, was the same as in the former trial; yet, while on the previous trial he sentenced the defendant to twenty years imprisonment, he now on precisely the same kind of a verdict, has sentenced the defendant to the penitentiary at hard labor for the term of his natural life. The right of the defendant in every criminal action to be tried by a judge free from bias and prejudice is as sacred as is his right to be tried by jurors free from bias and prejudice; and even more so, as the power and influence of the judge are far greater than that of any one juror. "The character of the case on trial affects the question to some extent. Where the penalty may be death, or a long term of

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imprisonment, the trial judge should listen with more care to the testimony presented to show his bias or prejudice, and a reviewing court will more closely scrutinize the record and give less weight to the presumption in favor of the correctness of the ruling, than where the penalty can only be a fine, or a short imprisonment in the county jail." (12 Kas. 627.) Applying this rule, this court will "closely scrutinize" this record, it being a case of imprisonment for life. Look at the testimony, as to what the judge said; his former rulings in the case; his disregard of decisions of this court; his conversations and statements; his final judgment and sentence. He presided at this trial against the protests and protestations of the defendant, sustained and supported by unanswered testimony. On the same verdict as rendered before, he pronounced a more severe and harsh sentence. If all this does not show prejudice, evidence cannot show it. If the extra-judicial and extraordinary "statement" of the judge can outweigh all this, the section of the statute that allows the change for this cause had as well be repealed. But we submit, that the cause specified in § 173 of the criminal code is properly presented in the manner specified in § 177, and that according to the doctrine of *Smith v. The State*, 1 Kas. 865, the showing by the defendant on his application was all that was required.

2. The court erred in not quashing or setting aside the jurors ordered and drawn 2d March 1876. A jury to try a citizen can only be drawn according to law—by the persons in whom the law has vested this high power. This position is so plain that it would be idle to discuss it. The power to draw a jury from the box is conferred upon certain designated persons. (See § 11, page 535, and § 23, page 538, Gen. Stat.) From this it appears that no deputy-sheriff is intrusted with this delicate power, no more than a school trustee, county surveyor, county attorney, or any other officer not named in the law. Yet the testimony in this case shows that a certain L. M. Tuttle, who was then a deputy-sheriff, participated in the drawing of the jury, and such participation rendered the whole drawing illegal.

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3. The court instructed the jury, "that the defendant cannot be excused because *he thought* he was justified; or *thought* that he was in immediate peril; but his belief must have been *well-founded* on reasonable circumstances." * * *

"The rule being, you should judge a defendant under the circumstances in which he was placed; *and if a reasonable and judicious man* would have been alike honestly mistaken as to the reality of the danger, then you should excuse him." * * *

"In the exercise of his judgment he (defendant) must act *rationaly*." * * *

"Apply the rules I have given you, and say, if the defendant's life *was then and there in immediate danger* of being taken—if he thought so—and if he had *reasonable grounds* to so think." * * *

"According to the testimony, nothing had been done up to this time, upon the part of the deceased, that should warrant the defendant by any means to take his life; and the defendant has testified on the stand that he did not shoot the deceased on account of this scuffle, or any prior difficulty." * * *

"Here was time for reflection, deliberation, and premeditation, for the defendant to decide what he would do." * * *

"And ask yourselves if it was *necessary* to kill him also." * * *

"You should ask yourselves if it was *necessary* to kill Thomas."

In considering the above several charges of the court, let us remember the rule laid down in *Horne v. The State*, 1 Kas. 73: "It was urged in argument that the court had in other parts of the charge given the true rule of law as applicable to this point; but as this was a separate charge it is impossible for us to say that it was not the controlling one with the jury." In the instructions quoted, the proposition is asserted, that defendant could not be excused if he thought he was in immediate peril, but his belief must have been *well-founded*, on reasonable circumstances. We submit that this instruction goes far beyond any doctrine laid down by this court. A point *well-taken* in the law, is an established proposition. A belief *well-founded*, is a belief based upon actual facts, not merely upon reasonable circumstances leading to and producing a belief upon which a fair and reasonable being would

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act. But here the court tells the jury it must be *well-founded*, that is, it *must be so*. In *The State v. Horne*, 9 Kas. 129, this court did not say the belief must be well-founded, but only that the "circumstances must not only tend to the belief, but must force the belief on the mind, and the belief must be reasonable." But in the case at bar, in addition to all this, the court below instructed the jury that this belief must be *well-founded* — that is, the foundation for this belief must in fact exist. No matter what the appearances, how likely to influence and control a reasonable mind, if in point of fact the facts upon which the belief is founded do not exist, no matter how prudently, how carefully, how circumspectly, defendant acted, he cannot be held excused. In other words, if a person warned of the attack of a burglar upon his house, seeing a person entering through his window in the night upon which he was threatened, and of which he was warned, fired and killed a person entering his window, though it turned out that the person so entering was his son, or friend, intending no harm, he is yet guilty because his belief is not *well-founded*. This cannot be the law. In *The State v. Potter*, 18 Kas. 425, this court says — "if the conduct of the deceased was sufficient to induce a *reasonable belief*." And again, in *The State v. Howard*, 14 Kas. 173 — "the rule, that if the defendant has reasonable ground to *apprehend* that he was in imminent danger he is justified in defending himself." And same case, page 175 — "a party assailed is justified in acting upon the facts as *they appear to him*, and is not judged by the facts as they are." In the instruction under discussion the court below told the jury the converse of this last quotation was the law, that no matter how the facts appeared to defendant, his belief must be *well-founded*. We submit that for this instruction the judgment must be reversed.

Another instruction given by the trial judge is equally erroneous. He told the jury that "*if a reasonable and judicious man would have been alike mistaken as to the reality of the danger,*" the defendant should be excused. We submit this is not the law. No man may be convicted of murder simply because he is not "a

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reasonable or a judicious man;" yet contained in this proposition is the legal monstrosity, that where a jury may be convinced the defendant, under the circumstances surrounding him, honestly and firmly *believes* he was in imminent peril, yet because they also believed he was not "*judicious*" he must be convicted of murder.

And again: In another instruction we are told the defendant must act "*rationally*;" but whether rationally "*upon the facts as they appear to him*," (14 Kas. 187,) or not, we are not told. And in the next instruction, the jury are told to apply the rules theretofore given, and "*say*" (*who say?*) "*if the defendant's life was then and there in immediate danger of being taken—if he thought so—and if he had reasonable grounds so to think.*" Here are three distinct propositions, all of which must be found in order to excuse the defendant. A party then according to this instruction is not to be judged "*upon the facts as they appear to him.*" The jury are to say "*if his life was in danger;*" and if they fail to find that, no matter what he believed, or what the grounds of his belief, or the reasonableness thereof, he must be convicted.

And we submit further, that the remarks of the judge upon the facts were utterly unwarranted by the testimony in the case, and were calculated to influence the jury against defendant. Again, the remarks that, "*Here was time for reflection, deliberation, and premeditation, for the defendant to decide what he would do*"—is a most flagrant usurpation of the province of the jury. Whether there was time or not for "*reflection, deliberation, and premeditation*" is purely a question of fact for the jury. No submission of the question to the jury as to whether there was time to reflect, to deliberate, to premeditate, but a bald instruction to the jury that such was the fact. With due respect may we not ask, Have the times of Jeffreys come again?

We quote again from the instructions: "*And ask yourselves if it was necessary to kill him also.*" "*You should ask yourselves if it was necessary to kill Thomas.*" No proposition is put to the jury in this connection as to whether *the defendant*

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thought it necessary; as to whether he thought his life in peril." No proposition on the basis of "*the facts as they appeared to him.*" But all through the charge, reiterated and intensified instructions that the jury must determine whether *they thought it necessary*; and if they did not think so, notwithstanding the solemn conviction of the defendant based upon "*the facts as they appeared to him,*" he must be convicted. We respectfully submit, that there can be found no case in the annals of the criminal jurisprudence of Kansas where more frequent and flagrant violations of the well-known rules of law have been committed, than in this case; and we beg the privilege of suggesting that it is about time that the inferior courts of the state were taught that the decisions of this court are binding on them.

John Foster, county-attorney, Saline county, for The State:

1. The first question in the case is, as to what portion of the transcript is legally before this court, and what alleged matters of error can this court consider? The appellant must file a "transcript" in this court from the court below; (§ 284, criminal code;) and such transcript must be properly authenticated; (§ 550, civil code.) The "transcript," or pretended record, brought to this court contains 914 pages. The only authentication in this record, (except as to an information on page 9,) is on page 914, in these words: "That the above and foregoing is a full, true, complete and correct copy of the records and papers in the case of The State of Kansas, plaintiff, v. Barney Bohan, defendant, No. 168, as the same now appears of record and on file in my said office." The record, from page 10 to 79, is what purports to be a bill of exceptions; from page 107 to 114, another; and from page 117 to 714, still another. But what are these papers from pages 1 to 10, and from 75 to 107, and pages 116 and 117? and what *authentication* have they in this record? They are nowhere referred to in either bill of exceptions. Is it claimed that pages 1 to 5 are the notices of appeal? There is no service, or authentication; neither do the papers look like the originals; and they are not papers or

records of the case in the court below. Is it claimed that pages 76 to 107 are copies of the journal of the court below? They are nowhere named as such—not referred to in either bill of exceptions, nor in any certificate. The appellant carefully designates journal entries on pages 66 to 71. But pages 92 to 103, and 116 and 117, have no *appearance even* of entries of a court journal; but if they had, “there is no authority for their record; and a copy of a paper from a book of records that is not by law authorized to be recorded, is of no validity;” 7 Kas. 177; 1 Kas. 308; 9 Kas. 90; 1 Ohio St. 411. The bill of exceptions (so-called) on the overruling of motion for new trial, has no date except the filing thereof, 5th June 1876. There is no evidence when it was signed, and it cannot be regarded as part of the record. 1 Ala. 317. This case was tried at the February term 1876, commencing on the 28th of February. The next term thereafter was commenced on the 29th of May. (Ch. 71, laws 1876.)

If the court finds the record in shape to consider the pages above referred to, then I say it appears that the bill of exceptions on overruling the motion for a new trial, so-called, was not presented and signed during the term said case was tried, and is therefore no part of the record. On pages 90 and 96 it will be seen that the February term of court was extended to the 24th of May, and was in no manner revived or heard of more. But the bill of exceptions was not signed and filed during the trial term. It could not be signed and allowed beyond the term. 1 Kas. 146, 363; 14 Kas. 153; 19 Ohio, 446; 13 Ohio St. 280; 18 Kas. 562; 10 Ohio St. 228. The paper signed by the ex-attorney-general, and attached to the record, is a nullity. It is not within the power of the attorney-general, or any other attorney in the case, to make valid any such record; 10 Kas. 688; 13 Kas. 563. Neither the attorney-general, nor even a judge, can extend the time beyond the term for making a bill of exceptions, or make the same valid if signed thereafter. To sustain the alleged waiver of the ex-attorney-general, is to hold that it is within the power of the attorney-

general to make or unmake any bill of exceptions on the part of the state whenever he chooses.

And the so-called *nunc pro tunc* order on pages 104 and 105, if made, is a nullity. 6 Ohio St. 12; Nash's Pl. and Prac. 1035; 2 Sup. Ct. Reporter, 268.

2. What the appellant says in his brief regarding the "peculiarity of this case," the former trial and sentence, and the "passion, excitement and frenzy" of the people of Saline county, will be passed by without discussion, as being not only outside the record, but in nowise warranted by the facts.

Counsel have much to say about the *honorable* acquittal of appellant for the killing of William N. Anderson. But the record in that case is but slightly referred to in this, and I confess entire ignorance of the rule of law by which this court can judge of what the record in that case was, or in what manner, or by what means that verdict of acquittal was obtained. On page 613 of this record it will be seen that one of the jurors in that case of acquittal was prosecuted for corrupt perjury; (and I might add, escaped conviction by a mere technicality in the charge.) I have no anxiety about the judge of the 14th judicial district. He is abundantly able to defend himself. But this court will look in vain through this record for any justification of counsel for the strictures against him. The record here shows that no defendant ever had a fairer or more impartial trial than appellant. Every doubtful question was resolved in his favor.

3. Turning to the record, and the first substantial claim of error is, the refusal of the change of venue on account of the prejudice of the judge. The application came too late, it nowhere appearing that the grounds thereof had come to the knowledge of appellant since the last preceding continuance. An examination of the affidavits submitted on the application do not disclose any prejudice or any improper act or word on the part of the trial judge; and there was no error in refusing to change the place of trial. Appellant claims that the life-sentence, on the last trial, as against the

twenty-year sentence, on the first trial, is evidence of prejudice. So far from such being the case, the testimony in each case shows that the sentence should have been for defendant's natural life.

4. Another claim is that there was error in drawing the jury. A special venire of fifty jurors was ordered by the court under § 28 of ch. 54 of general statutes of 1868. By §§ 10 and 11 of said chapter, it will be seen that two justices of the peace of the county, and the sheriff, in person, or by his under-sheriff, shall be notified by the county clerk to be present and witness the drawing, and *if any two of them attend* the clerk shall proceed to draw the jury. And the 19th subdivision of § 1 of ch. 104 of Gen. Stat. of 1868, reads, "The term 'sheriff' may be extended to any person performing the duties of the sheriff, either generally, or in special cases." It is not shown that either the sheriff, or his under-sheriff, attended the drawing. Neither does it appear that the sheriff was not notified, and it is not shown that any unfairness occurred at said drawing. If it can be called an error, it was immaterial and technical, and did not in any manner affect the substantial rights of appellant. A similar objection was raised in *Forsythe v. The State*, 6 Ohio, 21, and was by the court held technical. The court said, "We have never known in this state of an objection of this kind before. The profession, by universal consent, refuse to notice such matters, as they in no way endanger a fair trial."

5. Isolated extracts and sentences are taken from the charge of the court, by the appellant, and complained of here as erroneous. The charge should be read and considered as a whole; and when so read, I submit there is no error therein. I think the charge is distinctly within the rule laid down in *The State v. Horne*, 9 Kas. 130. In that case, the circumstances seem to be similar to the one at bar. And in this case, the court below first states the rules of the law, fully and correctly, and afterward more particularly applies them to the evidence of the case. Let us look at some of the important testimony, showing the circumstances, condition of deceased.

position of the parties, etc., appearing in the record. Deceased was drunk with appellant's whisky. He was just from a state of insensibility caused by the murderous blow of appellant with the iron brake-shoe—weak from the loss of blood. The case shows that a bag of wool would have been as dangerous in deceased hands, as a billiard-cue. The court did well to call the attention of the jury closely to the testimony in this case, and to ask them to apply the rules he had given, and say if there was imminent danger—if appellant thought so, and had reasonable grounds to think so. Observe the different stories of defendant, as to the position of the parties. The appellant was properly convicted on his own testimony. He came in at the front door, and left it open; went to the east side of billiard table; deceased was three or four feet north of him, when he shot him; neither of the Anderson boys had any fire-arms; defendant shot William, who was on the west side of the table, and then shot Thomas as quick as he could turn around and shoot. And yet he says: "The only reason I shot him I made up my mind I could not get away from him without his striking me, and if he hit me with it I was a goner." "Did not kill either of them because of the previous difficulty or scuffle." "He said, 'Thomas did not strike at him with the billiard-cue;' he said 'he killed him solely and alone because he had that billiard-cue, and for no other reason whatever.'" I submit that this story of self-defense is wanting in the proper legal thickness. 9 Kas. 129; 2 Head (Tenn.) 217. And I "beg the privilege of suggesting that it is about time that" appellant and his counsel were taught that there is punishment for murder.

6. It is claimed that "The appellant in the court below was tried upon a copy of the information." Here is an attempt to raise a question not raised in the court below. The record nowhere shows anything of the kind. If he was so tried, it was on his agreement and consent. The only reference of the kind anywhere, is in the clerk's certificate. The objection and fact must be in the bill of exceptions to be a part of the record, so as to be before this court. (11 Kas. 602.) It is not

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within the authority of the clerk to put in the record any matter of the history of the trial which is not in the bill of exceptions above the signature of the trial judge. But the certificate does not show any objection or exception of appellant to being tried on a certified copy, and the case therefore, even on the clerk's certificate, is not within the case of *The State v. Anderson*, 17 Kas. 89. Sec. 275 of the criminal code specifies only five causes for a new trial. Appellant in his motion for a new trial specifies twenty-one; and yet there is not one word about this alleged error of being tried on a certified copy of an information. It is not spoken of in his supposed motion in arrest of judgment. And the whole record shows that this claim of error is an afterthought. 7 Kas. 78.

The opinion of the court was delivered by

HORTON, C. J.: The appellant was convicted of murder in the second degree, at the February term for 1876 of the district court of Saline county, and now appeals to this court. This is the second time the case has been brought here. (*The State v. Bohan*, 15 Kas. 407.)

At the outset, objections are presented to this court by the counsel of the state to the record on file; and the first question in the case is, as to what portion of the record, if any, is legally before this court, and what alleged matters of error can this court properly consider. The term of the court at which the appellant was tried commenced on February 28th, and was extended and kept open until the commencement of the next term thereafter, to-wit, May 29th. Three separate bills of exceptions were signed and filed in the court below, viz., on March 3d, on April 28th, and on June 5th.

1. Bills of exception. Settlement. The bills of exceptions filed March 3d, and April 28th, during the term of the court, were within time, and all matters therein stated can be fully considered. These relate to the action of the court overruling a motion for a change of venue on account of the alleged prejudice of the judge, and the denial of an application of the appellant to set aside the jurors summoned at the term of the court, because

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of alleged irregularity in the manner the same were drawn. The alleged errors set forth in the third bill of exceptions, filed on the 5th of June, that day being after the commencement of the May term of the court, and after the February term had expired by law, are not legally here for our determination. "A bill of exceptions filed out of term, is no part of the record." *Brown v. Rhodes*, 1 Kas. 859; *Lounsberry v. Rakestraw*, 14 Kas. 151, 154. The defective record has been attempted to be cured in three ways, viz., by filing an agreement from the late attorney-general that the bills of exceptions were properly signed and filed, and that the case might be heard upon the merits; by bringing to this court a copy of an agreed statement showing that the bills of exceptions were presented to the court below on May 27th, for allowance; and by an alleged *nunc pro tunc* order of the court of June 5th. None of these attempted curative acts are effective for the purposes intended. This court has decided that the time for reducing exceptions to writing beyond the trial term cannot be extended by a judge, even when consent of counsel has been given, and that we cannot take cognizance of a case not brought here by regular process of law, nor unless in conformity with the statutes regulating the manner of bringing cases into this court. *Gallaher v. Southwood*, 1 Kas. 143; *Cohen v. Trowbridge*, 6 Kas. 385; *Hodgden v. Comm'rs of Ellsworth Co.*, 10 Kas. 637. If counsel could waive in this court manifest irregularities as to the mode and time of signing and filing bills of exceptions, the preparation and approval of bills of exceptions beyond term-time would become allowable, and the provisions of the statute in this respect be disregarded. As the time for reducing exceptions to writing cannot be extended beyond the trial term, so a bill of exceptions, which has been allowed and filed beyond the trial term, and at the regular term next after that of the trial, cannot be considered here, although counsel formally agree to waive the disregard of the law as to the making of the said bills of exceptions. The copy of the agreed statement, showing that the bills of exceptions were

Bill must be
settled at
trial term.

2. Requirements
of statute not
to be waived.

presented in due time to the court, and the argument thereon founded, that this court could by mandamus compel its being duly signed, even after the adjournment of the trial term, and hence the signing and filing of said bill of exceptions on June 5th should be held sufficient, does not help the case of the appellant. An agreed statement cannot be made to supply the place of a bill of exceptions taken in accordance with the statute. In this case, the agreed statement is neither filed, nor signed; and does not purport to be any part of the journal entry. It is no part of the record, and must be totally disregarded. *Patee v. Parkinson*, 18 Kas. 465; *Young v. The State*, 28 Ohio St. 577. In the absence of this agreed statement, there is nothing in the record to show that the bill of exceptions No. 8 was ever presented to the court prior to the 5th of June.

The so-called order *nunc pro tunc*, made June 5th, and during the May term of the court, does not relieve the difficulty.

Nunc pro tunc order, when void. If it was intended by such order to have the bills of exceptions which were presented and signed and filed at the regular term next after that of the trial refiled, and marked as if presented, allowed, and filed at the preceding term, such an order was a nullity. The grounds upon which said order was made simply show that application was made therefor by the attorney of the appellant, and the order does not purport to supply any matter omitted by the clerk from the records of the February term. Nor does it appear that the clerk had made a different entry from that which was ordered. *The State v. Jeffers*, 64 Mo. 376. Indeed, we cannot tell with certainty that such order was intended to apply to bill of exceptions No. 8. It is certain that the record does not show that said bill was presented at any other time than June 5th. Under what circumstances a bill of exceptions may, by order of the court at a subsequent term, be made available by a *nunc pro tunc* order, it is not necessary in this case to determine, because the parties, as the record is presented, are concluded by the record that the said bill of exceptions No. 8 was not presented, signed, or filed during the

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trial term. The so-called *nunc pro tunc* order makes this manifest. We return to an examination of the bills of exceptions which were properly filed.

I. The first supposed error was the refusal of the court to remove the case to the district court of some county in a different district, on the application and testimony presented by the appellant, when the cause was called for hearing, that the judge of the court was prejudiced. a. Change of venue; prejudice of judge. The testimony relied upon to sustain the motion was the affidavits of the appellant, and of his counsel, Messrs. Fenlon, Mohler, and Spivey, the records of a previous trial of this case, and a reversal by the supreme court of the judgment in the case, and also, the proceedings before the said judge under which the appellant was required to give bail in the sum of \$15,000 for his appearance to answer the charge contained in the information. We do not think the showing made was sufficient to compel a change of venue. That the testimony hereinafter set forth may be fully understood, we should perhaps state, that at the November term of the court for 1874 the appellant was convicted of the same crime for which he is now under sentence, namely, the murder of Thomas Anderson. Then he was sentenced by the court below to imprisonment in the penitentiary for twenty years. At the July term of this court for 1875, this judgment was reversed, because of the error of the district court admitting the so-called dying declarations of one William N. Anderson, when the homicide of Thomas Anderson was the subject of the charge and investigation. The same judge presided at both trials in the district court. The affidavit of defendant Bohan states: "That the rulings of the court (at the first trial) were adverse; that the court lectured him at the time of sentence, and said defendant was guilty of the offense of which he had been convicted; that he had committed a willful, deliberate and malicious murder; that there was no excuse or justification; that while there might be for killing William N. Anderson, there was none for killing Thomas; that if the verdict had been in the first degree, he would have sustained it." The affidavit of Thos. P.

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Fenlon, Esq., states, "That without charging any unfairness upon said judge, he believes he is so prejudiced," etc. J. G. Mohler, Esq., simply swears to the affidavit of Thos. P. Fenlon, on belief. J. G. Spivey, Esq., states, "That whilst he does not charge or intimate any unfairness or unworthy motive, yet he firmly believes the judge has, by his very situation, become so prejudiced," etc.; and "that he regarded the language of the judge at time of sentence, harsh and severe; and that the judge expressed convictions of appellant's guilt in the second degree, and also stated, as he recollects, that if the jury had found him guilty in the first degree he would have sustained it."

In answer to the affidavits and testimony of the appellant, on the motion, the trial judge filed a statement, which contains among other things, the following: "I am quite sure I did not use the language imputed to me in the petition and affidavit of defendant, to-wit, 'that he had committed a willful, deliberate and malicious murder.' I discussed the testimony somewhat in pronouncing judgment, and said there was some that would tend to show deliberation and premeditation, (quoting it,) and that this was the charge and the theory of the prosecution, and that the facts were such, as shown by the testimony, on these points, 'that if the jury had returned a verdict of murder in the first degree I should not have disturbed it'—coming nearer to the language used in the affidavit of John G. Spivey. In deciding upon the question of bail, I did not discuss the case, or express or intimate any opinion on it in any way, either of my own, or as to what the testimony had shown. And in pronouncing judgment, I did not in any way express my own opinion on the case, but only discussed the testimony adduced on the trial. The affidavits do not show any statements or acts of mine out of court, but as far as facts are stated therein (eliminating conclusions of law, and fact, and opinions, which have but little weight,) they show only an expression or words gathered now and then from the whole proceeding of the trial and judgment, at which I am compelled to preside and act; and when these words are quoted they are disjointed from

their legitimate connection, which leaves their construction, meaning, and weight not fully understood."

From the testimony we cannot say that the evidence shows any prejudice toward the appellant by the trial judge; much less can we say that prejudice *clearly* appears. The law provides, that "when the defendant appears for judgment he must be informed by the court of the verdict of the jury, and asked whether he has any legal cause to show why judgment should not be pronounced against him;" and in answer to the inquiry last stated, the defendant often replies that he is innocent, and has been wrongfully convicted. In answer, the trial judge frequently comments upon the trial, the manner the party has been defended, and the evidence introduced in the case, and frequently remarks very similar to those stated by the trial judge to have been spoken by him on the occasion of the first sentence of the appellant, are made use of. We are aware of no authorities which go to the extent that statements, thus made, amount to prejudice or ill-will. To thus hold in this case, would lead to absurd consequences. No authority is cited by counsel for appellant to sustain the proposition that these comments upon the evidence are sufficient to establish prejudice.

Neither can the adverse ruling of the trial judge, on the first trial, which was afterward corrected in this court, be held to authorize a change of venue. Errors of judgment, do not amount to prejudice or ill-will on the part of a judge. The theory of our judicial system is, that courts of *nisi prius* may commit errors of judgment in matter of law, which are to be reviewed by courts of last resort; but such errors have never been held equivalent to prejudice. *Burk v. Mayall*, 10 Minn. 287. Counsel for appellant contend however, that the cause for a change of venue, specified in section 173 of the criminal code (Gen. Stat. 847,) is properly presented in the manner required by section 177 of same code, and that according to the doctrine of *Smith v. The State*, 1 Kas. 365, the showing by the defendant on his application was all that was necessary. The argument is not good. The decision cited construes section 155 of the criminal code of 1862, (Comp. Laws, 259,) among

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others; and said section relating to change of venue did not require the defendant to prove to the satisfaction of the court the facts set forth in the application for the removal, but merely to support the truth of the allegations by the affidavit of the defendant, or some credible disinterested person. The law has since been changed. Section 177 of our present criminal code, (Gen. Stat. 1868, p. 848,) which answers to section 155 of the criminal code of 1862, prescribes that, "In the petition for a change of venue, the applicant shall set forth the facts upon which the application is made, and the truth of the allegations in the petition *shall be made to appear by affidavits to the satisfaction of the court.*" Sections 174 to 177, criminal code of 1868, apply to cases where the application is based upon the prejudice of the inhabitants. *City of Emporia v. Volmer*, 12 Kas. 622. In concluding this branch of the case we quote from the opinion of Mr. Justice Brewer in the case of the *City of Emporia v. Volmer*, supra: "If it were to be determined by simply the affidavit of the defendant, there would be almost numberless changes of venue. Every defendant closely pressed, would seek delay in this manner. A change of venue is a wrong to the public, unless the necessities of justice to the defendant require it. It works delay. It causes expense. It endangers a prosecution. A defendant is easily persuaded of the prejudice of the judge. Adverse rulings convince him of the fact. It seems to us therefore, that this is the true rule: that such facts and circumstances must be proved, by affidavits, or other extrinsic testimony, as *clearly* show that there exists a prejudice on the part of the judge toward the defendant; and unless this prejudice thus *clearly* appears, a reviewing court will sustain an overruling of the application, on the ground that the judge must have been perfectly conscious of the falsity or non-existence of the grounds alleged. It is not sufficient that a *prima facie* case only be shown, such a case as would require the sustaining of a challenge to a juror. It must be strong enough to overthrow the presumption in favor of the trial judge's integrity, and of the clearness of his perceptions."

II. The second error alleged in the exceptions filed in time is, that the court erred in not discharging or setting aside the jurors ordered and drawn on the second day of March 1876. The complaint is, that one L. M. Tuttle, a deputy-sheriff, attended at the county clerk's office to witness the drawing at the date named, in place of the sheriff of the county, or the under-sheriff of the county, as provided by sec. 11, Gen. Stat. 1868, p. 535. The alleged error is extremely technical; but as the law was fully complied with, we see no material error. By sections 10 and 11, (Gen. Stat. 535,) it will be seen that two justices of the peace of the county, and the sheriff in person, or by his under-sheriff, shall be notified by the county clerk to be present and witness the drawing, and if any two of them attend, the clerk shall proceed to draw the jury. The record shows that E. L. Norton and R. H. Bishop, two justices of the peace of said Saline county, did attend, as required by law, in answer to the notifications, and on the day of the drawing signed a sufficient certificate to the effect that on the 2d of March 1876 the jury were drawn. It is not shown that either the sheriff or his under-sheriff, attended the drawing. Neither does it appear that the sheriff was not notified; and it is not claimed that any other irregularity occurred except that said deputy-sheriff was present at the drawing, and together with the county clerk and the two justices of the peace signed the certificate of the names of the persons drawn, and the date thereof. The county clerk testified on the motion, that at the drawing of the jurors, he, as county clerk, alone drew the names of the jury from the box, and the other persons, whose names were attached to the certificate, were present and witnessed the drawing. As two of the officers required by the law to attend and witness the drawing were present, with the county clerk, and as the law compels the clerk to proceed (when two are present) to draw the jurors, the mere fact that a deputy-sheriff was also in attendance, and afterward signed with the others a certificate of such drawing, in no way renders the drawing void. The court rightfully overruled the motion.

A. Drawing
jurors; presence
of deputy-
sheriff.

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III. Notwithstanding the invalidity of the bill of exceptions filed on June 5th, and beyond the trial term of the court, we have examined the entire testimony, and record, with care; and we cannot say that the judgment rendered was erroneous.

a. Homicide;
self-defense;
instructions. The evidence very strongly sustains the verdict. Much complaint is made concerning the direction of the jury; but a review of all the instructions shows very clearly that the court, upon the question of self-defense, adopted the decisions of this court, and fully instructed the jury, that all the law exacts is, that there shall be a reasonable apprehension of imminent danger, and that of the reasonableness of this apprehension the jury are to be the judges. "There must not only be reasonable ground to believe such a design exists, but the person to execute the design must be accompanied by some attempt to execute it, or the person must at least be in an apparent situation to do so, and so induces a reasonable belief that he intends to do it immediately. Where the justification is based upon recent threats, and circumstances which would tend to lead the defendant to believe that his life was in imminent danger, the threats and circumstances must not only tend to lead to the belief, but they must force the belief upon the mind, and then the belief must be reasonable, and such as reasonable men act on." *The State v. Horne*, 9 Kas. 119; *The State v. Howard*, 14 Kas. 178. There are some expressions in the charge of the court, which are copied in the brief of counsel for the appellant, that, detached and isolated, as presented to us, seem proper subjects of criticism. But all of this arises from snatching a single phrase from its proper connections, and giving it a special instead of the general application it had. Taking the context, we find no just ground of complaint. Instructions are to be considered and construed together, as a whole; and if not erroneous when so construed, no one of them will be held to be erroneous. *The State v. Dickson*, 6 Kas. 209.

IV. Complaint is also alleged in the so-called bill of exceptions No. 8, that the court erred in overruling the motion and

showing for a new trial, because it was alleged that W. S. Warner, one of the jurors, had formed and expressed opinions as to the guilt of the appellant before the trial of the cause, and of which the appellant had no knowledge until after the verdict. This charge was fully and carefully investigated by the trial judge, and mostly upon oral testimony. Prejudice of juror. The juror satisfactorily denied all statements affecting the alleged incompetency. A large number of witnesses were introduced to show that the parties attacking the competency of said Warner as a juror were unworthy of belief, and that their reputations for truth and veracity were bad. Others were called to support the characters of these parties. Under the circumstances, without deciding whether, under our practice, the alleged statements of Warner, if proved, would be a ground for a new trial, when the objection is taken for the first time after the trial, upon affidavits showing disqualification, we are of the opinion we cannot now adjudge the action of the court below erroneous in this respect. The well-settled rule of this court should prevail in this matter, as in others, that where the trial court has had the opportunity of hearing the testimony from the witnesses in person, and of seeing them as they uttered the same, and has thereon rendered a decision, this court will not hold such decision erroneous as to questions of fact, unless it is *clearly* apparent that the decision or finding is wholly unsupported by evidence.

V. Additional error is alleged upon a statement incorporated in the record by the district clerk, to the effect that the appellant was tried in the court below upon a *copy* of the information; this ground of error is not well taken. The record does not sustain the allegation. The certificate of the clerk as to what took place at a trial must be disregarded. The clerk has no such authority. If such was the fact, Clerk's certificate to be disregarded. it should have been properly presented. This claim was not made upon the trial, and this alleged error nowhere appears in any of the numerous motions made in the court below. It is raised in this court in the case for the first

time. A reading of all the record would seem to show that the appellant was tried upon the original information filed against him; but the clerk, of his own motion, interpolates in the record his statement that such was not the case. This statement goes for naught. Bills of exceptions are not thus made, and matters of this character cannot thus be brought to this court for review.

Having examined all the causes for which it is claimed that a new trial should be granted, and having found no error in them, the judgment is affirmed.

All the Justices concurring.

J. M. DARROW *et al.* v. JOHN SCULLIN.

1. **NOTES AND MORTGAGE; Stipulation as to Payment; Effect of Default.** D and wife executed three notes, and a mortgage to secure their payment. The notes upon their face were due in one, two and three years respectively, but the mortgage contained a stipulation, that on default in payment of either, all should immediately become due and payable. On default in the payment of the first note, suit was brought upon all three, and to foreclose the mortgage. A decree was entered, which, after finding that the mortgage was given to secure the three notes, but that only the first was due, rendered a personal judgment for the amount of that note, directed a sale of the mortgaged premises and the application of the proceeds to the payment of the judgment and then to the satisfaction of the two remaining notes in the order of their maturity, and awarded execution for any deficiency. *Held*, That personal judgment should have been entered for the amount of all the notes, but that this was not an error of which the mortgagors could complain. [*Mussy v. Knight*, 8-456; *Meyer v. Graeber*, 10-166; *Bank v. Peck*, 8-660.]
2. **EXECUTION, Issues only upon Judgment.** In a case like the above, it is error to award execution for any deficiency in the amount of the last two notes, as no judgment has been entered therefor, and execution issues only upon a judgment.

Error from Labette District Court.

FORECLOSURE of mortgage, brought by *Scullin*, as plaintiff. Trial, and judgment for plaintiff, and against *Darrow* and wife, defendants, at the November Term 1875. The defendants bring the case here.

A. H. Ayres, and *J. W. Day*, for plaintiffs in error.

Cory & Kimball, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: In September 1875, the defendant in error commenced an action in the district court to recover judgment on three promissory notes, and foreclose a mortgage given to secure the same, each being signed by both defendants in error. The notes and mortgages were dated 20th May 1874; the former, each for the payment of \$753.33, with twelve per cent interest after maturity, together with reasonable attorney-fees, and were payable in one, two and three years from date respectively. The mortgage contained this stipulation:

"This grant is intended as a mortgage to secure the payment of the sum of twenty-two hundred and sixty dollars, in three equal annual payments, with interest at the rate of twelve per cent. per annum; and if default be made in the payment of either amount of principal or interest at its maturity, the whole amount of this mortgage shall become due and payable according to the terms of three certain promissory notes this day executed and delivered by the said James M. Darrow and wife to the said John Scullin; and this conveyance shall be void if such payment be made as herein specified. But if default is made in said payment, or any part thereof, as provided, then this conveyance shall become absolute, and it shall be lawful for said party of the second part, his executors, administrators or assigns, at any time thereafter, to sell the premises hereby granted, or any part thereof, in the manner prescribed by law; and out of all the moneys arising from such sale, to retain the amount then due for principal and interest, and also for statutory damages in case of protest, together with the costs and charges of making such sale, and three per cent. of the amount secured by this mortgage as a reasonable attorney-fee

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for foreclosure hereof, and the overplus, if any there be, shall be paid by the party making the sale to the said James M. Darrow," etc.

The first note not being paid at maturity, suit was brought as above stated. A decree was entered, which found that the mortgage was a security for all three notes, but that the first only was due, rendered a personal judgment for the amount of the note found to be due, directed a sale of the mortgaged premises, such sale not to be made until after maturity of the second note, that the proceeds be applied, first to the payment of the costs, then the personal judgment, then the two remaining notes in the order of their maturity, with twelve per cent. interest from the day of judgment, and also directed execution for any deficiency. Of this decree the defendants below now complain, and present several points of alleged error. It seems to us that the principal error was committed in their favor, and against the plaintiff below. Such error consisted in the finding, that only one note was due. While the language quoted from the mortgage may not be entirely clear, yet it seems to us that it contains a stipulation, that if either note is not paid when it becomes due, that then and thereupon all the notes shall immediately become due, and that the mortgage may be at once foreclosed in satisfaction of all. The words, "according to the terms of three certain promissory notes," etc., seem to qualify and limit, not the clause immediately preceding, but the entire prior statement of the purpose of the grant and the matter to be secured thereby. This is made more clear by the subsequent language of the mortgage, as shown in the quotation above. Such being the true construction of the mortgage, (and the mortgage and notes are to be construed as one instrument; *Muzzy v. Knight*, 8 Kas. 456,) all the notes were due at the time of the commencement of this action, and a personal judgment should have been entered therefor, and such judgment would draw twelve per cent. interest. *National Bank v. Peck*, 8 Kas. 660.

We think however that in the decree as entered there was error in directing execution to issue for any deficiency in the

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amount due upon the last two notes, after applying the proceeds of the sale of the mortgaged premises. Execution issues only upon a judgment, and as no judgment was entered for the amount of those notes, no execution could issue for any part thereof unpaid by the sale. (Gen. Stat. 731, § 517.) The plaintiff, we think, in case of any deficiency, must first place that deficiency in judgment before he can have any execution. The case will be remanded, with instructions to modify the judgment in this respect. Otherwise it will be affirmed. The costs of this court will be divided.

All the Justices concurring.

GERMAN SAVINGS BANK V. HENRY W. WULFEKUHLE.

1. **BANK; BANK OFFICER; Knowledge; Presumption.** A person who holds the office of director and vice-president of a bank, and at the same time has private and personal dealings with the bank, is conclusively presumed to know, (so far as the same affects his said personal dealings,) the general condition and management of his bank, and to know everything of importance that occurs therein, either at the time it occurs, or soon thereafter. [*Abeles v. Cochran*, 22-411.]
2. ——— **Overdrawn Accounts.** Such bank officer is bound to know when his bank is in an embarrassed condition, and the condition of an account which has been overdrawn for several months; and where the cashier gives a credit to a person having such overdrawn account, for an insufficient and illegal consideration, such officer is bound to know the same within less than several days thereafter.
3. **BANK STOCK; Purchase by Bank.** A bank organized under the laws of Kansas, cannot purchase its own stock, except in some cases for the purpose of securing a previously-existing debt.
4. ——— Where W., a stockholder, and also a director and the vice-president of such bank, sells his stock of such bank, while the bank is in an embarrassed condition, to H., who has no funds in the bank, but on the contrary has an overdrawn account with the bank of several months' standing, and W. receives in payment for his stock a check for \$2,100, drawn by H. on the bank, and H. then sells said stock to the cashier of the bank, who purchases it for the bank, but who has no authority from the bank or from any one else to purchase the same for the

Statement, and Opinion.

bank, and the cashier gives to H. a credit for such stock for \$2,100, on the books of the bank, and on the same day the cashier gives to W. a credit on the books of the bank for the amount of said check, and charges H. with a like amount, and several days thereafter W. draws said amount of \$2,100 out of the bank, *held*, that the bank may maintain an action against W. for the amount of money so drawn out of the bank by him.

5. ——— And it makes no difference that said stock may in fact have belonged to W. and his brother, as partners, and that all the transactions in selling said stock, in getting said credit, and in drawing said money out of the bank, may have been carried on in the name of the firm.
6. ——— *Cashier; Estoppel.* The acts of the cashier in said transactions cannot estop the bank as against W., who is a director and the vice-president of the bank.

Error from Leavenworth District Court.

ACTION by the *German Savings Bank*, as plaintiff. Trial, and judgment in favor of defendant *Wulfekuhler*, at the November Term 1874. The plaintiff brings the case here. The facts are stated in the subjoined opinion.

F. P. Fitzwilliam, for plaintiff.

Green & Foster, for defendant.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by the German Savings Bank of Leavenworth, against Henry W. Wulfekuhler, for the sum of \$2,100, alleged to have been obtained wrongfully from the bank by the said Wulfekuhler. Judgment was rendered in the court below in favor of the defendant, and the bank now brings the case to this court. The principal facts of the case are as follows: The bank was organized under the laws of the state of Kansas; the defendant was one of the original incorporators, and a subscriber for 100 shares of the capital-stock of the bank; each share was for \$100. He paid two assessments on said shares—each assessment being ten per cent. of the amount—and received two receipts therefor, each receipt being for \$1,000. No certificates of stock were ever issued to him; and

Statement of
facts.

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these receipts were the only evidences of his ownership of said stock which he ever held. The books of the bank however, furnished other and sufficient evidence of his ownership of said stock. He was a director of the bank, and also its vice-president, during the occurrence of all the following transactions, although at the time of said occurrence he was sick, and did not take any active part in the direction or management of the business of the bank. Also, during the same time he and his brother, Fred. Wulfekuhler, were partners carrying on a wholesale grocery business under the firm name of Rohlfling & Co. Said bank stock really belonged to this firm, although it was purchased and held in the name of the defendant, Henry W. Wulfekuhler. On the 4th of September 1873, and for some time previously, the bank was in an embarrassed condition. On that day, Fred. Wulfekuhler sold said bank stock to Henry M. Herman. The defendant indorsed his name on said receipts, and Fred. Wulfekuhler delivered the same to Herman; and Herman, in return, drew a check on said bank in favor of Rohlfling & Co. for \$2,100, and delivered the same to Fred. Wulfekuhler. Herman was at that time, and had been for several months previously, owing the bank on an overdrawn account; and the president of the bank had only a few days previously instructed both the cashier and the assistant-cashier of the bank not to honor any more of Herman's checks. Herman delivered said receipts to the cashier of the bank, and on the next day, September 5th, obtained a credit therefor for \$2,100, to be entered in his favor on the books of the bank. Herman and the cashier considered this transaction as a sale of said stock to the bank, but the stock was never transferred on the books of the bank as required by statute, (Gen. Stat. 197, § 27,) and also as required by the by-laws of the bank; but the stock still continued to remain on the books of the bank, in the name of the defendant. Neither does it appear that the cashier had any authority to purchase said stock. Also, on that same day, (September 5th,) the book-keeper of Rohlfling & Co. took said check of Herman's to the bank, and the cashier gave to Rohlfling & Co.

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a credit therefor of \$2,100, and charged Herman with a like amount. Rohlfing & Co. (or in other words, the defendant and his brother Fred.) afterward, but not for some days thereafter, drew out of the bank said \$2,100, with which they had been credited on Herman's check. On September 17th the bank, on account of financial embarrassment, closed business. On September 18th the president of the bank tendered said receipts to the defendant, and demanded that the defendant should pay back to the bank said \$2,100, but the defendant declined to do so, and then the bank commenced this action to recover said amount. The bank was reopened for business on 29th September 1878. The only question necessary to be now considered is, whether this action can be maintained upon the foregoing facts, and the law of the case. Now for the purposes of the case, we shall assume that the defendant acted in the best of faith in all the foregoing transactions; that the transaction with Herman was intended to be a *bona fide* sale of the defendant's stock to Herman; that in fact the defendant and his brother did not know of the embarrassed condition of said bank; that they did not know of the condition of Herman's account with the bank; that they did not know that Herman's check was not good; that they did not know anything concerning the transactions between Herman and the cashier; that they did not know, when they received said money from the bank on Herman's check, that they received it in consideration of a credit given to Herman for said stock receipts; and that in fact they believed, when they received said money, that they were simply receiving money from the bank which Herman had previously deposited with the bank; and assuming all these things, (which are assumptions in favor of the defendant and against the plaintiff,) then can the plaintiff recover? We think it can. For while we assume, as a matter of fact, that the defendant knew nothing of the condition or management of said bank, and nothing of the condition of Herman's account with the bank, yet still as a matter of law we think we must presume that he knew all about these matters. He was a direc-

1. Bank officer,
knowledge,
presumption.

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tor, and the vice-president of the bank, and it was his duty to have such knowledge, and therefore the law will conclusively presume that he had it. *Merchants' Bank v. Rudolf*, 5 Neb. 527; *United Society of Shakers v. Underwood*, 9 Bush, (Ky.) 609; Morse on Banks and Banking, 90 et seq., 97 et seq., and 115. He cannot now, as against the interests of the bank and its stockholders, and perhaps its creditors, be allowed to plead ignorance and innocence, and thereby profit by his own want of knowledge, and by his own failure to do his duty as an officer of the bank. Such would be against both morals and law. Of course, we do not hold that a director is bound to know everything that transpires in a bank, and at the very time when it occurs. But we do hold that a director, having personal and private dealings with his bank, is bound to know (so far as the same affects his said personal dealings) the general condition and management of his bank, and everything of importance that occurs therein, either at the time it occurs,

2. Knowledge of overdrafts.

or soon thereafter. In the present case, the defendant was bound to know when he received Herman's check, and when he obtained the credit thereon, that the bank was embarrassed, and that Herman had no funds in the bank. And he was bound to know when he drew the money out of the bank that Herman was still owing the bank, and that the said credit to Herman of \$2,100 was merely for said stock receipts. Said stock receipts we suppose really belonged to the firm of Rohlfing & Co., which was composed of the defendant and his brother Fred.; and the said money was drawn from the bank by the firm, and not merely by the defendant. But this makes no difference; for each member of the firm was bound to take notice of all of which the other had notice, or was bound to take notice; (*Merchants' Bank v. Rudolf*, supra;) and each member of the firm is liable in a separate action for all that the firm might be held to be liable. And as the firm obtained said money from the bank without any legal consideration therefor, as we shall presently see, the bank may recover it back. In Pennsylvania it has been held that it is a fraud upon a bank for the holder of a

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check to present the same to the bank and receive a credit therefor, when he knows that the drawer of the check has no funds in the bank with which to meet it. (*Peterson v. Union National Bank*, 52 Penn. St. 206.) The supposed sale of said stock from Herman to the bank was void. The cashier had

no authority from the bank, or from any one else,
S. Bank stock;
 purchase by
 bank. to purchase it; and no one had any power to give

him any such authority. A bank cannot purchase its own stock, except in some few cases for the purpose of securing some previously-existing debt. There is no law that attempts to give a bank any such power. And the purchasing by a bank of its own stock is not one of the objects for which banks are created, and is not legitimate banking business. For a bank to use its funds in the purchase of stock, is to withdraw that much of its capital from legitimate banking business; and to purchase its own stock, is in effect a withdrawal of that much of its stock from actual existence, and in that way the bank might reduce the amount of its capital stock below the amount required by law, (to-wit, \$50,000; Gen. Stat. 225, § 128,) and might also impair or even destroy all security given by law to the creditors of the bank. The law provides in effect that not only the bank, with all its property, shall be liable for its debts, but also that each stockholder in the bank to the amount of his stock, shall also be held liable. (Const., art. 12, § 2; Gen. Stat. 198, § 32.) But if a bank may purchase in all its stock, and own it itself, then where would be the security to the creditors of the bank, except in the bank itself? They could not, after exhausting the property of the bank, find any stockholders to sue. The law never contemplated any such a thing. But the law not only fails to authorize a bank to purchase in its own stock, but in effect it prohibits such a thing. Section 26 of the act authorizing the creation of banks provides, that "no corporation created under the provisions of this act shall employ its stock, means, assets, or other property, directly or indirectly, for any other purpose whatever, than to accomplish the legitimate objects of its creation." (Gen. Stat. 197.)

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Now as the defendant, or rather himself and his brother as partners, received said money from the bank, without the bank ever receiving any consideration therefor, and as the defendant was at the time a director and the vice-president of the bank, and is therefore conclusively presumed to have known all the facts, the bank may recover the money back from the defendant. The acts of the cashier cannot estop the

bank as against the defendant, who is a director,
A. Cashier;
estoppel. and the vice-president of the bank. Such officers cannot be allowed to wrongfully use the funds of the bank, and then plead that the same was allowed by either the one or the other of such officers. They make themselves liable by so using the funds of the bank. The court below tried this case upon the theory that the defendant, as a director and vice-president, was not bound to know the condition of the bank, and the condition of Herman's account, and was not bound to know when he and his partner drew said money out of said bank that they drew the same out of the bank without any consideration to the bank; and for this reason the court erred in instructing the jury, and especially erred in not granting a new trial to the plaintiff.

The judgment of the court below will therefore be reversed, and cause remanded for a new trial.

HORTON, C. J., concurring.

JOHN H. COLLAMORE V. JOHN H. WILDER *et al.*

1. **CLAIMS AGAINST ESTATE OF DECEDENT; *Laches of Claimant; Waiver of Right.*** Where A. exhibits his demand against the estate of a decedent, by causing a notice and statement of the amount due him to be served upon the administrator, and thereafter takes no further steps to have his demand allowed or established during the administration of the estate, and such administration continues over four years from the date of the letters of administration granted in the case, and said administrator makes a final settlement of such estate, which final settlement is approved by the probate court, and thereon the said administrator is finally discharged, and no claim is made of error, fraud, or concealment as to said final settlement, or the discharge of the administrator, A. cannot maintain his action in the district court against the heirs of the deceased, to whom lands have descended from him, to have his demand adjusted and allowed, and said lands sold to satisfy the same. [*Land Co. v. Perry*, 23-188; *Shoemaker v. Brown*, 10-383; *Anderson v. Beebe*, 22-771; *Smith v. Bank*, 24-530; *Klemp v. Winter*, 23-705; *Freeman v. Waynant*, 25-280; *Markson v. Kothman*, 29-722; *Scroggs v. Tull*, 23-181.]
2. **APPOINTMENT OF ADMINISTRATOR; *Actual Notice; Omission to Publish Notice.*** Where a creditor of a decedent has actual notice of the appointment of an administrator, treats with such appointee as the legal administrator, and exhibits to him his demand against the estate of such deceased person, he cannot thereafter complain that he has been misled or prejudiced by the neglect of such administrator to give the notice required by §74 of ch. 91, Comp. Laws of 1862. [*Clawson v. McCune*, 20-342.]
3. **ADMINISTRATOR; *Powers and Duties.*** An administrator is merely the agent or trustee of the estate of the decedent, acting immediately under the direction of the law prescribing his duties, regulating his conduct, and limiting his powers. [*Ins. Co. v. Swayze*, 30-122; *Crawford v. Lehr*, 20-512.]
4. **——— *Agreement with Creditor.*** An agreement between a creditor of an estate and the administrator thereof, to the effect that no further action should be had in Kansas toward the establishment of a demand of the creditor, beyond legally exhibiting to said administrator said claim, until the termination of a suit pending in another state on the same claim against the executor of the same estate, and that the determination of said suit in such other state should settle the matter here, is not binding on the estate, nor on the heirs of said estate.
5. **WILL; *Direction to "Pay all Just Debts."*** The formal and general language in a will, requiring that all the just debts of a deceased should be paid by his executors out of his estate, cannot be successfully invoked in behalf of a person who, having a just claim against such testator,

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neglects the legal proof of his demand until more than three years have elapsed after the issuance of letters testamentary, and until after the estate has been finally settled according to the provisions of law, and the administration closed. [*Scroggs v. Tutt*, 23-181.]

Error from Douglas District Court.

ACTION commenced by original petition filed in the district court by *John H. Collamore* as plaintiff, against *John H. Wilder*, as administrator of the estate of *George W. Collamore*, deceased, and the widow and children of said decedent, as defendants, to establish a demand against said estate, and subject certain lands in the hands of said widow and children to the payment of such demand. The defendants demurred, "for that said petition does not state facts sufficient to constitute a cause of action." The district court, at the April Term 1876, sustained the demurrer, and gave judgment against the plaintiff for costs. The plaintiff brings the case here. The averments of the petition are fully stated in the opinion.

S. O. Thacher, for plaintiff:

Did the petition state facts sufficient to constitute a cause of action? Of course the petition is taken as confessed, for the purpose of this debate. The nature of the plaintiff's claim grew out of the fiduciary relations of the deceased to him. The funds for which he brought his action were received by the deceased, as agent and trustee for his brother. During the time these funds were being collected by the deceased, the plaintiff was resident in the Empire of France for some seventeen years, up to and prior to November 1863; and during all this time no settlement was ever had by and between the plaintiff and deceased, and no demand for any such settlement was had so far as the Kansas estate is concerned, until July 25th 1866. Said Geo. W. Collamore died August 21st 1863, leaving all the defendants his heirs-at-law, save Wilder, who is administrator. The heirs-at-law at once removed from Kansas to Massachusetts, and ever since have resided away from Kansas. The deceased left a will whereby he appointed Gov.

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Andrew of Massachusetts, where the bulk of his estate was situated, his executor. This will was probated in Douglas county, on the 3d of May 1864, and Gurdon Grovenor duly appointed administrator with-the-will-annexed, but he never gave the notice required by law of his appointment. January 29th 1864, Gov. Andrew, in Massachusetts, duly qualified as executor under the will. Two legal representatives of the estate of the deceased then existed in July 1866. But before this, in the courts of Massachusetts, the plaintiff had commenced proceedings to establish his claim against his brother's estate, and these proceedings were pending when the claim was exhibited and demand made here to the legal representative in July 1866. When this was done, as was to be supposed, it was conceded that there ought not to be two litigations prosecuted for the same matter against really the same parties, for the heirs-at-law at the last are the parties directly interested in the amount of claims proven against the estate of the deceased. So it was mutually agreed by the parties that no litigation should take place here, but that the rights of the parties should be determined in the pending suit in Massachusetts. On the 12th of March 1867, Grovenor made a final settlement of his duties here, and was formally discharged in May 1868. The suit in Massachusetts was not determined until February 1874, and after applying all the estate in Massachusetts to the satisfaction of the amount thereby found due the plaintiff, there is still due the plaintiff the sum of over \$20,000. The Kansas estate of the deceased, so far as the realty is concerned, is not touched. May 22d 1875, defendant Wilder became administrator *de bonis non* of the deceased, (there having been no other administrator since the discharge of Grovenor,) and thereupon this suit was begun.

1. In the light of the foregoing facts, I suppose the question here is this: Is the debt or demand of plaintiff barred by the statute of limitations? As the last payment made by the deceased was in 1862, and as the funds in his hands were held by him as trustee, it will be conceded that up to the appointment of Grovenor in 1864 the statute had not run. The gen-

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eral statute would not begin to run until a demand, the funds being held in a fiduciary capacity by the deceased for the plaintiff: 12 Mo. 3, 8; 3 Johns. Ch. 190, 216; 7 Johns. Ch. 122; 6 Hill, 540; 23 Wend. 528; 33 Conn. 67; 6 Cal. 31. The demand made upon the administrator, Grovenor, was in July 1866. Hence no action could have been maintained by the plaintiff until that time, and the general statute of limitations began then to run. But in March 1867, Grovenor made settlement of his actions as administrator, and in May 1868 was discharged, and no successor was appointed until the commencement of this action, and all the heirs-at-law of the deceased were continuously out of the state. There was no one to sue. Beyond dispute then, the general statute had not run when this action was commenced. 3 Kas. 399.

2. No notice of his appointment as administrator was given by Grovenor, on his appointment in May 1864, as required by law. His appointment did not start the statute of limitations found in the executors act until such notice was given; 2 Kas. 399; 19 Mo. 259; 19 Cal. 85.

3. The claim of plaintiff below was duly and promptly exhibited to the administrator, July 25th 1866. It does not appear whether the administrator made due return thereof to the probate court or not; the presumption must be that he did. The claim or demand being thus exhibited, suspended the statute of limitations: 36 Mo. 96; 47 Mo. 299; 19 Cal. 98. And again—the claim once legally exhibited to the administrator cannot be barred. The statute nowhere requires it to be followed at once by an adjudication; and the petition shows ample reason why no further steps were taken in Kansas. Surely it needs no words to show that we are not pleading a promise of the administrator to revive a stale demand. And if the court will look at *Putnam v. Collamore*, 109 Mass. 509, it will see some of the reasons for the long delay in Massachusetts, and will be fully apprised of the nature of this litigation in that state.

4. The agreement made by Grovenor with plaintiff, when the account was presented, that the adjudication in Massachu-

Brief of Plaintiff.

setts should determine the amount of the liability of the estate, estops the defendant from any defense, unless it is one grounded in the fraudulent acts of the plaintiff. At least it estops them from any defense save one that tests the merits of the claim. Both parties acted upon the agreement. The matters in dispute between the representative of the deceased and the plaintiff covered very long and multifarious transactions; and without stopping now more than to refer to the record made in Massachusetts, it is sufficient to say that that record shows how tedious was the work of getting the plaintiff's claim from the tangle in which the decedent had involved them. I do not care to insist that that adjudication is conclusive upon the estate here, as to amount, or liability, unless the defendants chose to so regard it. But the fact that the litigation to settle these matters was then pending in Massachusetts, and that both sides agreed to have proceedings here await that decision, makes any attempt to defeat a full inquiry here of the merits of plaintiff's claim inequitable. The doctrine of estoppel is very well settled in cases of this kind. 2 Pars. on Contr., ch. 4, § 4, p. 801. In *Home Ins. Co. v. Balt. W. H. Co.*, Cent. Law Journal, March 2d 1877, page 206, the supreme court of the United States seem to hold such an agreement valid. (83 Iowa, 505; 50 N. Y. 538.) Within about nine months from the day the claim was exhibited to him, the administrator made a final settlement in the probate court of his acts, and in less than two years after the exhibition of the claim, he obtained a final discharge.

5. The will left by the deceased required that all his "just debts" should be paid by his executor out of his estate. Does the statute of limitations run against such a provision? If the debt is just, does not the law hold this provision for its payment beyond statutes of limitation of all kinds? Is it not in the nature of a direct disposition of the decedent's estate, for a purpose clearly conscionable, and worthy of the support of the law? In *Rosenthal v. Renick*, 44 Ill., 202, 206, a clause of a will something like the one at bar, is commented on. The court say it shows that the testator "intended his

devisees should derive nothing from his bounty, until his creditors had received their dues." That case has many features like the one before the court, and the general tenor of the reasoning fully confirms many of the considerations herebefore advanced. The equities involved, to my mind, are all and entirely with the plaintiff.

S. A. Riggs, and J. M. Hendry, for defendants:

As stated by counsel for plaintiff, the question presented is, was the demand of plaintiff barred by the statute of limitations? The statute applicable to the case is the statute of 1862. Whether the limitation is fixed by § 21 of the civil code, or by § 2 of ch. 27 of the laws of 1862, is immaterial in this case.

Counsel for plaintiff assumes that this claim grew out of fiduciary relations between George W. Collamore deceased, and John H. Collamore; that such fiduciary relations are sufficiently pleaded, and that the operation of the statute of limitations was suspended. The only trust exempted from the bar of the statute of limitations is *direct* or *express* trust; Angell on Lim., §§ 166, 178; 6 Johns. Ch. 110; 9 Pick. 242. It will hardly be contended that the claim exhibited to Grovenor as the administrator, and which was the basis of this action, partakes of the nature of an *express* trust. But it may be claimed that the trust involved in the relations between the parties is an *implied* trust—that the operation of the statute of limitation was suspended until demand, and that the facts operating to suspend the statute are sufficiently pleaded. An effort was made in the petition to plead payment, absence of demand, and a new promise—each and all being intended to take the case out of the statute. We claim that such effort has not been successful.

Again: Authorities are numerous, holding that no acknowledgment, however unequivocal, and no promise, however explicit, made by an executor or administrator, will operate to take a case out of the statute. Chancellor Kent uses this language: "Is the heir to be charged, at the mere pleasure

Brief of Defendants.

of the executor, with the debts of the ancestor? Does it rest entirely in the discretion of the executor whether the heir is or is not to be permitted to use the statute of limitations which the law has provided as a means of defense against a simple contract demand, which, perhaps, he knows to be unjust, though his ancestor has not left him the requisite proof?"

6 Johns. Ch. 273: Angell on Lim., §§ 263, et seq.; 7 Conn. 176; 1 Wharton, (Pa.) 66; 12 Wheaton, 565. The administrator takes only such powers as are conferred by law. Those who deal with him are bound to take notice of the extent of his powers, and of the limitations imposed by law upon the exhibition, presentation and proof of claims. It is not within the power of the administrator to enlarge the rights of creditors in the matter of the exhibition and proof of demands.

But even if the administrator had the power to make a promise which would take the case out of the statute, the petition alleges no such promise. The agreement alleged contains no express promise to pay. It contains no acknowledgment of existing liabilities. It has none of the elements of the acknowledgment and promise contemplated in § 31 of the civil code of 1862; nor is it the positive and unqualified acknowledgment of liability, with the clear, unequivocal and explicit promise to pay, which Mr. Justice Story holds necessary to remove or suspend the bar of the statute. 1 Peters, 851; Angell on Lim., §§ 230, 231.

If it should be held that a specific demand was necessary to put the statute of limitations in operation, and that such demand must have been made upon Grovenor, the administrator in Kansas, then we claim that such demand was made on the 25th of July 1866, when the claim was exhibited to him by plaintiff; and the statute, beginning to run from that time, was not suspended by the discharge of Grovenor as administrator in May 1868. We are aware that in the case of *Tobey v. Allen*, 8 Kas. 399, this court held that the death of a debtor operates to suspend the statute of limitation until an administrator is appointed, because there must be a party to be sued. But the reason of that decision does not apply in this case.

Upon the death of a debtor there is a period during which certain persons named in the statute are preferred in the matter of taking out administration—when creditors, as such, have no right to apply for, or procure administration—when by the operation of our laws, the right of creditors to sue is absolutely suspended. In the case at bar, plaintiff was in court in Douglas county, having exhibited his demand to the administrator. It was his duty to have followed up his exhibit of his claim with his proof; or if delayed in the production of his proofs, to have asked a continuance of the administration for the purpose of producing such proofs. The purpose of the notice of the final settlement provided for by § 194 of ch. 91, laws of 1862, was, among other things, to enable creditors to make proof of claims duly exhibited. There is no claim that such notice was not given. Further, it was within the power of plaintiff, upon a proper showing, to have procured the appointment of an administrator *de bonis non*. Upon these considerations the court will not hold that the discharge of Grovenor operated to suspend the statute. If these views be correct, the statute became a bar on July 25th 1868, or July 25th 1869, as the court may regard the contract a Massachusetts or a Kansas contract. Suit not having been brought until 1875, the question of the *locus* of the contract is not material. But in our view of this case there is no question of demand involved. The allegations of agency or trust are, in our view, not sufficient, under the rules of pleading. It will be conceded that if a trust existed which had grown out of tortious conduct on the part of the deceased, no demand would have been necessary. There is no allegation in the petition which excludes the idea of such a trust; but on the other hand, it appears upon close inspection that the pretended claim, if it really existed, was of this character.

Our view of the claim presented by the pleading, is, that it is an account as to which a perfect right of action existed at the date of the last item; and, admitting the sufficiency of the allegation of payment in 1862, that the statute was operating on January 1st 1863, eight months prior to the death of George

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W. Collamore; that under the decision in *Tobey v. Allen*, the statute was suspended from August 21st 1862, to May 8d 1864, when it again began to run; and that the bar was complete on September 8th 1865, if the contract was a Massachusetts contract, and on September 8th 1866 if the contract was a Kansas contract. 41 Penn. St. 482.

It is claimed by counsel for plaintiff, that the exhibition of the claim to Grovenor, administrator, suspended the statute of limitations. If by such proposition it is meant that the due exhibition of a claim suspended the statute limiting the time for proving up in the probate court, claims against an estate, the correctness of the proposition will be conceded. All the cases cited by counsel in his brief go to this point only. But we deny that the exhibition of a demand under the executors-and-administrators act has the effect to suspend the general statute of limitation. The reasoning of this court in *Tobey v. Allen*, supra, seems to us conclusive upon this point.

Again, it is claimed by counsel for plaintiff, that the clause in the will of George W. Collamore directing that all his just debts should be paid out of his estate, created a trust against which the statute of limitations would not run—and 44 Ill. 202, is cited. If such was the meaning of the case cited, it is, we submit, against reason and the weight of authority. 5 Selden, 398; 4 Selden, 362, 370; 7 Conn. 175.

The opinion of the court was delivered by

Horton, C. J.: This case comes to this court upon an exception taken by the plaintiff in error to the order of the court below sustaining a general demurrer to the petition filed in that court. It was alleged in said petition, that Geo. W. Collamore, in his lifetime and at his death, was indebted to John H. Collamore, plaintiff, on claims of a fiduciary character, in a sum of more than \$100,000, but for which no demand was made till July 25th 1866; that said Geo. W. Collamore died in Kansas on 21st August 1863, leaving estates in both Kansas and Massachusetts, and leaving all the defendants his heirs-at-law, save John H. Wilder; that in

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pursuance to his will, John A. Andrew of Massachusetts was duly appointed executor of the estate of said decedent in Massachusetts, by the probate court of Suffolk county, on 29th January 1864; that on 3d May 1864, one G. Grovenor was duly appointed administrator, with the will annexed, by the probate court of Douglas county, in this state, but never gave the notice of his appointment required by section 74, ch. 9, p. 523, laws of 1862; that by his said will, the said George W. Collamore among other things appointed and required that all his "just debts should be paid by his said executor out of his said estate;" that on July 25th 1866, the plaintiff in error exhibited his demand against the estate of Geo. W. Collamore, deceased, to the said G. Grovenor as administrator; that prior to the last-named date, the said John H. Collamore had commenced his action in the supreme judicial court of Suffolk county, Massachusetts, against said John A. Andrew, as executor as aforesaid, to recover and secure the moneys in the account and demand exhibited to said Grovenor; that when said demand was so exhibited to said administrator in Kansas, it was then agreed between the parties that no further action should be had in Kansas beyond legally exhibiting to said administrator said claim, until the determination of said suit in Massachusetts, and that the determination there should settle the matter here; that the suit in Massachusetts was not finally determined until the 28th of February 1874, at which time the supreme judicial court of that state rendered judgment in favor of the plaintiff in error in said action for \$73,577.37 damages, and \$1,898.31 costs; that on said judgment so rendered in his favor, there was paid about \$60,000, leaving due thereon about \$20,000; that the estate in Massachusetts was exhausted; that said Grovenor, as said administrator, made his final settlement of the estate of said Geo. W. Collamore, deceased, in Kansas, on March 12th 1867, which final settlement was approved by the probate court of Douglas county, and such administrator was finally discharged 15th May 1868; that there being a large amount of real estate in Kansas belonging the said estate of Geo. W. Collamore, deceased, on

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May 22d 1875 the probate court of Douglas county appointed the defendant in error, John H. Wilder, administrator *de bonis non*, with the will annexed, of said estate of said decedent; that said Wilder duly qualified and accepted such trust, and that between the dates of May 15th 1868, and May 22d 1875, there was no administrator in Kansas; that at the November term 1867 of the district court, in an action then pending between the heirs-at-law of said Geo. W. Collamore, deceased, said John H. Wilder was appointed trustee of the said estate, and accepted such trust, and still remained as such trustee; that all said heirs-at-law of Geo. W. Collamore, deceased, left the state of Kansas in August 1863, and have ever since resided out of the state, and been absent therefrom; that there was no personal property of said estate in Kansas, unadministered upon, but certain real estate remained, a list of which was attached (with a copy of the account sued on) to the petition. The prayer of the petition asked for a full accounting between the parties, for a judgment for the amount that should be found due the plaintiff in error, and for an order and decree to have the real estate described in the petition sold to pay said judgment. The suit was begun in the court below on May 29th 1875.

The question is presented by the record, whether the facts set forth in the petition constituted a cause of action against the defendants in error. In other words, did the court below commit error in refusing to assume jurisdiction of the cause?

We are of the opinion that the failure of Grovenor, as administrator, to give the notice of his appointment, as required by sec. 74, p. 523, laws of 1862, and the subsequent agreement of such administrator as to the suit pending at the time in Massachusetts, do not materially affect the determination of the inquiry presented. The evident purpose of said section 74, is to give all creditors of estates in administration notice of the appointment of an executor or administrator, so that claims can be exhibited within the statutory limitation of three years; but where an administrator has been legally appointed, and a creditor of the estate has

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notice.

actual notice of such appointment, and treats with the person thus appointed as the legal administrator, and exhibits to him, as such administrator, his demand against the estate, such creditor is in no manner misled or prejudiced by the want of said notice. To him such notice is useless, and he cannot complain of its non-publication.

The promise or agreement of the administrator, whereon the plaintiff bases his failure to have his account allowed or established before the discharge of the administrator from his trust, was not binding on the estate, or the heirs-at-law of the decedent. An administrator takes only such powers as are conferred by law, and those who deal with him have notice of his duties and his powers, and of all limitations thereon. He is merely an agent or trustee, acting immediately under the direction of the law regulating his conduct and defining his authority. His duty is to settle his estate according to the terms of the law, and he cannot postpone indefinitely the settlement of an estate, or bind an estate, or the heirs of an estate, by agreeing to the decision of a court to which he, as such administrator, is neither a party nor privy. In contemplation of law, there is no privity between administrators in different states of the same estate. *Jones v. Jones*, 15 Texas, 463; *Slacy v. Tharasher*, 6 How. 44; *Ela v. Edwards*, 13 Allen, 48; *Slanter v. Chenowith*, 7 Ind. 211. Whether the administrator could be held upon the said agreement as his *personal* undertaking, or whether such an agreement would be good cause, if the proper proceedings had been commenced, to have delayed the final accounting and discharge of such administration until the determination of the suit in Massachusetts, we need not now discuss, as these matters are not presented for consideration.

With the non-publication of the notice of the appointment of Grovenor as such administrator, and the agreement of said administrator as to the suit in Massachusetts eliminated from the record, the sole question remaining is, whether the district court erred in refusing to entertain the said suit against the heirs of the decedent, to whom lands had descended, to have such lands sold to satisfy the claim of

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a creditor, who, having exhibited his demand during the administration to the administrator, and without any apparent reason had neglected within the prescribed time to pursue his remedy against the estate by having his claim allowed or established, classified and paid, when there were ample assets to pay it off, and after there had been a final accounting and settlement of said estate, and a final discharge of said administrator, and such final discharge of the administrator has not taken place for more than four years after the date of the letters of administration, and no charge is made of error, fraud, or concealment as to the final settlement and discharge of the administrator. The appointment of Wilder as administrator *de bonis non*, without setting aside the prior settlement, and the facts concerning the selection of the same person as a trustee, in a suit between the heirs of Geo. W. Collamore, deceased, do not add anything to the rights of the plaintiff in the premises, or afford additional reasons for the institution of the suit. The matter submitted is one of great practical importance. If the argument of the learned counsel for the plaintiff is to be sustained, then the whole settlement of estates can be transferred from the tribunals specially established by the statute for the administration of estates to the district courts, and that too after the expiration of the three years given for administration, and when a final accounting and settlement have been had in the probate court, from which there has been no appeal, and which remain unassailed on account of any error, or fraud, and having the like validity of any other judgment. Such a conclusion would keep for years unsettled the titles to lands descended to heirs, and estates could be settled, opened, and resettled, without any definite result. Such ought not to be the law, and we do not think such a purpose is to be gathered from the statute. While it is true that the statute

Administration;
jurisdiction of
district courts. prescribing the jurisdiction of the district courts is certainly broad enough to give to such courts full chancery and common-law jurisdiction, (and the subject of this action has always been held a subject of chancery jurisdiction,) and while an estate by descent renders the heir liable for the debts of his

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ancestor to the value of the property descended, still, it has also been equally well settled, that where the property sought to be reached constitutes, as here, assets of a deceased debtor which have already been subjected to administration and distribution under a special tribunal having jurisdiction of the matter, the rule requiring the existence of special circumstances bringing the case under some recognized head of equity should not only be insisted upon with rigor, but some satisfactory excuse should be given for the failure of the creditor to collect his claim in the mode prescribed by law, before final settlement and discharge of the administrator. The question becomes one, not of jurisdiction, but of the exercise of such authority. *Public Works v. Columbia College*, 17 Wall. 521; *Williams v. Gibbs*, 17 How. 239, 255; *Titterington v. Hooker*, 58 Mo. 593; *Littleton v. Addington*, 59 Mo. 275. No valid excuse is here presented for the delay, or rather, non-action, of the creditor after the exhibition of his demand to the administrator. Where claims are exhibited and the estate is solvent, save in exceptional cases, the statute seems to intend that the administration shall continue for three years; and before any final settlement can be had, a notice thereof must be published by the administrator or executor, as the case may be, for four weeks in some newspaper, so that the creditors and all others interested shall be informed as to the time the final settlement is to be made, and such final settlement is a judicial determination, binding upon all the property of the estate, and upon any interest in such property that any person may have as heir, devisee, or legatee. *Shoemaker v. Brown*, 10 Kas. 388. Such final settlement, when not completed till more than three years after the letters are granted, is a determination of the settlement of the estate of the decedent, and thereafter, ordinarily, the title of the property which has remained undisposed of is not held in abeyance to await the presentation and litigation of other proceedings. In this case, although the final settlement purports to have been had on March 12th 1867, a few weeks less than three years from the date the letters were granted, the administra-

Final settlement
 in probate
 court.

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tion was kept open till the discharge of the administrator in May 1868, more than four years from the issuance of the letters of administration. The plaintiff in error had ample time and opportunity to have his claim allowed, and the lands subjected to the payment of the same during the lifetime of such administration. This he neglected to do. That he leaned upon a broken reed, in the way of an agreement which the administrator had not the power to make, is a mistake of law on his part for which the courts furnish no relief.

We conclude that a creditor of an estate in the hands of an administrator or executor, must not only exhibit his demand against such estate within the three years prescribed by statute, to obtain any recovery thereon, but he must do something more, and that is, before the final accounting and discharge of the administrator after three years have expired from the date of the granting of letters, he must have his demand allowed or established, and paid from the assets of the estate; and that he cannot merely exhibit his claim to the administrator, and then be passive, and permit the three years of administration to expire, and, after a final accounting has been had, the administration closed, and the administrator discharged, seek in the district court to subject the lands descended to the heirs to the payment of his claims. Under such circumstances, the lands ought not thus to be pursued, and the heirs ought not in this way to be harassed; and above all, the titles to lands derived from persons who are dead should not thus be the subject of contest, after the estate has been judicially settled, and the records of the proper tribunal show no allowed or established claims unpaid, and when all parties have the right to presume that all debts have been paid, and that the lands inherited are relieved from further claims of creditors against the estate of the deceased. Statutes designed to produce a speedy settlement of estates, and the relapse of titles derived under those who are dead, should be stringently enforced; and courts of equity will not relieve parties therefrom, except upon strong and peculiar circumstances.

Counsel for the plaintiff in error finally suggests, that in

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any event the suit of the said plaintiff is maintainable because of the provision in the will of the deceased requiring ^{will; terms construed.} that all his "just debts" should be paid. We cannot concede the proposition. The weight of the authority is against the position, and rightly so. Such formal and general language in a will is meaningless, and has no authoritative force. The law compels the payment of all just debts of any decedent, where there are sufficient assets, and the legal steps are pursued to obtain a recovery thereon. Hence, these words give no power to an executor, nor deprive him of any authority. They will not strip an estate of a just defense, nor can a party who neglects a proper presentation and proof of his demand invoke these words successfully to his aid, after he has suffered the estate to be settled and the administration closed. *Peck v. Botsford*, 7 Conn. 176; *Martin v. Gage*, 5 Selden, 398; *Bloodgood v. Bruen*, 4 Selden, 382.

The district court did not err in refusing to exercise its jurisdiction in the case, and therefore the judgment will be affirmed.

All the Justices concurring.

KANSAS PACIFIC RAILWAY CO. v. LYDIA H. CUTTER, *as*
Administratrix, &c.

1. **FOREIGN JUDGMENT; Attestation.** It seems that the attestation of a foreign record, under section 905 of the revised statutes of the United States, must be made by the clerk in person, and cannot be made by a deputy or other person acting as a substitute for him. [*R. R. v. Cutter*, 16-568, and cases cited.]
2. **OBJECTION TO TESTIMONY, Must be Specific.** An objection to the introduction of testimony, to be available in this court for purposes of error, must, except perhaps in cases where the defect cannot be obviated by further proof, distinctly and clearly state the point of objection, so that we can see from the record that the very matter to which our attention is directed was presented to the mind of the trial judge. [*Walker v. Armstrong*, 2-199; *Wilson v. Fuller*, 9-176; *Luke v. Johnnycake*, 9-511; *Marshall v. Shibley*, 11-114; *Ferguson v. Graves*, 12-43; *Simpson v. Kimberlin*, 12-587; *Willis v. Sproule*, 13-263; *Reinhart v. State*, 14-323; *Bolkin v. Livingston*, 16-39; *Davis v. Wilson*, 11-81; *Ogden v. Walters*, 12-291; *Joseph v. Bank*, 17-256; *Cross v. Bank*, 17-336; *Abbott v. Coleman*, 22-254; *Grandstaff v. Brown*, 23-176; *Humphrey v. Collins*, 23-549; *Edmondson v. Beals*, 27-656; *Long v. Kasebeer*, 28-240; *Osborne v. Woodford*, 31-290; *Stout v. Baker*, 32-113; *R. R. v. Morrow*, 32-217.]
3. **INSTRUCTIONS; Waiver of Error.** Where the charge of the court is in accord with the instructions asked by the party now alleging error, it will, for the purposes of the case, be conclusively presumed to be correct. [*Greer v. Higgins*, 20-424; *Irwin v. Thompson*, 27-645.]
4. **DAMAGES; Death from Wrongful Act of Another.** In an action under section 422 of the code of civil procedure, (Gen. Stat., p. 709,) to recover damages for the death of a party, and outside of the question of exemplary damages, the recovery is to be of a pecuniary compensation for a pecuniary loss.
5. ——— In determining the amount of such compensation, much must be left to the good sense and sound judgment of the jury upon all the facts and circumstances of the case. No uniform and precise rule can be laid down for estimating the value to the survivors of the life of the deceased, for the elements which go to make up such value are personal to each case.
6. ——— A charge to a jury, in such an action, that they are not to take into consideration the pain suffered by the deceased, or the wounded feelings of the surviving relatives, but may consider the relations between him and the next of kin, the amount of his property, the character of his business, and the prospective increase of wealth likely to accrue to a man of his age, with the business and means which he had, or the possibility of a decrease of the same, is held under the circumstances of the case to present no error. [*R. R. v. Hand*, 7-392, 393; *R. R. v. Pointer*, 9-620; *R. R. v. Brown*, 26-467.]

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7. ——— *Compensatory Damages; Items; Verdict.* Where the jury find the pecuniary loss to be a certain sum, (in this case \$1,320,) and in answer to a specific question say that the loss consisted of notes and mining stocks, and there is testimony that the deceased had notes and mining stocks which were lost on account of his death, and the amount of the verdict seems to be but a reasonable compensation for such loss, the verdict will be upheld, although the amount named by the jury cannot be deduced from the testimony by any mere addition of the items of an account, and although it is not made perfectly clear in what manner, whether by running of the statute of limitations, or otherwise, the death of the deceased brought about the loss of the notes and stocks.
8. ——— *When Exemplary Damages not Recoverable.* Where the testimony shows that the railroad train upon which the deceased was riding as a passenger was thrown from the track, and that thereby the deceased received the injuries from which he died, and fails to show any unusual speed or want of care in the management of the train, or by any direct evidence the cause of the train's being thrown from the track, and discloses as the only evidence of negligence on the part of the company the fact that some of the ties at and near the place of the accident were rotten, and it appears that the company had a suitable and competent person in charge of the track at that place as section-boss, and that he was from time to time and as fast as he deemed necessary for the safety of the track replacing the old and rotten ties with new and sound ones, held, that no case was shown for exemplary damages. [*Malone v. Murphy*, 2-260, 263; *R. R. v. Rice*, 10-426; *R. R. v. Little*, 19-269.]

Error from Riley District Court.

ACTION by *Lydia H. Cutter*, as administratrix of the estate of Joseph Stewart, deceased, to recover damages sustained by the next of kin of said deceased by reason of his death. The plaintiff was appointed administratrix of said estate by the probate court of Arapahoe county, territory of Colorado. Stewart came to his death in Riley county, in this state, while riding as a passenger on the cars of the *Railway Company*, August 1st 1872, while *en route* from Kansas City, Mo., to Denver, Colorado; and this action was brought under § 422 of the civil code, the petition alleging that the deceased's death was caused by the wrongful acts, negligence, and mismanagement of the defendant. [The case was here upon demurrer to the petition, (16 Kas. 568,) when it was held, that an administrator appointed in another state or territory could main-

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tain an action in this state under said § 422.] A trial upon the merits was had in the district court, at the March Term thereof 1876. The plaintiff offered in evidence the record of the probate court of Arapahoe county upon which her appointment as administratrix was made, and also the letters of administration issued to her as such administratrix. Such record and letters were dated September 27th 1872, and such letters of administration were authenticated as follows:

TERRITORY OF COLORADO, COUNTY OF ARAPAHOE, SS.

I, Webster D. Anthony, county clerk of said county, and *ex-officio* clerk of the probate court of Arapahoe county, do hereby certify the above and foregoing to be a true, correct, and complete transcript and copy of certain letters of administration issued to Lydia Harvey(*) upon the estate of Joseph Stewart deceased, as the same appears from the original now on file in my said office.

Witness my hand and the seal of said court, at Denver, in said county, this 4th day of June 1875.

[SEAL.]

WEBSTER D. ANTHONY, *Clerk.*

By James F. Watson, Deputy.

TERRITORY OF COLORADO, ARAPAHOE COUNTY, SS.

I, William C. Kingsley, judge of the probate court of said county and territory, do hereby certify that the said Webster D. Anthony, who by his deputy James F. Watson hath signed the above certificate and attestation, and to which the seal of said probate court is annexed, was on the 4th day of June 1875, and the time said certificate and attestation was made, the clerk of the said probate court, and the keeper of the records and files of said court; that the said certificate and attestation of the said Webster D. Anthony is in due form, and by the proper officer, and to all acts by the said Webster D. Anthony so done, full faith and credit are and ought to be given, in judicature, and without.

This 18th day of August, 1875.

WILLIAM C. KINGSLEY, *Probate Judge.*

The letters and record were admitted in evidence over the objection and exception of defendant. Several witnesses tes-

[*THE petition states that since the issuance of these letters of administration to the plaintiff, she has intermarried with Benj. P. Cutter; and the action is brought in her present name of Cutter; 16 Kas. 568.]

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tified respecting the condition of the defendant's railroad track, the injury and death of Stewart, his age, health, circumstances, etc., and his next of kin, and their dependence upon him for support, or assistance. The jury found for the plaintiff, and assessed her damages in two items—compensatory, \$1,820; exemplary, \$2,200. Judgment upon the verdict for \$3,520, and the *Railway Company* brings the case here on error.

C. E. Bretherton, and *J. P. Usher*, for plaintiff in error.

Green & Hessin, for defendant in error.

The opinion of the court was delivered by

BREWSTER, J.: This was an action under section 422 of the code, by the personal representative of Joseph Stewart deceased, to recover damages for the death of the deceased caused by the negligence of the company. The first error alleged is in the admission of a record of the probate court of the territory of Colorado, certified to in the name of the clerk by a deputy. It is not claimed that this record as authenticated was admissible under the section of our own statutes applicable thereto, (Gen. Stat. p. 700, § 371,) but it is claimed that it was under section 905 of the U. S. Revised Stat. That section however authorizes attestation by the clerk, and names no other person. And it seems to be settled that this of itself grants no authority to a deputy-clerk. 1 Greenleaf on Ev. (13th ed.) § 504; *Stephenson v. Baumster*, 3 Bibb, 369; *Morris v. Patchin*, 24 N. Y. 394. This last case is directly in point, and in it the court says: "The attestation is directed to be by the clerk, and not by any person acting as a substitute for the clerk, or possessing like power under the state laws. In making the certificate, which is made evidence under the act of congress, the clerk derives his authority from the federal and not from the state laws, and the certificate has vitality and effect, not by reason of the official character of the officer making it under the laws of the state, but in virtue of the act of con-

1. Foreign judgment; how authenticated.

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gress prescribing it as the mode of proof in this particular case. The certificate of the judge, as to the authority of any person other than the clerk to make the certificate, is of no more force than would be a like certificate as to the effect of the judgment. Again, if a deputy-clerk, or other person, could make the certificate by reason of the power conferred upon him by the state laws, and thus satisfy the act of congress, such law should be proved as other facts are proved, or as other laws are proved, and not by the certificate of the judge, which is not made evidence of any such fact. The records were not competent evidence, and were improperly admitted."

But it is insisted that, conceding the defect in the authentication, no objection was made on that ground, and therefore the error will not now be considered. When offered, the record was objected to "as being incompetent." Thereafter a motion was made to strike out the record "as not being competent evidence;" and finally an instruction was asked in reference to the fact sought to be proved by it. "No competent evidence has been offered," etc. Was this objection sufficient to raise the question now presented? In *Ferguson v. Graves*, 12 Kas. 43, it was said, "that where evidence is apparently admissible for any purpose, or under any circumstances, the court does not err in admitting the same, unless the reasons for its exclusion are given by the party objecting, has been repeatedly decided by this court." And in *Botkin v. Livingston*, 16 Kas. 41, that "if a party fails to object to the introduction of an instrument on the ground that its execution is not proven, he cannot thereafter raise the question. He has waived that point." In 1 Greenleaf on Ev. (18th ed.) § 421, the author uses this language: "It is also to be noted as a rule, applicable to all objections to the reception of evidence, that the ground of objection must be distinctly stated at the time, or it will be held vague and nugatory." The idea of course is, that as this court simply reviews the rulings of the district court it should be made clear to us exactly what these rulings were. A party

2. Objection to
testimony
must be
specific.

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should not be permitted to try his case upon one series of questions in that court, and upon another in this. If upon every question to which the attention of that court was directed it ruled correctly, with what propriety is it said that it erred, and for its errors the judgment must be reversed? As said in the case of *E. & C. Rld. Co. v. Lawrence*, 29 Ind. 622, "it is of consequence in the administration of justice that all such questions shall be so distinctly made in the lower court, that judgments shall not be liable to reversal upon points never before the mind of the presiding judge, which do not affect the real controversy, and which if suggested might have been obviated." In the case of *Bundy v. Hyde*, 50 New Hamp. 117, it appears that on the trial an objection was made to testimony as "not competent." The judge desired that the specific ground of incompetency be pointed out. This not being done, he declined to consider the objection, and this ruling was sustained. *The State v. Jones*, 7 Nev. 408, is still more closely in point. An objection was made to a deposition as incompetent evidence. Depositions were admissible in a criminal case only under certain circumstances and conditions. Although the record failed to show those circumstances and conditions, yet the objection was held too general to reach the point of a failure to show that the deposition was taken in a case authorized by statute. See also *Camden v. Doremus*, 8 How. U. S. St. 515; *U. S. v. Anguisola*, 1 Wall. 352; *Lombaugh v. V. C. & T. Rld. Co.*, 9 Nev. 271; *Dewey v. Dornec*, 18 Cal. 88; *Leek v. Wilson*, 24 Cal. 398.

It may not be possible to specify in advance a form of objection which will be sufficient in every case. The only rule that can be laid down is, that it must be such as distinctly and clearly presents the precise point of objection, and upon which the ruling of the court is asked. We must be able to see from an examination of the record that the attention of the trial judge was called to the very matter presented to us. It often happens that the objection is so apparent that a very general expression could not fail to bring it to attention. If it does, that is sufficient. But not infrequently such general expres-

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sions really cover up the specified matter, and naturally call the attention away to something else. Then they are not sufficient. Now in the case at bar there was a pivotal question as to the right of a foreign administratrix to maintain such an action. True, it had been ruled upon in the district court on demurrer, but it had not yet been determined in this court. It was still an open question. When therefore the record of the letters of administration in Colorado was offered in evidence, an objection that such evidence "was incompetent" would naturally suggest this vital question, and indicate simply a desire to preserve that question beyond any chance of waiver. The thought of the court would scarcely be turned to the mere authentication of the record. It would look to the substance rather than the form of the testimony—to that which was irrelevant, and beyond the power of correction, rather than to that which was incidental and could be corrected. Thrice was the objection presented, and the very repetition, as well as the manner of its repetition, would only strengthen the conviction that the substantial question was all that was sought to be raised. It seems to us that the attention of the district court was not distinctly and clearly called to the specific objection here made, and that therefore it should not now be considered. It perhaps should be remarked, before passing from this subject, that the views we have expressed are in reference to cases in which the defect could be obviated by further proof. If the defect was necessarily fatal, and could not be avoided by other testimony, the consideration suggested might have little force.

Objections were also taken to the instructions of the court on the question of damages. The instructions authorized the award of exemplary or punitive damages. For a. Instructions; waiver of error. this they are now challenged; but as the instructions asked by plaintiff in error also recognized the propriety of such damages in actions of this nature, we do not think the question is fairly in the case. It may be remarked, in passing, that there is a marked difference in the language of

Damages;
statutory
provisions. the statutes of the various states in this respect. In some, as in California and Kentucky, such damages are expressly or by clear implication authorized. *Myers v. San Francisco*, 42 Cal. 215; *Bowler v. Lane*, 8 Met. (Ky.) 318. In others, New York, Ohio, Wisconsin, Illinois, and Pennsylvania, by the present statute the recovery is plainly limited to the actual damages, to compensation. *Green v. Hudson R. Rld. Co.*, 32 Barb. 25; *Grottenkemper v. Harris*, 25 Ohio St. 510; *Cassillo v. Landwehr*, 28 Wis. 522; *Even v. C. & N. W. Rld. Co.*, 38 Wis. 618; *Brady v. Chicago*, 4 Bissell, 448; *C. & P. Rld. Co. v. Rowan*, 66 Penn. St. 398; *P. Rld. Co. v. Keller*, 67 Penn. St. 800. Such also is the force of the original English statute known as Lord Campbell's act, 9 and 10 Vict. 93; *Blake v. Midland Rly. Co.*, 18 Q. B. 98. While in some states, as Maine, Colorado, and Kansas, and Pennsylvania prior to 1868, the statute simply provides for the recovery of damages. *State v. Railroad Co.*, 58 Maine, 176; *K. P. Rly. Co. v. Miller*, 2 Col. 442; *K. P. Rly. Co. v. Linden*, 3 Col. 94; *Penn. Rld. Co. v. Zebe*, 33 Penn. St. 330; *Penn. Rld. Co. v. Henderson*, 51 Penn. St. 315. See also Field on Damages, p. 490 and following, where the various statutes and rulings are collected. It is said in the Maine case, that the purpose of the statute was simply to prevent the abatement of the action by the death of the party injured, leaving all other matters to be controlled by the ordinary rules governing actions for personal injuries. But as before stated, it is hardly necessary for us in this case to settle the construction and effect of our own statute.

The instructions are also challenged in respect to the measure of damages other than exemplary. The language of the charge is as follows:

4. Compensatory
damages

"You should not take into consideration the pain suffered by deceased, or the wounded feelings of the surviving relatives, nor give punitive damages, unless said accident was the result of gross carelessness, and reckless indifference to the rights of passengers. But you should give what you deem a just compensation to them for such loss. And in determining

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the same, you may take into consideration all the circumstances attending his death; the relations between him and his children, and next of kin; the amount of his property; the character of his business, and the prospective increase of wealth likely to accrue to a man of his age, with the business and means which he had, or the possibility of a decrease of the same. Damages, in a case of this kind, must depend very much upon the good sense and sound judgment of the jury, upon all the facts and circumstances of the case."

Many cases have arisen in the different states under statutes like this, and many inquiries have been made in the various courts as to the proper matters for consideration by the jury in fixing the damages. It is safe to say, that no rule has yet been laid down of definite and precise statement, and applicable to all cases. That the purpose of the statute was to give to the survivors compensation for the value of the life taken away, may be conceded; and therefore all the elements which go to make that life valuable, are proper matters of consideration; and matters which do not affect its value to the survivors, such as the pain and suffering endured by the deceased, the grief and sorrow of the survivors, are not to be considered. But how shall the value of a man's life be determined? By the needs of the survivors? Where the deceased leaves a family of small children, should the recovery be greater than where he leaves none? That logically would exclude all recovery where the deceased left no one dependent upon him. By the probable earnings of the deceased? That would often furnish the most inadequate compensation in the most deserving of all cases, as, where a wife and mother is the party killed. By the present value of the probable net accumulations of the deceased, considering his present business and expectation of life? That would be open to objections of the same character as the last, only of a far more serious nature. In the very nature of things it seems to us an exact and uniform rule for measuring the value of the life taken away to the survivors, is impossible. The elements which go to make up the value are personal to each case. All that can well be done is, to say that the jury may take into consideration all the

A. Rule for determining amount of damages.

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matters which go to make the life taken away of pecuniary value to the survivors, and, limited by the amount named in the statute, award compensation therefor. To go beyond this, and lay down an arbitrary rule for valuing the life of the deceased, a rule applicable to all cases alike, however satisfactory it might be because of its uniformity, would in many instances operate to defeat the accomplishment of the wholesome purposes sought by this act. It was well said by Mr. Justice Nelson in the case of *Railroad Co. v. Barron*, 5 Wall. 90, in language quoted in the charge in this case, that "the damages must depend very much on the good sense and sound judgment of the jury, upon all the facts and circumstances of the particular case." The instructions as given in this case find abundant support in the latest and best decisions, and do not present matters other than those proper for the consideration of the jury. Thus, in the case of *Catawissa Rld. Co. v. Armstrong*, 52 Penn. St. 282, the court says: "The jury were instructed to put a value upon his life, and in doing this to have regard to his probable gains and accumulations, his age, his health, his usual wages, and the family he had to support. We have said that in this class of actions all that can be sought or recovered is pecuniary indemnity for a pecuniary loss, and we think nothing else was submitted to the jury in this instance." In *McIntyre v. Central Rld. Co.*, 87 N. Y. 287, "What did the deceased usually earn?" was held to be a proper question as tending to show the value of the decedent's life. In *Filley, Adm'r, v. Hudson R. Rld. Co.*, 24 N. Y. 471, it was said, that "It is not required that the degree of kindred should be such as to create the duty of sustenance, support or education," and the same proposition is affirmed in *R. R. Co. v. Barron*, 5 Wall. 90. See also, *Filley, Adm'r, v. Hudson R. Rld. Co.*, 29 N. Y. 252; *K. P. Rly. Co. v. Miller*, 2 Col. 442, and cases hereinbefore cited on exemplary damages. The only expression in the charge which occurs to us as possibly misleading, is that which suggests for the consideration of the jury the circumstances attending the death of the deceased. Outside of the question of exemplary damages, it is the fact and not the

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manner of death that determines the amount of damages. But from the view we have taken of the testimony, we cannot think that the plaintiff in error was prejudiced, or the jury misled.

The jury found a general verdict for the plaintiff, but answered specific questions as follows:

"Q.—If you find for the plaintiff, state the pecuniary loss sustained by the next of kin of the deceased by the death, and in what such loss consisted. *Ans.*—We find that the next of kin of Joseph Stewart, deceased, have sustained pecuniary loss by his death to the amount of \$1,320. Said loss consisting of notes and mining stocks.

"Q.—If you assess damages beyond pecuniary loss sustained by next of kin, state the amount. *Ans.*—We further assess damages beyond the pecuniary loss sustained by the next of kin, at the amount of \$2,200."

An examination of the testimony satisfies us that there was evidence sustaining the first answer, but that no case was made out for exemplary damages. A verdict of \$1,320, as the pecuniary loss, was not excessive. Perhaps it may not be clear how the jury reached that exact figure, as the loss in notes and stocks, for the testimony is in this respect indefinite, though Mrs. Cutter testified that her father had some notes and mining stocks which were lost on account of his death, the stocks being sold for non-payment of assessments; and again, that there were over \$1,000 in notes, and that she put them into a lawyer's hands, but that he could not collect any; that she was told that several of the parties whose notes he held were reliable; that one note given by a man named Parsons was for \$800 or \$900, and that he was as much able to pay now as he ever was, etc. Why the Parsons note was not collected, is not specifically stated. Perhaps it was barred by the statute of limitations. But we do not wish to be understood as stating that the testimony points out in exact sums the amount of \$1,320 in stocks and notes, or makes it perfectly clear how the death of the decedent brought about the loss even of those notes and stocks. We do decide however that \$1,320, as compensation for the loss, was warranted by the tes-

7. Items of damages; verdict.

timony; and that while the jury have indicated in what respect they considered the death as working a pecuniary loss, it is not essential to the sustaining of the verdict that from figures and amounts named in the testimony the result can be reached as by adding up the items in an account.

In regard to the damages above compensation, the exemplary or punitive damages, we do not think the case warranted such damages. The injury happened in this way: 8. Exemplary damages not recoverable. The train, upon which deceased was riding as a passenger, was thrown from the track, and thereby he received such bruises as caused his death in a few hours. The record is silent as to any positive evidence of the cause of the accident. It seems probable however, that the train jumped the track from some defect in it, rather than from running over anything, or with unusual speed. And in reference to a defect in the track, it appears that there were some rotten ties at and near the place of the accident. And that is the only matter of negligence which from the testimony can in any manner be imputed to the company. And while of course that is sufficient to sustain an award of compensatory damages, yet it does not disclose that gross and wanton negligence which is necessary to justify exemplary damages. It appears further from the testimony of the company, that it had a suitable party employed to take care of this portion of the track, as section-boss, and that from time to time he replaced the rotten ties with sound ones as he thought the safety of the track required. We think therefore upon the whole case that the judgment should be modified by striking out the \$2,200 awarded for exemplary damages, and affirmed as to the rest. The costs of this court will be divided.

All the Justices concurring.

ARNOTT AND ARCHER V. KANSAS PACIFIC RLY. CO.

1. **BAILMENT; *Locatio Operis Faciendi*; Right of Property in the Thing Bailed.** A railway company, having a quantity of old and worn-out railroad iron, which it wished to utilize, entered into contract with a rolling-mill company, by which the latter company was to re-roll into new bars or rails the old iron when delivered to it, and the rolling-mill company was to add to the old iron a certain amount of new iron to form the head or top of the new rails; and thereafter, under said agreement, old iron was delivered to the rolling-mill company by the railway company, and new rails were manufactured therefrom, with occasional additions furnished by the rolling-mill company, the railway company supplying the chief or principal part of the materials for the new rails: *held*, that the right of property to the iron, while the work was going on, and to the rails, when completed, remains in the railway company; and *held also*, that the transaction between the two companies is of the nature of the bailment denominated by law-writers of the class *locatio operis faciendi*.
2. **ACCESSION; The Party Furnishing the Principal Part of the Material, Has the Title.** In such a transaction, as above stated, the material inquiry is, which company furnishes the chief or principal portion of the material for the manufacture of the new rails; and where the old and new rails are levied upon in the possession of the rolling-mill company, as the property of the latter company, and are afterward replevied by the railway company as its property from the officers making such levy, and on the trial of said replevin action the president of the rolling-mill company, introduced by the plaintiff to prove the process of the manufacture of the new rails, testifies in full as to such process, and states he is familiar with the details of the manufacture of the rails, it is material error for the district court to refuse to defendants the right to show by such witness the amount of new iron intermingled with the old iron in the process of manufacturing the old rails of the railway company into new ones.

Error from Shawnee District Court.

REPLEVIN, brought by the *Railway Company*, to recover possession of "a specific mass of railway iron in bars and flats, amounting in weight to about three hundred tons." The material facts are stated in the opinion, *infra*. Trial at the December Term 1874 of the district court. The following are the instructions given by the court to the jury:

"1. This is an action of replevin, in which the plaintiff seeks to recover the possession of a lot of iron described in the pe-

tition, alleging that at the commencement of this action it was the owner of said iron and entitled to the possession thereof, and that the same was then unlawfully detained by the defendants.

"2. The defendants claim that this iron was the property of the Topeka Rolling-Mill Company, and was levied upon by them, as constables, under and by virtue of writs of attachment and execution in their hands against said mill company.

"3. If this iron was the property of the plaintiff, and was by it delivered to the Rolling-Mill Company to be re-rolled into rails and returned to it, this arrangement did not change the ownership of the iron, even if in the process of rolling other iron was used and added to it by the mill company. In such case, the iron, when manufactured, and during the process of manufacture, including the added material, would still remain the property of the plaintiff.

"4. The plaintiff claims ownership, and right of possession by virtue of said ownership. The defendants may show right of possession either in themselves, or in any other person or corporation than the plaintiff; and a showing of either, is sufficient to defeat the plaintiff's recovery.

"5. Proof that the plaintiff delivered old railroad iron to the Topeka Rolling-Mill Company, without showing the amount delivered; or the amount received back (it appearing that some iron had been received back,) is not *alone* sufficient to entitle the plaintiff to a recovery.

"6. Identification of the property in question is an essential requisite to plaintiff's right to recover. That is, plaintiff must show that the specific property belongs to the plaintiff, and not merely that the plaintiff has a certain amount of *like property*, or a number of articles of *the same kind* as those replevied. So, if the jury find from the evidence that the plaintiff delivered to the Topeka Rolling-Mill Company old, worn and broken railway iron, for the purpose of having it re-manufactured or re-rolled, the Rolling-Mill Company to furnish some new iron, called 'head iron,' which was necessary to the re-manufacture, and then to re-deliver to the plaintiff the same weight of new rails as was delivered of the old ones; that said old iron was rolled into the form of flat bars, called 'flats,' in the usual process of re-manufacture, and that the said old iron was, either before, or after, or during such partial re-manufacture, mixed or intermingled with a considerable quantity of iron which belonged to any other person or corporation, so that at the time of the levy by the defendants

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it was impossible to distinguish or divide the iron which was delivered by the plaintiff from such other iron, then the plaintiff cannot recover in this action, and the jury must find in favor of the defendants.

"7. An artificer's or mechanic's lien on personal property is not the subject of levy as against the owner of such property in the hands of the artificer or mechanic, under execution against such artificer or mechanic.

"8. The plaintiff must recover, if, at all, upon the weight and preponderance of the evidence in its favor. If you find from the evidence that at the commencement of this action the plaintiff was the owner of and entitled to the possession of said iron, your verdict will be for the plaintiff. If you do not so find, your verdict will be for the defendants.

"9. If you find for the defendants, you will also find what was the value of their possession, which will be the amount due on the executions and attachments levied by them on the property, including interest at the rate of seven per cent., and the costs that have accrued in those cases.

"10. If the jury find in favor of the defendants, then the measure of their recovery will be the amount due on said executions and attachments, admitted to be \$2,508.37, unless that sum exceed the value of the iron, in which case it will be limited to the value of the iron.

"11. The jury are the exclusive judges of the evidence, of its weight, and of the credibility of the witnesses."

The 6th and 10th of the foregoing instructions were prepared by defendants, and given at their request. The defendants excepted to the 3d, 4th, 5th, and 7th of said instructions. Defendants also asked the following instructions, which were refused by the court:

"1st. If the jury find from the evidence that the plaintiff delivered to the Topeka Rolling-Mill Company old, worn and broken railway iron, commonly known as T rails, for the purpose of having it re-manufactured or re-rolled, the Rolling-Mill Company to furnish some new iron, called 'head iron,' which was necessary to the re-manufacture, and then to re-deliver to the plaintiff the same weight of the new rails as was delivered of the old ones; that said old iron was rolled into the form of flat bars, called 'flats,' in the usual process of re-manufacture, so that it became impossible to identify any one of said 'flats' as the product of any one of said rails, then the plaintiff cannot recover in the action.

"2d. If the jury find from the evidence that the Topeka Rolling-Mill Company carried on the business of re-manufacturing, rolling or re-rolling railway iron, and that the plaintiff delivered to said rolling-mill company a large quantity of railway iron, for the purpose of having it re-manufactured or re-rolled into new rails, for a compensation to be paid by the plaintiff; that said rolling-mill company had proceeded with said re-manufacture or re-rolling so far as to heat and weld the old iron and transform it into the flat bars called 'flats' which were replevied in this action, that being the usual process of re-manufacture or re-rolling, then said rolling-mill company had a lien upon and interest in said iron; and if any sum was due the rolling-mill company by the plaintiff at the commencement of this action, for the work done on said iron, then the plaintiff cannot recover in this action, and the jury must find in favor of the defendants."

"3d."—[The third instruction asked and refused was in the words of the 4th instruction given, as above, with the addition of the following words: "And the burden of proof is upon the plaintiff, to show that all the iron replevied in this action is the same iron which it delivered to the Topeka Rolling-Mill Company."]

"4th."—[The fourth instruction asked and refused, is exactly like the 5th instruction given by the court, omitting the word "alone."]

Verdict and judgment for the plaintiff, and defendants, *A. A. Arnott and Thomas Archer*, bring the case here on error.

D. Martin, for plaintiffs in error:

1. The court erred as to admissibility of evidence. Questions were propounded to the witness Coldren, in cross-examination, and ruled out, as improper. The first two questions were intended to show the jury the process undergone by the Kansas Pacific railway iron in being made into new rails. The witness was president of the rolling-mill company, and familiar with the details of the business. He had explained the usual process. We desired to show that the Kansas Pacific iron was to, and did, pass through the same process. The court allowed us to prove what was done with the particular iron replevied, from the time it was delivered to the rolling-mill company until it was taken by the sheriff. This limited

the evidence to a part of the iron only, and to a part of the process only. We should have been allowed to bring out the whole truth. It appeared from his cross-examination that two other railroads had sent old iron to said rolling-mill to be re-rolled about the same time that the Kansas Pacific iron was there. We desired to show by him that the iron of the different roads was not kept separate, and that the rolling-mill company did not pretend to deliver to each railroad the identical metal received from it, and the question was relevant. The identity of the iron replevied with that delivered, was necessary to a recovery by the plaintiff, and so the court instructed the jury. But by this ruling the court excluded the testimony by which we expected to show that the iron replevied could not be identified as that furnished by any particular railroad.

2. The instruction given by the court assumes that the transaction between the railway company and the rolling-mill company was a bailment coming under that subdivision designated as *locatio operis faciendi*; but it is of the essence of such a bailment that the thing bailed is to be returned when the purpose of the bailment has been accomplished. Could it have been the intention that all the old iron delivered by the railway company in this transaction was to be returned to it by the rolling-mill company? We think the evidence shows the contrary. Suppose that to one hundred tons of old iron the rolling-mill company was to add twenty tons of new for "head iron," and that in the process of re-manufacture five tons of the one hundred and twenty tons are lost in dross and waste: then we have one hundred and fifteen tons of new rails. Now, which corporation owns these new rails? The court below instructed the jury, in effect, that *all* of them would belong to the railway company. We think they would *all* belong to the rolling-mill company, but that it would *owe* the railway company one hundred tons of them in kind, on being paid or tendered the agreed price for re-manufacturing. The railway company could certainly have no claim whatever on the fifteen tons remaining.

It is quite obvious that this transaction was what the Civilians would call a *mutuum*, rather than a regular bailment—that the iron in the possession of the rolling-mill company was what the Scotch and French lawyers denominate a *fungible*; that by the delivery of the iron by the railway company to the rolling-mill company, the title of the property passed to the latter; and that the obligation to deliver the new rails to the railway company, on payment or tender of the price of re-rolling, became a debt. The transaction constituted one of those innominate contracts of the Civilians which are to be governed and interpreted by the law of sale, or barter, rather than by the law of bailment. It results, that the title of the iron being in the rolling-mill company, the defendants below had a right to levy their executions upon the same, and that the plaintiff below ought not to have maintained its action of replevin: Jones on Bail. 64, 102; Doct. & Stud., ch. 38, pp. 219, 220; Story on Bail., § 439, 283, 284, 370, 47; 2 Kent's Com. 573, 589; 2 Pars. on Contr. (5th ed.) 133, and note *v*; 7 Cow. 752, and note *a*, p. 756; 21 Wend. 83; 2 Comst. 153; 7 Hill, 497, 498; 8 Mason, 478; 10 Me. 31, 33; 11 Penn. St. 264; 1 Blackf. 353; 12 Ind. 252; 1 Ohio St. 244.

The court modified the 3d instruction asked by defendants by striking out these words, to-wit: "And the burden of proof is upon the plaintiff to show that all the iron replevied in this action is the same iron which it delivered to the Topeka Rolling-Mill Company." And in said modified form the instruction was given. The refusal to give the instruction as asked, added emphasis to the instruction given by the court to the effect that the new or added material, as well as the old, belonged to the railway company—a notion based upon the erroneous idea that the transaction was a *locatio operis faciendi*, instead of a *mutuum*. In our view the case was tried throughout under a misapprehension of the legal nature of the transaction between the railway company and the rolling-mill company. The law of an ordinary bailment *locatio operis faciendi* was applied to a *mutuum*; while a *mutuum* is in effect a sale, except that the consideration is received in kind, not in money.

Brief of Plaintiffs in Error.

This error runs through the instructions and the questions raised in the introduction of testimony, and will require a reversal of the judgment.

The court ruled very explicitly, that the interest acquired by an artificer in goods upon which he had performed labor, and on which he holds a lien, is not subject to levy under an execution against the artificer, and testimony offered by defendants upon this point was excluded. In support of our views, we cite, Laws 1872, p. 298, ch. 142; Story on Bail., § 440; 9 How. Pr. 569-573; 42 Barb. 411; 4 Wend. 298. That undivided interests in chattels may be sold on execution, see, 21 Conn. 148, 157; 2 Ga. 73, 76; 15 Mass. 82; 7 Gray, 416.

3. The verdict was not sustained by sufficient evidence, and is contrary to law. It devolved upon the railway company to show that the iron replevied was its property. Yet it did not even show how much iron was delivered to the rolling-mill company, nor how much was received back from it. For aught that appears in the testimony (which is all in the record,) the railway company may have received, prior to the commencement of this action, as much new iron as it delivered to the rolling-mill company in old rails and scraps. In that case, we think the railway company could recover nothing more, notwithstanding the instruction that the added material would belong to the railway company. The evidence shows that the rolling-mill company was re-rolling for two other railroads during the same season, and furnishing the new metal for head iron, and that the iron of the three different railroads was not kept separate. Indeed, it distinctly appears that there were delivered to the K. P. railway company seventy or eighty tons of new rails made out of the Hannibal & St. Joseph iron. From this showing it does not appear that *any* of the iron levied on by defendants belonged to plaintiff, much less *all* of it, even on the hypothesis that the transaction between the plaintiff and the rolling-mill company was a *locatio operis faciendi*, instead of a *mutuum*. The jury seems to have entirely misapprehended the purport and effect of the

evidence, and is therefore at fault as well as the court, and the judgment should be reversed so that the case may be properly tried.

C. E. Bretherton, for defendant in error:

1. This case is brought here by plaintiffs in error under an entire misapprehension of the law applicable to the case. Their theory is that the property in the iron, which is conceded to have originally belonged to the railroad company, would pass from the railroad company to the rolling-mill company, if they could prove that it became so mixed with iron belonging to two other companies that the iron belonging to each could not be separated. Such would not be the law. The mixture of the various iron, would not transfer the property in it to the common bailee, but would make the original holders tenants in common, according to their respective quantities of the general mass; and if afterward the other owners withdrew their proportion, the sole property in the balance would be in the remaining bailor.

A small part of the iron had been completely converted into new rails, and a certain proportion of new iron belonging to the rolling mill was made use of in the process. It is claimed that the mixture of this new iron made the whole mass the property of the rolling mill. This is erroneous, because such a mixture would in any case only entitle the rolling mill to their proportion, as tenants in common, of the entire mass. But as a matter of fact this rule is not applicable to this particular case, first, because the evidence clearly shows the new iron was sold by the rolling mill to the railroads, and the property thus transferred to them, and that the rolling-mill company at the most had but an artificer's lien for the price of the additional iron and the workmanship; and second, because it is shown that the new iron was merely added as an accessory to the old.

The real legal question below was, whether the transfer of the old iron by the railroad company to the rolling mill was a

bailment, or a sale. If the contract between the parties was, that in consideration of so many tons of old iron, and so much money, the rolling-mill company would deliver to the railroad company so many tons of re-rolled iron, the contract was a sale; if the contract was, that the rolling-mill company would re-roll the old iron delivered to them, and put in a certain amount of new iron for the purpose, then the contract was only a bailment of the iron, and the property remained in the railroad company. The admixture with iron belonging to other companies could create at most a question of parties; and no such objection was raised by demurrer or answer, and it is therefore waived. But in any case, one tenant in common is entitled as against all persons but his co-tenants to the exclusive possession of the property, and may recover it in an action against an adverse possessor without making his co-tenants parties. (15 Cal. 371.) His possession is *per my et per tout*. This is the rule at least under reformed systems of procedure. At common law it may have been otherwise. (Barbour on Parties, 110; 15 Me. 255.) But even at common law the non-joinder of other tenants in common could only be pleaded in abatement, and not in bar. (4 Mass. 515.) The distinction between a bailment and a sale was long since laid down by Bronson, C. J., in *Mallory v. Willis*, 4 Comst. 85, and has been ever since universally followed. See, 1 Ohio St. 244; 19 Ohio, 344; 7 Lansing, 79; 23 Wis. 643; 4 N. Y. 156; 6 N. Y. 64, 461; 8 N. Y. 433; 92 U. S. 563; 21 Wend. 83; 1 Blackf. 353; 12 Ind. 252; 13 Minn. 174; 11 Penn. 264; 32 Me. 404; 7 Johns. 472. The rules of the civil law can be found in Domat, vol. 1, p. 132; Pothier, Du Domaine de Propriete, p. 107; Contrats de Bienfaisance, I, p. 171; Code Nap., art. 565, 1892; and are substituted for the common-law rules in the California Code, §§ 577, 1025.

As to the question of levy on the alleged lien of the rolling-mill company: While the proposition may not be free from doubt, that a mere possessory lien cannot in any case be taken in execution, the question does not arise in this case. Our

artisan's lien is regulated by statute, and not by the common law. Laws of 1872, ch. 142, § 1. As to the flats, it is clear the mill company could have no lien, because the work was incomplete; had they sold the iron while in flats, it would have been a conversion; and equally so for the sheriff to attempt to do it. Nor could the right to finish re-rolling and receive payment, be the subject of sale, because the bailment was personal, and called for the skill and appliances at the service of the mill company, and not of any casual assignee. Like all executory contracts of labor, where the skill of a particular person or the resources of a particular establishment is contracted for, it was not assignable, and therefore not capable of judicial sale. The case of the completed rails may not be so clear. The mill would then be in the position of a mere pledgee for money, with a statutory power of sale, and such an interest might perhaps be within the cases cited by plaintiffs in error. There is not a particle of evidence that the railroad company were in debt to the rolling-mill company, while Coldren testified expressly that the mill had no money interest in the iron; and of course, without a debt there could be no lien.

2. The questions asked Coldren, the president of the mill company, on cross-examination, were properly excluded because irrelevant to the issue. The amount of new iron did not affect either the question of ownership, or of lien. The lien depended on the existence of a debt; the ownership, on the contract between the parties. Neither the amount of work in the bars, nor the worth of the labor, was material to the issue. The question was simply, was money due the rolling mill, for which they had a lien on the iron.

3. As to the instructions: Defendant's 1st instruction was properly refused, as inaccurate. Confusion of the iron of different bailors would not, as assumed by this instruction, vest title in the common bailee. If the issue was, whether the contract between the mill and the railroad was *mutuum*, or bailment, then it was a matter for the jury below, and there

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being some evidence to sustain their verdict, its weight will not be considered by this court. The 2d instruction asked was also properly refused. It is inaccurate, because it assumes a lien would exist before the work was completed; and it is altogether erroneous in further assuming that the question of indebtedness was before the jury. A lien presupposes a debt, and no evidence was offered in the case to show that the K. P. railway company was indebted to the mill, while Coldren directly testified that the latter had no money-interest in the iron. Nor was there error in striking out the last clause in defendant's 8d instruction. It is inaccurate in assuming that either confusion or addition would transfer the property from the bailor to the bailee. The addition of the word "alone," in the 4th instruction asked, (the 5th given by the court,) was proper. Without the addition of the word *alone*, the instruction would have been altogether inapplicable. The receipt of old iron by the mill was material, and a proper matter to go to the jury with other evidence.

The 6th instruction given by the court was more favorable to defendants in error than they had a right to expect. If it were proved either that plaintiff below was a tenant in common of the iron with other bailees, or, that other bailees having withdrawn their proportion of the iron, left this as the proportion of the Kansas Pacific, although not the identical iron, plaintiff would be entitled to recover; and this, although to the bailor's iron was added new iron in the process of re-rolling, when the contract provided for labor and new material being used in the process of re-rolling and paid for in money. Neither party, it seems, attached sufficient importance to the exact character of the contract between the railroad and the mill. There was no evidence to go to the jury that there was a debt due by the railroad to the mill, and therefore, whether a lien, subject to levy, existed on the completed bars or not, is immaterial; hence, the 7th instruction given by the court, even if erroneous, did no harm.

The opinion of the court was delivered by

HORTON, C. J.: The following is a general statement of the facts in this case: In August and September 1874, the plaintiffs in error, who were constables of Shawnee county, held several executions issued by justices of the peace of said county on judgments against the Topeka Rolling-Mill Company, a corporation doing business in North Topeka. The executions amounted in all to \$2,508.87; and certain iron, being in possession of the rolling-mill company, the constables levied upon it as the property of this company, to satisfy their executions. The iron was so held by them as such constables when the K. P. Rly. Co., on 23d September 1874, commenced this action in the court below in replevin to recover the possession of the property. The said personal property was described in the petition as follows: "The specific mass of railroad iron, in bars or flats, amounting in weight to about three hundred tons, now stacked in North Topeka, near to and south of the track of K. P. Rly. Co., and about one hundred and fifty yards east of its depot, in North Topeka aforesaid, being all the railroad iron stacked in such locality." The railway company claimed to be the owner of the iron, and that the rolling-mill company was only its bailee. The proof tended to show that the railway company, having a large quantity of old and worn-out railroad iron which it wished to utilize, entered into a contract with the rolling-mill company by which the latter company would re-roll into new bars or rails the old iron delivered to it, and put in a certain amount of new iron, called "head-iron," to form the head, or top of the rails. The course of business was to weigh in the old iron, cut it up, heat several pieces together to a welding heat, roll it into flat pieces, add the new iron, heat it again (several pieces together) to a welding heat, roll it into rails, and weigh out to the railway company the number of tons of new iron weighed in of the old, charging so much per ton for all the new rails so made. The defendant in error made sev

eral consignments of old iron to the rolling-mill company during the summer, and received back a large quantity of new rails; but the evidence does not show how many tons of old iron the defendant in error consigned to, nor how many tons of new rails it had received from, the rolling-mill company. Nearly all the iron replevied in this action had gone through only one of the heating processes, and was in flat pieces called "flats." There were also about twenty-five tons of new rails or bars in the mass in dispute. Verdict and judgment in favor of the railway company.

The first question is, as to the character of the transaction between the railway and rolling-mill companies. Counsel for plaintiffs in error contends that it was what the civilians would call a *mutuum*, rather than a regular bailment; that the iron in the possession of the rolling-mill company was what the Scotch and French lawyers denominate a *fungible*; that by the delivery of the iron by the railway company to the rolling-mill company, the title passed to the latter; that the obligation to deliver new rails to the railway company on payment or tender of the price of re-rolling became a debt, and therefore, that the personal property levied upon was liable to be sold to pay the judgments against such rolling-mill company. Said counsel assigns as error the holding of the court below, that the transaction between the companies was a bailment under that subdivision designated by Sir William Jones in his work on bailments as *locatio operis faciendi*, and classified by Pothier, in his definition of contract of hire, as a regular contract of hire, that is, that contract of hire where the specific thing which is let to hire is to be returned. We think that the learned counsel misconceives the law as applicable to the facts discussed, from an attempt to marshal the case *nolens volens*, within the definition of the *mutuum* of the Romans, because it differs slightly from the common bailment classified as *locatio operis faciendi*. While it is true, that the transaction between the two companies varies from the terms of either a regular or an irregular contract for hire, yet if any technical term is to be

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applied to it, it must be placed in the category of bailments denominated *locatio operis faciendi*, rather than that of the *mutuum*, or *fungible*, of the law-writers. In other words, by the rules of the common law and the decisions of this country, the transaction was a regular contract of hire, in contradistinction from an irregular contract of hire, if the railway company furnished the chief or principal part of the material of the new rails, and if such was the case, the proprietary interest in the iron let was not changed, but remained in the latter, viz., the Kansas Pacific Railway Co. This conclusion is based on the rule that, as the law does not favor tenancy in common in such transactions, and as the addition of considerable accessorial material to the chief or principal material in the manufacture of an article may be deemed an actual sale by delivery of such additional material to the original owner, such original owner, so far from losing his general property in the thing thus placed in the hands of another person for manufacture, acquires that right to whatever minor accessorial additions are made in bringing it to its new and improved form. In *Slaughter v. Green*, 1 Rand. 3, it was held that where wheat was delivered at a mill to be ground upon an agreement that the miller should return to the farmer a given quantity of flour for so many bushels of wheat, the miller was a bailee, and not a purchaser. In *Foster v. Pettibone*, 7 N. Y. 433, it was held that where a contract is made with the manufacturer to deliver him raw materials to be returned manufactured, the contract is one of bailment, and not of sale, and the title to the article when manufactured remains in the original owner. In *Pierce v. Schenck*, 3 Hill, 28, it was held, if logs be delivered at a saw-mill, under a contract with the miller that he shall saw them into boards within a specified time, and that each party should have one-half of the boards, the transaction inures as a bailment merely, and the bailor retains his general property in the logs till all are manufactured pursuant to the contract; and it was further held in the case, that where the miller, after sawing a part of the logs into boards within the

time, failed to perform as to the rest, and converted both the boards and the logs to his own use, the bailor might recover in trover for the whole, and that the miller was not entitled to any deduction on account of what had been actually sawed. In *Wison v. Nason*, 4 N. Y. 156, it was held that when one who has possession of the owner's wheat mixes it with other wheat of the same description and quality, whether his own, or belonging to third persons, without the consent of the owner, the latter does not lose the title to his wheat. He may call for a division, or when the other parties have received from the mass their several quantities, he may claim and recover the residue as his separate parcel. Identification of the very grains of wheat is not necessary. In *Pulcifer v. Page*, 32 Me. 404, it was held that where a chain was made of broken links belonging to different parties, that a right of property by accession occurs when materials belonging to several persons are united by labor into a single article. The ownership of an article so formed is in the party, if such there be, to whom the principal part of the material belonged. In *Merritt v. Johnson*, 7 Johns. 472, it was held that when the materials of John are united with the materials of Richard by the labor of Richard, who furnished the principal materials, and those of John are only accessory, the right of property in the whole belongs to Richard by right of accession. So if A. deliver to B. some cotton yarn on a contract to manufacture the same into cotton plaids, and B. was to find the filling, and A. agreed with B. to have the particular yarn with the fillings to be found by B. made into plaids on joint account, and the plaids when woven were to be divided according to their respective interests in the value of the materials, and the plaids, before the division, had been burned by an accidental fire, the loss would have been mutual, each losing the materials furnished by himself. Story on Bail., § 420. Again, where materials are furnished to a workman to manufacture into some article, the case is still treated as a mere bailment, although the workman may add some accessorial materials or ornaments. Thus, if A. sends cloth to a tailor to be made into a garment, and the

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tailor furnishes buttons and twist to complete it, it is a mere case of *locatio operis faciendi*. Story on Bail., § 423; *Gregory v. Stryker*, 2 Denio, 629.

In the case at bar, old rails, as the material, were furnished by the railway company to the rolling-mill company to manufacture into new rails; and in view of the above authorities, and the conclusion we have reached, it was important on the trial to show how much old and how much new iron entered into the new rails. The court below seems to have assumed that the accessorial material added by the rolling-mill company in the way of new iron, which formed the top of the rail, was the lesser part of the iron used in the manufacture of the rails; and such, perhaps, was the case. But the district court committed error in *assuming* such to be the fact, and in refusing to permit the plaintiffs in error to prove the materials of the new rails.

While the witness Coldren was upon the stand, after having testified concerning the process undergone by the Kansas Pacific railway iron in being made into new rails, and that he was familiar with the details of the business of the manufacture of the new rails, he was asked on cross-examination: "How much new iron did you put in with the old, in the process of manufacturing these old rails of the Kansas Pacific Railway Company into new ones?" The defendant in error objected to the question, and the court refused to allow the question to be asked, or answered. The question was pertinent and important. Its rejection by the court was substantial error, and prejudicial to the rights of the plaintiff in error. It is probable, if the witness, who was the president of the rolling-mill company, had answered the interrogatory, it would have been fully established that the material furnished by the railway company formed the chief portion of the new rails; but this is only a presumption from other evidence in the case; and as the inquiry was a legitimate one, and the jurors were the parties to be informed of the various amounts of metal furnished by the two companies in the manufacture of the rails, the case must be reversed. The court had no right to judicially deter-

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mine the amount of new material added to make the top of the rails, nor to deprive the plaintiffs in error from proving how much was used therefor. Again, it was clearly incumbent on the part of the defendant in error to show by the proof that, as to the twenty-five tons of new rails which were replevied, the material thereof was principally the property of the Kansas Pacific Railway Company; and the refusal of the court to permit the president of the rolling-mill company to be cross-examined on the subject, at a time the matter was a proper subject of examination, left the question of the amount of material furnished by each company in the manufacture of the new rails to be decided by the jury upon other testimony, and this was of an indirect and indefinite character. The best evidence upon this point was held inadmissible.

The judgment will be reversed, and a new trial awarded.

All the Justices concurring.

ANDREW NEAL *et al.* v. J. H. KELLER.

1. **LIABILITY OF SURETIES; *Official Bond of Justice.*** In April 1871, N. was elected justice of the peace of *Franklin* township, in Jackson county, and gave an official bond, with W. and S. as sureties. In June 1872, in certain proceedings had before said N. as justice of the peace of *Netawaka* township, money was received by him which was not paid over to the party entitled. In an action on said bond to recover such money, this court cannot presume, in the absence of testimony, that there had been simply a change in the name of the township, and that the justice, in June 1872, held the same office as that for which he gave the bond in April 1871; and a judgment in such action against the sureties must be reversed.
2. **EVIDENCE; *Official Receipt.*** In an action against a justice to recover money received by him from a constable, and not paid over to the party

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entitled thereto, the receipt given by the justice to the constable, and signed by the justice, with his official title added, is competent evidence to charge the justice, and admissible without further proof of its execution.

Error from Jackson District Court.

ACTION on an official bond, brought by *Keller*, as assignee of James Goodwin, to recover \$117.16 and interest, alleged to have been received by *Neal* as justice of the peace of Neta-waka township. The action was against *Neal*, principal, and *J. F. Wyatt* and *Charles Sprague*, sureties on the official bond. Trial at the October Term 1875 of the district court, C. B., judge *pro tem.*, presiding. Findings and judgment in favor of the plaintiff, and the defendants bring the case here.

Chas. Hayden, A. M. Crockett, for plaintiffs in error.

J. H. Keller, defendant in error, for himself.

The opinion of the court was delivered by

BREWER, J.: This was an action on an official bond of Andrew Neal, by a justice of the peace, to recover moneys received by him by virtue of his office and not paid over on demand to the party entitled to the same. One matter compels a reversal of the judgment so far as the sureties are concerned, and obviates the necessity of inquiry into other alleged errors. The bond given in April 1871, as well as the oath of office of the justice, recites that he has been elected justice of the peace of *Franklin* township; and for that office the oath is taken, and the bond given. The proceedings had before the justice in which he received the moneys sued for were commenced 29th April 1872, and were had before him as justice of the peace of *Neta-waka* township. No explanation is given of this discrepancy. The name of the township is repeated so often, and in so many different papers, as to exclude the idea of a mere clerical error. Upon the record the fact is patent, that sureties on an official bond given by a justice of the peace of a certain township, in one year, are sought to be held liable for his

official acts in a succeeding year as justice of a different township. Of course this cannot be sustained. An official bond only covers the acts of the officer in the office for which it is given; and the office of justice of the peace in one township, is not the same as the office of justice of the peace of another township. It is possible that in fact there was nothing but a change in the name of the township, or a mere change of boundaries of townships, so that the justice at the time of the proceedings was holding the same office as that for which the bond was given. But it is equally possible that he during the year had removed from Franklin to Netawaka township, and vacating the office of justice in the former had been elected or appointed justice in the latter. But whatever may be the real facts in the case, we cannot go outside the record to indulge in any mere conjectures. Upon the record, as it comes before us, no judgment should have been rendered against the sureties, for they never became bounden for the acts of any justice of the peace of Netawaka township.

The same considerations do not apply to the justice, Andrew Neal, for whether he ever gave a bond or not, he acted as justice of the peace of Netawaka township, and cannot now avoid responsibility for his acts as such justice. As to him, it seems to us that there are really but two questions, and they arise on the admission of two instruments in writing. The first was an official receipt for money given by the justice, Neal, to a constable, and signed "A. NEAL, J. P." The admission of this was objected to as not properly authenticated, and not the best evidence. The objection was not well taken. The signature of the justice with his official title constituted sufficient authentication, and his receipt to the constable was as good evidence of the fact as a minute on his docket that he had received the money.

The other document was an assignment of the claim against the justice by the party who originally held it to the plaintiff. This also was objected to as not properly authenticated. There was no proof of its execution. Now the defendant in error insists that the objection did not raise the question of the exe-

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cution of the assignment, as it was not an instrument that required any acknowledgement or attestation. Waiving any determination of this question, we think the error, if error there was, not sufficient to compel a reversal. Outside of this assignment there was sufficient evidence of Keller's ownership of the claim, and not a particle of conflicting testimony. If this assignment had not been admitted, the finding of the court on this question could scarcely have been other than it was.

We think therefore that the judgment must be affirmed as to Andrew Neal, and reversed as to the other plaintiffs in error, and remanded with instructions to grant a new trial as to them. The costs of this court will be divided between Andrew Neal and the defendant in error.

All the Justices concurring.

A. SHUSTER V. THOMAS FINAN, JR.

JURISDICTION; Appearance; Amicable Action. In an attachment proceeding before a justice of the peace, F. interposed a claim for the attached property. A jury was demanded, and trial commenced; but before any verdict was returned, the parties, by written consent, stipulated that the jury might be discharged, no further proceedings had before the justice, and the matter certified to the district court for trial. The papers and records were transmitted to the district court, the parties appeared, a jury was impaneled, and thereupon S., the attaching party, objected that the district court had no jurisdiction. *Held*, That as the parties voluntarily appeared and submitted themselves to its jurisdiction, as no objection was made to the form of the proceedings, and as the question of the title to personal property is within the scope of its jurisdiction, the district court committed no error in overruling the objection. [*Reedy v. Gift*, 2-392; *R. R. v. Akers*, 4-453; *Cohen v. Trowbridge*, 6-385; *Carver v. Shelly*, 17-472; *Dickson v. Randal*, 19-212, 213; *Ziegler v. Osborn*, 23-467; *Hodgin v. Barton*, 23-744; *R. R. v. Quinn*, 24-371; *Dilley v. McGregor*, 24-363; *Freeman v. Waynant*, 25-280; *Burdette v. Corgan*, 26-102; *Smith v. Emporia*, 27-530; *Meixell v. Kirkpatrick*, 29-683; *Bantz v. Eubanks*, 32-324.]

Error from Harvey District Court.

At the March Term 1876 of the district court, *Finan* had judgment, and *Shuster* brings the case here. All necessary facts are stated in the opinion.

C. S. Bowman, for plaintiff in error.

Ady & Reid, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: In an action before a justice of the peace certain property was attached as the property of the defendant therein. The defendant in error interposed in that action, under and by virtue of ch. 164 of the laws of 1872, as a claimant of the property attached. A jury was demanded to try this claim. After the trial had been progressing for three days, and before its close, the following proceedings were had and entered upon the docket of said justice, to-wit:

"Now comes the claimant in person, and by his attorneys *Ady & Reid*, and the attachment-creditor in person and by his attorneys *C. S. Bowman*, *A. L. Green* and *C. C. Nichols*, and consent that the cause proceed no further in this court, and that the jury be discharged from further consideration of this cause, and this action be certified to the district court of this county, there to be tried. All costs of this suit to follow the result of the action.

"*ADY & REID*, for Claimant.

"*C. S. BOWMAN*, *C. C. NICHOLS*, *A. L. GREEN*,

"Attorneys for Defendant.

"The above request is hereby granted by this court, and the jury is discharged; and the court adjourns this 20th of July 1875.

A. MARKWELL, Justice of the Peace."

Thereupon the jury were discharged without returning any verdict; and the justice of the peace, without rendering any judgment in said action, and without any appeal being taken by either party, except as by the agreement above set forth, transcribed the proceedings had in this court, and transmitted the same together with all of the files and papers in said action to the clerk of the district court of said Harvey county.

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When the case was called for trial in the district court, and after the impanneling of a jury, the plaintiff in error, the attaching-creditor, (and defendant as against the claimant in these proceedings,) objected that the district court had no jurisdiction. This objection was overruled, and judgment rendered, after trial before a jury, in favor of claimant.

The creditor now brings the matter here, and alleges as sole ground of error that the district court had no jurisdiction. He claims that this by the statute was a special proceeding authorized to be had only before a justice of the peace; that the act vests no original or appellate jurisdiction in the district court; that no judgment or order was made in the justice's court, and no appeal taken in the manner provided for appeals from justices courts, and that as it does not appear that either party claimed in his bill of particulars a sum exceeding twenty dollars, and a jury trial was had, no appeal could be taken even by consent. We think the objection not well taken. It may be conceded for the purposes of this case, that this is a special statutory proceeding, designed principally for the protection of the officer; that it can be commenced only before a justice of the peace; that it is not conclusive upon the rights of the parties; (*Armstrong v. Harvey*, 11 Ohio St. 527;) and that no provision is made for appeal; and still we think the jurisdiction of the district court must be sustained. It was a trial of the right of property, a matter which could by suit be tried in the district court. True, the proper method to bring this question before that court was by an action of replevin, but still the subject-matter was one of which that court could take cognizance. No objection was made to the form of the proceeding. The paper filed by the claimant, though not a technical petition in replevin, contained the essential facts, that he claimed certain property which the attaching-creditor had through his process, and by a constable, taken possession of. By their written consent to a trial and appearance in the district court, the parties submitted themselves to its jurisdiction. But to sustain jurisdiction, all that is essential is, to show that the tribunal had jurisdiction of the person, and of

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the subject-matter. The district court is one of general original jurisdiction, and if parties come voluntarily into that court to litigate a matter of which it could take cognizance, and which is within the scope of its jurisdiction, and make no objection to the form of the proceedings, they will not be heard to say that the court had no jurisdiction, or that its judgment is not binding. *Reedy v. Gift*, 2 Kas. 392; *North Mo. Rld. Co. v. Akers*, 4 Kas. 453; *Carver v. Shelly*, 17 Kas. 472; *Besher v. Richards*, 9 Ohio St. 495. Suppose in this case, without any preliminary proceedings before the justice, the claimant had filed his statement in the district court, that he claimed the property, and that the constable had it; and the constable had, without process, voluntarily appeared in that court, and gone to trial upon such claim: could he be heard to say, after the trial had commenced, that the court had no jurisdiction? Clearly not. Nor do the prior unfinished proceedings before the justice prevent the district court from obtaining jurisdiction.

The judgment will be affirmed.

All the Justices concurring.

 BELLEFIELD MILLER V. ELIAS BOGART.

1. *APPEAL, in Non-Appealable Cases; Appearance; Waiver; Jurisdiction; Error to Dismiss Appeal.* M. brought an action against B. before a justice of the peace, to recover the possession of personal property valued at fifteen dollars. Upon a jury trial judgment was rendered in favor of B., the defendant. Plaintiff appealed to the district court. In that court the parties appeared, a jury trial was had, and judgment was rendered in favor of the plaintiff. At the next term of the court the defendant moved to set aside the judgment, and dismiss the appeal, on the ground that under the statute no appeal could be taken from the judgment of a justice of the peace in cases tried by a jury in which "neither party claimed in his bill of particulars a sum exceeding twenty dollars." No reasons were given for not raising the question of jurisdiction and former judgment at the trial. The motion was sustained. *Held*, That, waiving the question as to the right of appeal in such cases, the defendant was too late in presenting his objection, and the court erred in sustaining the motion. [*Reedy v. Gift*, 2-392; see cases cited, *Shuster v. Finan*, ante, 114.]

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2. ——— [Whether the action of replevin is within the prohibition regarding appeals, found in the second clause of section 132 of the justice act, (as amended by § 10 of ch. 88, Laws of 1870,) is not decided.]

Error from Woodson District Court.

At the October Term 1875 of the district court, *Miller*, on appeal from a justice's judgment against him, recovered judgment against *Bogart*. Afterward, and in vacation, *Bogart* filed a motion to set aside the last-mentioned judgment. At the March Term 1876 the district court sustained this motion, and dismissed *Miller's* appeal. *Miller* now brings the case here. The facts are stated in the opinion.

Gillett & Forde, for plaintiff in error.

W. C. Huffman, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This action was replevin for a steer valued in affidavit at \$15, commenced before a justice of the peace by plaintiff in error, and was tried to a jury, and verdict and judgment for defendant, from which plaintiff appealed to the district court, where the action was again tried. On this trial the jury found for the plaintiff. A motion for a new trial was overruled, and judgment rendered for plaintiff below, plaintiff in error. After the close of the term of the district court at which the trial occurred, defendant filed his motion in said court "to set aside the judgment and dismiss the appeal in said cause." This motion came on to be heard by said district court at its next succeeding term; and upon the arguments of counsel, and an inspection of the record, no evidence being heard, the court sustained said motion, to which exception was taken by the plaintiff.

The defendant claims that inasmuch as the action was replevin for one steer valued at fifteen dollars, it comes within the second exception of section 10, p. 185, laws 1870, amending section 132 of the justices act, which prohibits an appeal in jury trials, "when neither party claims in his bill of particulars a sum exceeding twenty dollars." In sustaining this mo-

tion we think the court erred. Even if it were conceded that an action for the recovery of personal property of a value not exceeding twenty dollars was within the section quoted, (a proposition we by no means concede to be correct; *Martin v. Armstrong*, 12 Ohio St. 548,) still the ruling of the court was wrong. The district court has original jurisdiction in an action of replevin, no matter how small the value of the property. (Gen. Stat. 304, § 1; Laws of 1870, p. 181, § 1; Laws of 1870, p. 183, § 5; *Henderson v. Kennedy*, 9 Kas. 163.) Hence, when a claim for personal property is presented in that court, and the plaintiff and defendant voluntarily appear and proceed to try the question, the defendant cannot be permitted thereafter to say that the court had no jurisdiction. It acquires jurisdiction of the person by the appearance of the parties, and has, by virtue of its general powers, jurisdiction of the subject-matter. (*Shuster v. Finan*, recently decided, and cases cited in opinion, *ante*, 114, 116.) Nor does it matter that a judgment has been rendered in another court between the same parties, and in fact conclusive upon them. Such a judgment would be a defense to be raised on or before the trial. If not presented then, it must be considered as waived, or abandoned. Take this case: Suppose a judgment had been rendered in the district court of one county in favor of the defendant, in an action wherein both parties appeared, and thereafter the plaintiff commences an action in the district court of another county upon identically the same cause of action, and the defendant voluntarily appears and litigates the subject-matter without presenting the defense of a prior adjudication, and upon that trial judgment is rendered against him: can he be permitted to come in at a subsequent term, without any excuse for failing to present that defense at the trial, have the judgment against him set aside and the case dismissed because of such prior judgment? Clearly not. He is too late with his defense. Now if there be no appeal in this kind of an action from the justice to the district court, then in this respect the courts are as independent as the district courts of different counties. The action which was had before the justice was never trans-

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ferred to the district court. Certain papers were filed there in which the plaintiff alleged that he was the owner and entitled to the possession of certain property. The defendant voluntarily appeared and litigated that question. After he had been beaten, and judgment rendered against him, and the court had adjourned, it occurs to him that the matter had been elsewhere conclusively adjudicated in his favor before another tribunal, and at a succeeding term moves to have the judgment set aside, and makes no showing why he did not present this defense at the trial. His objections to the judgment were not in time. The ruling of the district court must be reversed, and the case remanded with instructions to overrule the motion to set aside the judgment and dismiss the appeal.

All the Justices concurring.

WM. C. JENNINGS v. A. B. MCKAY *et al.*

1. **ATTORNEY-FEE; Stipulation; "Foreclosure."** A mortgage contained a stipulation, that upon default in the payment of the debt the mortgage should be "subject to foreclosure according to law, and that an attorney-fee of fifty dollars for foreclosure, with costs of suit and accruing costs, should be taxed against the mortgagor." *Held*, That where, after suit brought, but before decree, the mortgagor paid the debt, interest and costs, the court committed no error in refusing to render judgment in favor of the mortgagee and against the mortgagor for the fifty dollars attorney-fee, or any part thereof, or in dismissing the action. [*Sover v. Johnnycake*, 9-387; *Foot v. Sprague*, 13-160; *Shellabarger v. Leidigh*, 15-624; *Coburn v. Weed*, 12-182]
2. ——— The case of *Life Association v. Dale*, 17 Kas. 185, commented on, and distinguished.

Error from Howard District Court.

THE only question here is as to the right of a mortgagee to recover an attorney-fee. The facts are in the opinion. The district court, at the October Term 1873, refused to allow the claim made by *Jennings*, and he brings the case here—(his petition in error being filed 11th October 1876—only

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three days less than three years from the date of the order appealed from.)

E. A. Barber, for plaintiff in error.

M. V. Yoder, for defendants in error.

The opinion of the court was delivered by

BREWER, J.: A mortgage contained a stipulation, that in case of default "this conveyance shall become absolute, and each and all of the several amounts herein secured shall be due and payable, and said mortgage shall be subject to foreclosure according to law, and an attorney-fee of fifty dollars for foreclosure, with costs of suit and accruing costs, shall be taxed against said mortgagor." Upon default, suit was com-

1. Attorney-fee;
stipulation.

menced, but before any decree was entered the mortgagor paid the full amount of the debt, interest and costs, and upon his motion the suit was dismissed. The mortgagee claimed that he was entitled to a judgment for the fifty dollars attorney-fee, or at least to such an amount thereof as would be proportioned to the work already done in the suit; and upon the refusal of the district court to allow this claim he brings the question here for our consideration. The allowance of attorney-fees in the foreclosure of a mortgage is based upon contract. *Stover v. Johnnycake*, 9 Kas. 367; *Coburn v. Weed*, 12 Kas. 182. The court can allow none unless the mortgagor has stipulated to pay them, and can allow no more than he has stipulated to pay, and under no other circumstances than those under which he has stipulated to pay. In other words, the court can make no new contract for the parties. It simply enforces the contract already made. Again, it is a matter of common knowledge that as a rule the form of the mortgage is determined by the mortgagee. He refuses to complete the loan until the terms of the instrument are made to suit his wishes, even where he does not himself prepare the mortgage. Hence, while the rule is not so strict against him as in construing legislative grants against the grantee, yet it is fair and reasonable to construe doubtful language against

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rather than in favor of him. And this upon the general principle, that he who prepares an instrument by which he is to acquire rights will seek to express fully and clearly all the rights he intends to secure.

The stipulation in the case at bar is, that an attorney-fee for foreclosure shall, with costs of suit, be taxed against the mort-
 "Foreclosure,"
 explained. gator. There was here no foreclosure. The commencement of an action to foreclose, is not a foreclosure. Strictly speaking, there is no foreclosure until the mortgagor's interest is actually and finally barred—forever closed, as the term suggests. This, under our laws, would not be at least until the sale, and perhaps not until the confirmation of the sale. So that the stipulation in this case is not so strong in favor of the mortgagee as in most mortgages where the stipulation is that the attorney-fee shall be entered in and become a part of the judgment. Probably however in a case like this it would have to be named in the judgment, though it might be questionable whether the mortgagor could not at any time before sale release his property by paying the amount of the debt and costs without the attorney-

fee. That question however is not before us. Nor
 2. Cases distinguished. is this stipulation anything like that in the case of *Life Association v. Dale*, 17 Kas. 185, where it read that "In any action that may be brought * * * the party of the second part * * * shall be entitled to and may have, recover and receive * * * ten per cent. upon the amount due and recoverable at the time *payment shall be made or judgment rendered*," etc. It may be said, that the commencement of the suit is a step in the foreclosure proceedings, and that as the mortgagor stipulated to pay fifty dollars for the entire proceedings, equity ought to compel him to pay proportionately for that part actually taken. In case that by his default he should cast a certain burden and expense on the mortgagee, he agreed to pay fifty dollars therefor. By his default he did cast a part of that burden and expense on the mortgagee, and ought he not rightfully to pay proportionately therefor? There is force in this claim, and it has something

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of equity in its favor; but still it does not accord with the contract. There is no express promise to pay anything. It is merely a stipulation that in a certain event an attorney-fee of a fixed amount may be taxed against him. That event never happened. The time never came for a taxation of costs against him, and no foreclosure was ever had. If no contract had been made concerning attorney-fees, then no matter how equitable it might be that he should pay the fees of counsel employed by the mortgage, none could be recovered. We may not enlarge his contract. We may not enforce against him a liability which he never assumed, or construe a doubtful expression prepared by the mortgagee so as to impose a burden which it may be he ought to have assumed, but which if expressly named he might have refused to assume.

The ruling of the district court will be affirmed.

All the Justices concurring.

HARRY McBRIDE v. NICK REITZ.

EXEMPTION LAW; Wages of Clerk, Mechanic, Laborer, and Servant. Section 6 of the exemption law of 1868, (Gen. Stat. 474,) which provides that "none of the personal property mentioned in this act shall be exempt from attachment, or execution, for the wages of any clerk, mechanic, laborer, or servant," is constitutional and valid.

Error from Johnson District Court.

In June 1875, one Alfred Rebersman recovered a judgment in the district court for \$712.80, and costs, against *Harry McBride*, and Mary his wife. The whole consideration for the claim upon which said judgment was based was the wages of said Rebersman as a laborer for said *McBride* and wife. A writ of execution was duly issued upon said judgment, and duly delivered to defendant *Nick Reitz*, then the sheriff of

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Johnson county, who as such sheriff, and by virtue of said writ, levied upon and took into his possession, as the property of said *McBride*, three bedsteads and bedding, one wash-stand, one marble-top bureau, six chairs, three rocking-chairs, one Singer sewing-machine, two parlor stoves, two heating stoves, one cooking stove, one milch cow, one other cow, one two-horse farm-wagon, one wine-press, two turning-plows, one potato-digger, ten chisels, two hammers, two mallets, one harrow, one set double harness, one grape mill, two mules, and one cultivator. *McBride* claimed that said property was exempt from execution, and he demanded possession thereof from the sheriff, and upon the refusal of the sheriff to return the same *McBride* brought replevin to recover possession thereof. Answer, general denial. Trial at the March Term 1876. The amount due on the execution held by the sheriff was \$767.50. The value of the goods seized by the sheriff, and replevied by *McBride*, was \$900. It was conceded that *McBride* was the head of a family, and that all said property would be exempt to him except for the provisions of § 6 of the exemption law. The district court found for the defendant, *Reitz*; that no part of said property was exempt to said *McBride*, and gave judgment that said defendant, as sheriff, have and recover possession of said personal property, with costs of suit, or, if return of said property could not be had, that he have and recover of and from said *McBride* the said sum of \$767.50, with interest from the day of trial, and costs of suit. *McBride* appeals, and brings the case here on error.

A. Smith Devenney, for plaintiff in error, contended, that § 6 of the exemption law is unconstitutional; that it violates our state constitution; that it is "unequal and partial legislation, class legislation," and not within the powers conferred on a legislative body. The grant of legislative powers, though without prohibition or restraint that the legislature shall not discriminate and do gross and palpable injustice between man and man by the passage of unequal and partial laws, does not carry with it the power to pass such laws. Such

Brief of Plaintiff in Error.

a power, from its very nature, and of necessity, is taken out of the grant without any express exception or limitation; and that portion of the act referred to, though in form of law, yet not being within the scope of the authority conferred, is not legislation at all; and so the provision is *void*. 3 Dallas, 387.

A statute which dispenses in favor of particular individuals or classes, does not come within the rightful attributes of legislative power, and is not to be regarded as a law. This rule is approved by this court in 2 Kas. 115, 116; 2 Bouv. Law Dic. title, "Legislative Power." A specific clause of our constitution is violated (§ 17, art. 2,) by said § 6 of the exemption law, because the latter applies its operations to the clerk, mechanic, laborer, or servant, *only*, and all other classes are wholly deprived of its benefits. The exemption law, like all other laws in Kansas, must be general in its character and provisions. Local or special legislation upon the privilege of debtors, which would deprive those belonging to particular classes of the advantage conferred by law upon others, cannot be sustained; and said § 6 legislates specially for certain persons, and discriminates against others, which is contrary to the spirit and intent of the constitution, and is in derogation of the constitution, and is not legislation. As § 6 now stands, it is "class legislation" in the true sense and meaning of those words, and is obnoxious to the charge of partiality and favoritism. The constitution makes no exception in favor of any particular class of persons, or kind of debts. Then why should we recognize any right on the part of the legislature to make any such distinction? "The 9th section of the act," (being in the language of § 6 of our law,) "entitled an act for a homestead exemption, which excepts debts or liabilities due for the wages of clerks, laborers, and mechanics, from the operation of the exemption provided by the act, is unconstitutional and void." *Tuttle v. Strout, Sheriff of Hennepin County*, 7 Minn. 465.

J. P. St. John, and *F. R. Ogg*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: The only question raised in this case is, whether section 6 of the exemption law of 1868 (Gen. Stat. 474,) is constitutional, or not. Sections 3 and 4 of said law exempt certain personal property "from seizure and sale upon any attachment, execution, or other process issued from any court in this state;" and section 6 provides as follows:

"SEC. 6.—None of the personal property mentioned in this act shall be exempt from attachment, or execution, for the wages of any clerk, mechanic, laborer, or servant."

The plaintiff in error claims that section 6 is unconstitutional and void, as being in contravention of section 17, article 2 of the constitution, and also because it is "unequal and partial legislation, class legislation, and not within the powers conferred on a legislative body." Said section 17, article 2 of the constitution reads as follows:

"SEC. 17.—All laws of a general nature shall have a uniform operation throughout the state; and in all cases where a general law can be made applicable, no special law shall be enacted."

We are unable to see how said section 6, or any portion thereof, contravenes any portion of § 17 of article 2 of the constitution, or any other provision of the constitution. Nor are we able to see how said section 6 or any part thereof is such "unequal and partial legislation," or such "class legislation" as to be unconstitutional or void. If it is void for such a reason, then said section 3 under which the plaintiff in error founds his whole claim in this action, must also be void. Said section 3 applies only to a particular class of persons. It applies only to a "person residing in this state, and being the head of a family." Hence, if we should hold that said section 6 is void because it applies only to particular classes of persons, we should also have to hold that said section 3 is void for the same reason, and the same result would follow in this case as though we should hold that both sections are valid. We think that the legislature had full power to pass said section 6,

and that it is constitutional and valid. The case of *Tuttle v. Strout*, 7 Minn. 465, has no application in this state. That decision was rendered upon a peculiar provision in the constitution of Minnesota. We have no such constitutional provision in this state.

The judgment of the court below will be affirmed.

All the Justices concurring.

THE STATE OF KANSAS V. C. A. SAUNDERS.

INTER-STATE COMMERCE; *Constitutional Law; Act of 1876, Relating to "Birds."*

Section 6 of the act of the legislature of Kansas of 1876, entitled "An act for the protection of birds," so far as it prohibits the transportation from Kansas to other states of prairie chickens which have been lawfully caught and killed, and have thereby lawfully become the subjects of traffic and commerce, is unconstitutional and void, being in contravention of that provision of section 8 of article 1 of the federal constitution, which declares that "the congress shall have power to regulate commerce among the several states." [*Hardy v. R. R.*, 32-715.]

Appeal from Cherokee District Court.

AN information was filed against *Saunders*, charging among other things, that, on the 8th of November 1876, *Saunders* was the agent at Columbus, in Cherokee county, of the Adams Express Company, a common carrier, and as such agent was then and there acting for said company, and then and there as such agent "knowingly and unlawfully did receive and ship prairie chickens which had been recently killed as game," to be transported by said express company from said Columbus, Cherokee county, to the city of Chicago, in the state of Illinois, etc. Trial at the January Term 1877 of the district court. *Saunders* admitted the facts as alleged, but contended that such acts constituted no offense, claiming that § 6 of ch. 82 of the laws of 1876, for the alleged violation of which the proceedings against him were commenced, was unconstitutional and void. The district court held the statute valid, and, a jury being waived,

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found the defendant guilty, and sentenced him to pay a fine of "ten dollars, and costs of prosecution, and to stand committed until such fine and costs be paid." From such conviction and sentence *Saunders* appeals to this court.

A. A. Harris, and *W. H. Spencer*, for appellant.

D. M. McKenney, county attorney, for The State.

The opinion of the court was delivered by

VALENTINE, J.: This was a criminal prosecution for an alleged violation of section 6 of the act of the legislature of the state of Kansas of 1876, entitled, "An act for the protection of birds." (Laws of 1876, pp. 183, 184.) It seems that the defendant, as the agent of the Adams Express Company, on the 8th of November 1876, shipped by said express company from Columbus, Cherokee county, Kansas, to Chicago, Illinois, four prairie chickens, which prairie chickens had previously and recently been killed as game. Said prairie chickens were not caught or killed in violation of any law, but were caught and killed at a time and in a manner allowed by law. The provision of said act which it is claimed that the defendant violated reads as follows:

"Sec. 6. It shall be unlawful for any person, railroad corporation or express company, or any common carrier, knowingly to transport or to ship, or to receive for the purpose of transporting or shipping, any of the animals, wild fowls, or birds, mentioned in this act, *in or out of the state of Kansas*; * * * and any agent of any such person, corporation, or company, who shall knowingly violate the provisions of this section by receiving or shipping any such game as the agent of such person, corporation, or company, shall, on conviction thereof, be fined in a sum not less than ten nor more than fifty dollars; * * * *provided*, that such penalty shall not apply to the transportation of such birds and animals in transit through this state from other states and territories."

The defendant claims that said act is unconstitutional and void so far as it has any application to this case; *first*, because it is in violation of that clause of section 16 of article 2 of the constitution of Kansas, which declares that "no bill shall con-

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tain more than one subject, which shall be clearly expressed in its title;" *second*, because it is in violation of that provision of section 8 of article 1 of the constitution of the United States, which declares that "the congress shall have power * * * to regulate commerce * * * among the several states."

I. Of course, said act of the legislature is unconstitutional and void so far as it relates to any *animal* except "birds;" and how the inhibition against the transportation of living birds would promote "the protection of birds," is not altogether clear. The birds transported in this case were however dead; and it is supposed by the prosecution that the prevention of the shipping or transportation of dead birds would in some manner "protect birds," and therefore that the act, so far as it prohibits the shipping of dead birds (although the birds are lawfully taken and killed,) is constitutional and valid. We shall not decide this question however, but shall pass to the next question.

II. Section 8 of article 1 of the federal constitution provides among other things that, "the congress shall have power * * *

Inter-state commerce, subject to federal control only.

to regulate commerce with foreign nations, among the several states, and with the Indian tribes."

Ever since the adoption of this provision, the judges of the supreme court of the United States seem to have been groping their way cautiously, but darkly, in endeavoring to ascertain its exact meaning, and the full scope of its operation. They have many times construed it, but as yet have hardly fixed its boundaries, or its limitations. They have no doubt generally construed it correctly, but some of their decisions with reference thereto seem to be conflicting and contradictory, and scarcely one of such decisions has been made without a dissenting opinion from one or more of the judges. We think however that amidst all their conflicts and wanderings they have finally settled, among other things, that no state can pass a law (whether congress has already acted upon the subject or not,) which will directly interfere with the free transportation, from one state to another, or though a state, of anything which is or may be a subject of inter-state commerce.

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(Case of *The State Freight Tax*, 15 Wallace, 232, and cases there cited. See also in this connection, *Welton v. The State of Missouri*, 91 U. S. 275; *Henderson v. Mayor of N. Y.*, 92 U. S. 259; *Chy Lung v. Freeman*, 92 U. S. 275; *Ward v. Maryland*, 12 Wallace, 418.) This view of the law does not prevent a state from passing proper sanitary laws, or any proper law for the protection or preservation of life, liberty, health, or property. Nor does it in any case prevent a state (in the absence of congressional legislation upon the subject,) from passing laws for any proper purpose where such laws only indirectly and remotely interfere with interstate commerce. (*State Texan Railway Gross Receipts*, 15 Wallace, 284; *Sherlock v. Alling*, 93 U. S. 99. See also, in connection with this and the foregoing propositions, the following Texas-Cattle cases, to-wit: *Chicago & Alton Rld. Co. v. Gasaway*, 71 Ill. 570; *Sangamon Distilling Co. v. Young*, 77 Ill. 197; *Wilson v. Kas. City, St. Jos. & C. B. Rld. Co.*, 60 Mo. 184, 216; *K. P. Rly Co. v. McCoy*, 8 Kas. 538.) For instance, a law which prohibits the catching and killing of prairie chickens, may be valid, although it may indirectly prevent the transportation of such chickens from the state to any other state; but a law which allows prairie chickens to be caught and killed, and thereby to become the subject of traffic and commerce, and at the same time *directly* prohibits their transportation from the state to any other state, is unconstitutional and void. The federal constitution seems to give to congress the absolute and unqualified power to regulate interstate commerce; and it has frequently been said that this power is exclusive; and it is certainly exclusive within the limits hereinbefore mentioned. In the case of *Welton v. The State of Missouri*, 91 U. S. 275, 282, it is said, that "the fact that congress has not seen fit to prescribe any specific rules to govern inter-state commerce, does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that inter-state commerce shall be free and untrammelled." But qualifying this language to some extent, it

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is said in the case of *Sherlock v. Alling*, 93 U. S. 99, 104, that "it may be said generally, that the legislation of a state, not directly against commerce, or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or inter-state, or in any other pursuit." We think that said section 6, so far as it has any application to this case, is unconstitutional and void.

The judgment of the court below will therefore be reversed, and cause remanded for further proceedings.

All the Justices concurring.

THOMAS NETCOTT v. B. W. PORTER *et al.*

1. **MOTION FOR NEW TRIAL; Unsupported Verdict.** When the assignment of error is, that a verdict is contrary to law, or contrary to the evidence, unless the assignment is clearly and satisfactorily sustained by the record the judgment will be affirmed.
2. **REPLY, When Unnecessary.** An answer which merely puts in issue allegations of the petition does not need a reply. [*Wilson v. Fuller*, 9-177, 189.]
3. ——— **Waiver of Reply.** Where a case is tried by both parties as though all the allegations of the answer were in issue, it must be deemed, under such circumstances, that a reply was waived, even if under other circumstances a reply should be considered as necessary. [*Osgood v. Haverly*, McC.-182; *Barrett v. Buller*, 5-358; *Wilson v. Fuller*, 9-177, 192; *Bashor v. Nordyke Co.*, 25-222, 224; *Russell v. Smith*, 14-372; *Wright v. Bacheller*, 16-286; *Holden v. Clark*, 16-346, 357; *R. R. v. Taylor*, 17-509; *Bent v. Philbrick*, 16-190; *Hopkins v. Cothran*, 17-173; *Nooner v. Short*, 20-624; *Clay v. Hildebrand*, 34-706.]

Error from Cloud District Court.

A MECHANIC'S LIEN was filed by *B. W. Porter* and *Holden Beard*, and an action commenced thereon by them. They had

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entered into a contract with *Netcott* to construct for him a house and cistern. On this contract, and for extra work on the house and cistern, plaintiffs claimed \$1,155, less payments made by defendant amounting to about \$500. Included in said sum of \$1,155, is an item of \$300 "liquidated damages," specified in the contract, and alleged to be due by reason of defendant's breach of the contract. Defendant answered, 1st, a general denial, except as to the admitted payments; 2d, that plaintiffs had not performed their contract; 3d, certain payments in money and goods. Plaintiffs demurred to the second defense, and replied to the third. The demurrer was sustained, and defendant amended his second defense, alleging that he had "performed his part of the contract." Trial at the October Term 1875 of the district court. Verdict and judgment for plaintiffs for \$156.50.

With respect to the payments made by defendant to plaintiffs on account of their total claim, exclusive of the claim for "liquidated damages," defendant, (plaintiff in error,) in his brief sets forth two tables, or "showings," one of which contains 52 items, amounting to \$675.82, which he claims were shown by plaintiffs' testimony appearing in the record; and the other table contains 60 items, amounting to \$890.41, which he claims were shown by his (defendant's) testimony; and the difference between these "showings" being greater than the verdict for plaintiffs, defendant below contends that the verdict is contrary to the evidence.

L. J. Crans, for plaintiff in error.

Strain & Sturges, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: The plaintiff in error assigns, in his petition in error, eight different grounds for a reversal of the judgment of the court below. But on the hearing in this court, and in his brief, he seems to abandon all but two of them—the sixth and seventh. The first five of said assignments relate to the refusal of the court below to give certain instructions to the

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jury, and the eighth is, that "the court erred in rendering judgment against the plaintiff" in error. These assignments (the first five, and the eighth,) are evidently all untenable. Under the evidence in the case the court gave all the instructions that were necessary, and under the verdict in the case the court rendered the proper judgment. But without entering into any greater particularity with regard to these, we pass to the sixth and seventh assignments.

I. The sixth assignment is, that "the court erred in overruling the defendant's motion for a new trial." And the only grounds upon which the motion for a new trial was made, are as follows: "1st, The verdict is contrary to law;

1. Motion for new trial; verdict; evidence.

2d, The verdict is contrary to the evidence." Now

we cannot say from the evidence brought to this court that the verdict is contrary to either the law or the evidence; and therefore we cannot say that the court below erred in overruling the defendant's motion for a new trial. Under the rules of law, repeatedly enunciated by this court, we think the evidence is sufficient to sustain the verdict; and if it is, then we suppose it will not be claimed that the verdict is contrary to law. The plaintiff in error, defendant below, gives in his brief two lists of items claimed by him to be payments made by him to the plaintiffs below. One of these lists he entitles, "plaintiffs' showing," and the other he entitles, "defendant's showing." Now whether either the plaintiffs or the defendant ever made any such showing, we hardly think it necessary to consider. For even if the largest list were true, it would not even then necessarily follow that the judgment of the court below should be reversed. But we do not think that either list is true. Of course there was some evidence to support said lists, but still as we think, and as the court below and the jury evidently thought, they are not true with respect to all their items. The list entitled "plaintiffs' showing," is the smallest list in its aggregate amount, but even that list is too large. The plaintiffs never made any such showing as that list imports that they did. Many of the items therein inserted are only to be found in the defendant's evidence. And some

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of such items we think are too large, some of them are repeated, and some of them are not true at all. Or at least we cannot say from the evidence that they are not too large, or are not repeated, or that they are true. Taking all the evidence together, we cannot say that the verdict is contrary to the evidence. We cannot even say that it is contrary to the weight of the evidence, or the preponderance of the evidence. We therefore think that the motion for a new trial was rightfully overruled.

II. The seventh assignment for error is, that "the court erred in overruling the defendant's motion for judgment." This motion was made upon the ground that the plaintiffs had not replied to the second defense stated in defendant's answer as amended, and that said second defense for that reason should be taken as true. Now the record shows at least two good answers to this assignment; and the defendants in error say in their brief that there is still another good answer which the record does not show. We however can take notice of only what the record shows. The answers to said assignment as shown by the record are—first, the amended answer did nothing more than to put in issue allegations already set forth in the plaintiffs' petition, and therefore it was not necessary for the plaintiffs to reply to said answer. (*Wilson v. Fuller*, 9 Kas. 177, 192, 193.) Second, the case was tried by both parties as though all the allegations of the amended answer had been put in issue; and therefore, under such circumstances, it must be deemed that a reply was waived, even if under other circumstances a reply would have been necessary. (*Wilson v. Fuller*, supra; *Russell v. Smith*, 14 Kas. 366; *Bent v. Philbrick*, 16 Kas. 190; *Holden v. Clark*, 16 Kas. 346, 357; *Hopkins v. Cothran*, 17 Kas. 173, 178, 179; *K. P. Rly. Co. v. Taylor*, 17 Kas. 566, 569; *Walker v. Armstrong*, 2 Kas. 198, 222.)

The judgment of the court below will be affirmed.

All the Justices concurring.

HARRISON BERRY V. MONTGOMERY CARTER.

1. **MISJOINDER OF CAUSES OF ACTION; Waiver.** When no question is raised in the district court as to the misjoinder of two causes of action, such court does not err in any case in adjudicating upon both of such causes of action. [*Simpson v. Greeley*, 8-586.]
2. **LOST INSTRUMENT; Parol Evidence.** Where no objection is made to the introduction of parol evidence to prove the contents of a lost written instrument, it is not error for the court to permit such evidence to go to the jury.
3. **CONTRACT; Anticipated Trespass; Damages; Arbitration.** Where several persons enter into a written contract, stipulating that each shall keep up his own cattle, and prevent the same from trespassing upon or injuring the crops or hedges of any of the others, for the period of three years, and that in case any injury should occur by reason of the cattle of any one of said persons trespassing upon the crops or hedges of any of the others, and in case the parties themselves could not agree upon the amount of the damages sustained, then, that the question as to the amount of such damages should be submitted to arbitrators consisting of three of the signers to said contract—one of such arbitrators to be selected by each of the parties respectively, and the third one to be selected by the other two arbitrators—and that the decision of such arbitrators should be final between the parties, *held*, that such contract is valid and binding.
4. ——— **Breach of Contract; Action at Law, Maintainable.** Where, after such contract has been made, the cattle of B. (one of the parties to said contract,) trespass upon the crops of C., (another of the parties to said contract,) and injure said crops, and B., on the demand of C., refuses to pay any damages, and refuses to recognize such contract as having any force or validity, C. may immediately, and without offering to submit the question of damages to arbitrators, commence an action against B. for the amount of such damages. B., by refusing to recognize the validity of such contract, waives his right to have the amount of said damages determined by arbitrators under the contract. And, under said contract, it makes no difference, with reference to C.'s right to recover, whether C.'s crops were fenced, or not.
5. ——— **Contract not Affected by Mutual Trespases.** Where B.'s cattle trespass upon the crops of C., and C.'s cattle upon the crops of B., these mutual trespases do not in and of themselves rescind or destroy said contract, or render any of its stipulations inoperative.
6. ——— And where C.'s cattle trespass upon the crops of B., and B. does not claim that his crops were fenced, or that C. drove his cattle onto said crops, or that B. was willing or that C. was unwilling to submit the

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question of damages to arbitrators under the contract, B. has no cause of action against C. for said damages. Before B. can have a cause of action against C., in such a case, he must be willing, and C. unwilling, to submit the question of damages to arbitrators in accordance with said contract.

Error from Chautauqua District Court.

TRESPASS, brought by *Carter*, to recover damages for injuries to his hay, growing crops and hedges, committed by *Berry's* cattle. In his bill of particulars, *Carter* averred the making of the contract mentioned in the opinion, *infra*, alleged that he had "performed all the conditions of said contract faithfully, according to the terms thereof," and alleged that *Berry*, "in violation of the condition of said contract, ever since the 1st of November 1874, has and still does willfully and carelessly allow and permit certain cattle belonging to him (said *Berry*) to run and trespass upon plaintiff's land and crops," etc., and that he "requested said defendant to settle the question of damages and the amount thereof according to the terms of the said contract or agreement, which the defendant refused and still refuses to do." Trial at the May Term 1875 of the district court. Verdict and judgment for *Carter* for twenty-five dollars, and *Berry* brings the case here.

J. D. McCue, for plaintiff in error, contended, that there was a misjoinder of causes of action; that as *Carter's* land was not fenced, he was not entitled to damages for injuries to his crops and hedges; that the contract between the parties was one that could be rescinded and repudiated by the parties; and that the court erred in excluding testimony offered by *Berry* to establish a counter claim for damages sustained by him by reason of certain trespasses committed by *Carter's* cattle upon the lands and crops of *Berry*.

M. G. Miller, and *R. H. Nichols*, for defendant in error, maintained that an action at law had accrued to *Carter*, by reason of the trespasses, and of *Berry's* refusal to arbitrate. The testimony of *Carter* direct, and of *Berry* on cross-exami-

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nation, shows that Carter performed all that was required of him under the contract. Carter demanded of Berry the payment of damages done by Berry's cattle, and Berry positively refused to pay damages, and also refused to be governed by the contract; this removed the necessity of any further demand on the part of Carter. The contract is wholly independent as to each of the parties thereto. It is a contract between Carter and each of the other parties thereto respectively, as well as between any party thereto and each of the others respectively; and if all except Carter had mutually agreed to rescind and repudiate it, they could not do so as between Carter and any one of themselves. It could not be rescinded unless all the parties thereto mutually agreed that it should be so rescinded. (2 Pars. Contr. 528.)

The testimony offered by Berry and rejected by the court was for the purpose of a set-off against Carter's demand. This testimony was properly rejected, because Berry had positively refused to be governed by the contract, and had not performed any of its conditions, and because the contract was wholly independent as to each party thereto, and Berry could not recover for damages resulting from Carter's violations of the contract until he had first made the proper demand of Carter to submit it to arbitrators. But even if Berry had continued to recognize the contract as being binding upon him, and had performed all things under the contract necessary to avail himself of the benefit of its provisions, he could not recover in this suit by way of set-off.

There is no misjoinder of causes of action, and if there was, the plaintiff in error has waived all his right to objections and exceptions by reason thereof, because he did not raise this question at the trial of the case as required by law and practice. (5 Kas. 441.)

The opinion of the court was delivered by

VALENTINE, J.: This was an action commenced in a justice's court, and after trial and judgment it was appealed to the district court, where it was again tried, and on such trial judg-

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ment was rendered in favor of the plaintiff, Montgomery Carter. The defendant, Harrison Berry, as plaintiff in error, now brings the case to this court. The plaintiff below set forth in his bill of particulars two causes of action. We think

1. *Misjoinder; waiver.* there was no misjoinder of such causes of action; but even if there was, still, as the question is raised for the first time in this court, no error was committed by the court below in adjudicating upon both of said causes of action.

The first cause of action was founded upon a written instrument. The plaintiff did not furnish a copy of said written instrument with his bill of particulars, nor did he introduce either the original or a copy thereof in evidence. But he alleged in his bill of particulars that the original

2. *Lost instrument; parol evidence.* was lost, and on the trial he sufficiently proved its loss, and then proved the contents thereof by parol evidence. No objection was made, in the court below, to the introduction of said parol evidence, and hence of course no error was committed in permitting it to go to the jury.

Said written instrument was a contract made and signed by the parties to this action, and by several other persons. It was in substance as follows: Each signer was to keep up his own cattle, and prevent the same from trespassing upon or injuring the crops or hedges of any one of the other signers, for the period of three years; but in case any injury should occur within that time by reason of the cattle of any one signer trespassing upon the crops or hedges of any other signer, and in case the parties themselves could not agree upon the amount of the damages sustained, then the question as to the amount of such damages was to be submitted to arbitrators consisting of three of the signers to said written instrument—each party choosing one of such arbitrators, and these two a third, and the decision of the arbitrators was to be final between the parties. We know of no reason why such a contract should not be valid and binding. The defendant's cattle trespassed upon the plaintiff's wheat crop, and injured it. The wheat stood growing

3. *Parties may by contract provide for settlement of claims for damages.*

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in a field around which no fence or other lawful inclosure existed. But if said contract was valid and binding, and we think it was, it made no difference whether said field was fenced or not. The plaintiff, after driving said cattle from his wheat-field to the defendant's premises, demanded of the defendant damages for the injury which he (the plaintiff) claimed that the cattle had committed, and he had sustained; but the defendant refused to pay any damages; he said that he would not be bound by said contract, and that if the plaintiff got anything out of him it would be by law. The defendant

himself testified on the trial—"I told plaintiff that I had consulted with attorneys with reference to said contract, and that I would not recognize it, as others had not recognized it." The plaintiff did not propose to appoint arbitrators under the contract; and under the circumstances we do not think that he was required to do so. It would have been an idle and useless ceremony to propose an arbitration under a contract which the defendant refused to recognize. The defendant, by refusing to recognize the contract, waived his right to an arbitration, and at once gave authority to the plaintiff to sue him in any court having the requisite jurisdiction, for the damages which plaintiff had sustained.

The defendant, Berry, offered to prove on the trial, that plaintiff's cattle had trespassed upon his crops; but the plaintiff objected, and the court sustained the objection.

The defendant (plaintiff in error) now claims that this ruling of the court below was erroneous. We do not think however that it was erroneous. The defendant did not inform the court below for what purpose he offered to introduce said evidence, and he had no bill of particulars or other pleading on file (for he had filed none) from which his purpose might be ascertained or inferred. But we would think said evidence was incompetent for any purpose. It was certainly not sufficient to show that the parties had by mutual consent rescinded said contract, or waived its terms. The contract itself contemplated that there would be tres-

4. On refusal to arbitrate, right of action at law accrues.

5. Mutual trespass; effect of contract.

 Berry v. Carter.

passes, and provided a way for settling the damages caused thereby. Each party had a right under the contract to recover damages for trespasses committed by the cattle of the other party, and each party had a right to have these damages determined in a particular manner. And neither party lost his rights under the contract by permitting his cattle to trespass upon the crops of the other party. Therefore, as mutual trespasses would not of themselves and could not of themselves revoke or destroy the contract, then said evidence could have been relevant only for the purpose of establishing a counterclaim, or set-off. But it was not sufficient for that purpose. A counterclaim or set-off is necessarily a *cause of action* in and of itself, and in favor of the defendant and against the plaintiffs; and a set-off must be a cause of action arising *upon contract*, or ascertained by *the decision of a court*. A trespass disconnected with contract could not be the subject of set-off. But the defendant's evidence did not even prove a cause of action of any kind. It did not prove or tend to prove that the defendant's crops were fenced, or that the plaintiff drove his cattle upon the defendant's crops. Nor did it tend to prove any other contract than the one we have already mentioned. Now under that contract the defendant did not have either a counterclaim or a set-off. Under that contract it was not only necessary that the defendant's crops should have been injured by the plaintiff's cattle, in order to give the defendant a cause of action, but it was also necessary that the defendant should have been ready and willing to have his supposed damages adjudicated under the contract by arbitrators, and that plaintiff should have been unwilling to have such damages so adjudicated. Now there is no pretense that the defendant was ever willing, or that the plaintiff was ever unwilling, to submit any question of damages to arbitrators according to said contract. Indeed, the defendant wholly ignored the contract, and refused to recognize it. This is shown by the testimony of the defendant himself while on the witness-stand. If the defendant has really sustained any

6. Prerequisites to maintain action at law, while contract is in force.

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damage by reason of the plaintiff's cattle trespassing upon his crops, or hedges, he may hereafter offer to submit the question of damages to arbitrators, according to the contract, and then, if the plaintiff refuse, the defendant will have a cause of action against the plaintiff. But from the evidence he has no such cause of action now.

The judgment of the court below will be affirmed.

All the Justices concurring.

COMM'RS OF POTTAWATOMIE CO. V. ALBERT MORRALL.

NON-RESIDENT POOR; Relief and Support; Medical Aid; Liability of County; Right of Appeal. Under section 24 of the act for the relief of the poor, (Gen. Stat. p. 626,) a physician and surgeon who furnishes medical and surgical attendance to a person in distress, and not an inhabitant of the township in which he is found lying sick without friends or money, under the direction and employment of an overseer of the poor of such township, is entitled to reasonable compensation for his services; and if the board of county commissioners of the county in which such employment occurs refuses to allow a claim therefor, properly made out and presented, or disallow such claim in part, the claimant may take the same to the district court on appeal, and there recover what the services are reasonably worth. [*Comm'rs v. Renner*, 27-225, 228; *Smith v. Comm'rs*, 21-669; *Comm'rs Smith Co. v. Comm'rs Osborne Co.*, 29-72, 74.]

[As to discussion on page 143, see *Points v. Jacobia*, 12-54; *Bridge Co. v. R. R.*, 12-413; *State v. Cobb*, 2-32; *Judd v. Driver*, 1-434; *Gardenhire v. Mitchell*, 21-88.]

Error from Pottawatomie District Court.

MORRALL recovered a judgment against the *Board of County Commissioners*, at the February Term 1876 of the district court for one hundred dollars, and costs of suit, and the county board brings the case here on error. All the facts appear in the subjoined opinion.

R. S. Hick, for plaintiff in error, contended, that the county was only liable for such claims arising under § 24 of ch. 79 of

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Gen. Stat., as the board of county commissioners should find "reasonable." In this case the county board did not find the claim reasonable, and therefore did not allow it, except in part; and there would seem to be an end of the case. The board of county commissioners is the exclusive judge of what is reasonable in such a case, and no appeal lies from its decision.

The opinion of the court was delivered by

HORTON, C. J.: The defendant in error, Albert Morrall, by occupation and profession a physician and surgeon, under the direction and employment of the overseer of the poor of Wamego township, in Pottawatomie county, attended to one George Allen for the period of eight weeks, and during said time amputated one of his limbs, and a part of his foot on the other limb. Allen, at the time of such medical and surgical treatment, was a non-inhabitant of the township, but was lying sick therein, and was in distress, and had neither friends nor money to maintain himself or procure relief. Upon the termination of his attendance upon Allen, Morrall duly presented his bill for compensation for his services to the board of county commissioners of Pottawatomie county, and his claim having been disallowed in part, he appealed to the district court. In that court, he filed a petition setting forth in full the facts in the case, and against the demurrer of the county board he obtained judgment for his demand. The county board claimed in the district court, and insist here, that there is no appeal in such a matter, for the reason that as the county commissioners did not find the claim *reasonable*, they were not obliged to audit and pay it. Upon the question presented, we are called upon to interpret the provisions of section 24, Gen. Stat., p. 626; at least, so much of them as relate to the auditing and payment of the claims arising thereunder. It is prescribed therein that—

"It shall be the duty of the overseers of the poor, on complaint made to them that any person, not an inhabitant of their township or city, is lying sick therein, or in distress, without friends or money, so that he or she is likely to suffer, to ex-

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amine into the case of such person, and grant such temporary relief as the nature of the same may require; and if any person shall die within any township or city, who shall not leave money or other means necessary to defray his or her funeral expenses, it shall be the duty of the overseer of the poor of such township or city to employ some person to provide for and superintend the burial of such deceased person, and the necessary and reasonable expenses thereof shall be paid by, and upon the order of, such overseer; and the board of county commissioners of the proper county, at any meeting of such board, shall examine all claims arising under the provisions of this section, and if found reasonable, shall direct the same to be audited and paid out of the county treasury."—Sec. 24, Gen. Stat. 626.

It is a cardinal rule of exposition, that the intention of a law is to be deduced from the whole and every part of the statute, taken and compared together, and such a construction adopted as will best effectuate the intention of the law-giver. With this established rule in view, and considering that the purpose of the legislature by the enactment of this section was to provide for the sick and distressed in a township who are not inhabitants thereof, and are without friends or money, we cannot suppose that this object was intended to suffer defeat by leaving the payment of the claims, which it was the duty of the overseers to incur, entirely to the discretion of the county commissioners. If the commissioners have the power to disallow a claim accrued under this section, because in their judgment the same is not reasonable, and there is no appeal from their refusal, and no right to sue the county in an original action, then the overseers of the poor are absolutely helpless officially to grant temporary relief to the sick and distressed named in the statute, and they can only imitate the example of the Levite, who, when he was at the place of the unfortunate man, half dead, came and looked on, and then passed by on the other side. If reasonable compensation cannot be enforced for services rendered under the statute upon the employment of the overseers, neither will such employment be sought for nor obtained. The law requires a duty of certain township officers, and yet, in the view of the county

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commissioners, denies to the persons employed to aid in the performance of that duty, any pay, unless the commissioners in their opinion agree to audit and pay for the services. The laborer is worthy of his hire; and if his hire is subject to the caprice of a board of county commissioners, as a matter of course he will refuse further service under the direction of an overseer. Such a construction of this section of the law would surely "keep the word of promise to our ear, and break it to our hope." Our conclusion is, that the word "reasonable," used in the section under discussion, must be construed to mean reasonable in fact; and if the board of county commissioners do not allow a claim presented under said section of the law, or disallow a claim in part, the claimant may take the same to the district court on appeal, as was done in this case. Of course, only reasonable compensation for services, which are performed within the purview of this section, are to be allowed, either by the county commissioners, or a district court; but under the statute the commissioners are not the exclusive judges of what is a proper and reasonable claim. Nor do the terms of said statute deprive parties of an appeal from an arbitrary and perhaps an unjust decision.

The judgment of the district court will be affirmed.

All the Justices concurring.

DANIEL RICE V. MEDAD HARVEY.

1. **JUSTICES JUDGMENTS; When Not Reviewable on Error.** Where an action has been tried in a justice's court by a jury, and judgment rendered for the plaintiff, and no motion made for a new trial, the district court cannot upon a petition in error reverse such judgment on account of the partiality of the justice in his rulings, or for the admission of incompetent testimony against the objection and subject to the exception of the defendant. [*George v. Hatton*, 2-387; *Ayres v. Crum*, 13-269; *Nesbit v. Hines*, 17-316; *Hover v. Cockins*, 17-518; *Tyler v. Sooy*, 19-599; *Hadley v. R. R.*, 22-362; *Holland v. Mudenger*, 22-733; *Atchison v. Byrnes*, 22-65, 67; *Clark v. Imorie*, 25-425; *Greenwell v. Greenwell*, 28-413; *Decker v. House*, 30-616; *Fowler v. Young*, 19-150, 159; *State v. Riddle*, 20-713; *Ingersoll v.*

Brief of Plaintiff in Error.

Yates, 21-95; *Lucas v. Sturr*, 21-488; *Comm'rs v. Land Co.*, 23-196; *Jarrett v. Apple*, 31-695; *State v. Benson*, 22-478; *Mills v. Lumber Co.*, 28-580; *Thielen v. Hann*, 27-782.]

2. **APPEAL**—*The Proper Remedy*. A party aggrieved by the final judgment of a justice of the peace, has a proper and adequate remedy by means of the appeal allowed by statute to be taken to the district court. [*R. R. v. McReynolds*, 24-368.]

Error from Atchison District Court.

THE district court, at the March Term 1876, on petition in error wherein *Rice* was plaintiff in error, and *Harvey* was defendant in error, affirmed the judgment of a justice of the peace. *Rice* now brings the record to this court for review. All necessary facts are stated in the opinion.

D. Martin, for plaintiff in error:

During the trial before the justice, hearsay evidence of the most mischievous character was permitted to go to the jury, over the objections of plaintiff in error. Statements prejudicial to *Rice's* title, made by one who was neither agent nor attorney for *Rice* at the time that he is said to have made the statements, were admitted. Such testimony was not given for the purpose of contradicting the supposed agent, for he was not a witness in the case. It appears from the record that the hearsay statements of such party were given as substantive testimony in support of *Harvey's* title. This incompetent testimony was of the most mischievous character; for it related to the title of the property, the very essence of the controversy.

The defendant in error claims that the proceedings are not subject to review, because no motion for a new trial was made in the justice's court. There is no statute requiring a defeated party in any inferior court to ask for a new trial in the same court as a prerequisite to obtaining a review in an appellate court on a question of law. Such a notion is in direct conflict with the statute law of this state, which prescribes the terms on compliance with which a defeated party may ask the corrective interference of the appellate court. The cases men-

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tioned in section 563 of the code, (Gen. Stat. 741,) are not exceptions to the rule, for in such cases no question has ever been passed upon by the court. If a question of law has been once fairly presented to and passed upon by the inferior court, and exception taken to the ruling, the statute gives the right of review in the appellate court, and there is no more statutory authority for requiring the question to be presented a second time to the same court than for requiring it to be presented a third, a tenth, or an hundredth time. Under such a notion a party might be compelled to have a dozen trials before an inferior court, and each time with the full assurance of defeat, before he can obtain the boon of a decision of the supreme court settling the law of his case. We know of no cases in the state holding such a doctrine unless it be *Nesbit v. Hines*, 17 Kas. 316, and *Hover v. Cockins*, 17 Kas. 518, which cases seem to be in direct conflict with the reasoning of the court in *Lender v. Caldwell*, 4 Kas. 349. We think the case in 4 Kas. is the true exposition of our statute law on this point.

The grounds for a new trial in justices courts are few. They are all embraced under the following heads: 1st, where the verdict is obtained by fraud, partiality or undue means; 2d, where the verdict is not sustained by sufficient evidence; 3d, where the verdict is contrary to law. (Laws of 1869, p. 146.) Our complaint is not based upon any of these grounds. We have no objection to the form or sufficiency of the verdict, and do not claim that it was obtained by any fraud or undue means used by the defendant in error, nor by partiality of the justice or the jury, and the case is not here on the evidence. We complain of a ruling of the justice admitting incompetent evidence of a very prejudicial nature, against our objection, and subject to our exception. We do not complain of any act or decision of the jury. A verdict favorable to defendant in error was inevitable under the evidence complained of, which was erroneously admitted as competent. We complain on account of error of law occurring at the trial, and excepted to at the time. This is not one of the causes for a new trial in a justices court. We have done all that the law requires to en-

Brief of Defendant in Error.

title us to relief against the errors of the justice. Because of "error appearing on the record," we think it is the duty of this court to reverse the judgment of the court below, and remand the cause with directions to reverse the judgment of the justice, and for further proceedings.

Manley & Tufts, for defendant in error:

Seven witnesses were introduced, and gave testimony in behalf of plaintiff, now defendant in error, at the trial before the justice. No word of all this testimony is preserved, save the one question and answer to which exception is taken. No case should be reversed upon such an imperfect and one-sided record. Such practice if encouraged will reverse all cases tried in justices courts. The matter of agency, is a question of fact for the jury; and the jury must have considered it fully proven. The point should have been saved by a special finding of fact, or by an instruction, or by a motion to strike out the objectionable testimony after all the evidence as to agency was before the court.

If there was sufficient legal and competent evidence upon which to base the verdict and judgment, as returned and rendered in the justice's court, (and such a state of facts will be presumed until the contrary is affirmatively shown; 15 Kas. 323; 17 Kas. 297; 6 Kas. 128,) then no material error is even assigned in this case. Hence the assignment of error, if it amounts to anything, amounts to this: that the verdict and judgment are not sustained by sufficient evidence. Plaintiff in error has not shown this. He has not placed himself in a position to show it. (16 Kas. 419.) No special findings were requested or made. Plaintiff in error did not even ask for a new trial. Opportunity should be given to correct error in the court where it is made. Under these circumstances the principle laid down in *Ayres v. Crum*, 18 Kas. 269, applies; and the judgment of the justice is final in this case.

The alleged error is one for which a new trial may be granted. No new trial was asked for. 17 Kas. 316, 518. There is just as much reason for requiring a motion for a new

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trial in a justice's court as in district court; it is even more important in the interest of justice, and to save expensive litigation.

The opinion of the court was delivered by

HORTON, C. J.: Harvey brought an action of replevin against Rice, before a justice of the peace. He obtained possession of the property in controversy upon the order of delivery, and at the trial he obtained judgment for the retention of the property, and also for costs, taxed at, \$88.90. The cause was then taken up from the decision of the justice's court on error to the district court, and having been there affirmed, is now presented to this court for a review of the decision of the district court. The plaintiff in error complains, that the justice admitted incompetent evidence of a very prejudicial nature, against his objection, and subject to his exception. The evidence complained of was embodied in a bill of exceptions allowed and signed by the justice before whom the case was tried, and made a part of the record of the cause. No motion was made for a new trial before the justice; and the defendant in error now insists, that the plaintiff in error has no remedy by petition in error, and that the action of the district court therefore must be affirmed. In this view of the case the latter counsel are sustained by the decisions of this court. *Ayers v. Crum*, 13 Kas. 269; *Nesbit v. Hines*, 17 Kas. 316; *Hover v. Cockins*, 17 Kas. 518. If the ground of error alleged by plaintiff in error is one of the causes for which a new trial may be granted in a justice's court, then, by the frequent adjudications of this court, such error is waived by the neglect of the party to move for a new trial. On the other hand, if the counsel of plaintiff in error is correct in his argument, that the complaint which he makes against the action of the justice is not one of the causes for a new trial in a justice's court, he is excluded by such reasoning from obtaining a new trial by the discretion of either this court, or the district court. "A party has no abstract inherent right to a new trial. He

1. Justice judgment; petition in error to district court.

Opinion of the Court.

has a right because, and so far only as, the statute gives it to him." *Nesbit v. Hines*, supra.

The reasons for requiring a second presentation of alleged errors on the part of the tribunal trying a cause, before such errors are subject to review in this court, are much stronger for errors occurring at the trial of a case before a justice than in the district court. The law provides, that when a party is aggrieved by the final decision of a justice he may appeal to the district court, in most cases; and upon such appeal he can have a trial *de novo* upon the merits of the case. No such right is granted where a party brings his case here from the judgment of a district court. We can only review the rulings of the district court upon questions of law. In this case, if the plaintiff in error was prevented from having a fair trial by any ruling of the justice, even if he could not apply for a new trial before the justice he had ample remedy by appeal to the district court. *Martin v. Armstrong*, 12 Ohio St. 548. If the law gives him all of this protection, he ought not to complain because he has not the additional remedy by petition in error. Again, it is not to be expected that causes will be tried with the same judicial care, attention and precision by justices of the peace as by the district judges, who are elected on account of their ability, learning, and experience as lawyers; and therefore the importance of restricting the removal of cases by error from justices courts within all the fair intendments of the law. If this case could be reversed for the single erroneous ruling of the trial justice, almost every case tried before a justice, where the beaten party was represented by as learned, cautious, and watchful an attorney as now argues for a reversal, would be set aside, and justices courts would literally become "courts of errors." Such a practice is not in consonance with the spirit of our laws, nor the language of our decisions.

The judgment of the district court will be affirmed.

All the Justices concurring.

D. J. FOWLER *et al.* v. ELIZABETH YOUNG.

1. **GUARDIAN *Ad Litem*; Motion to Vacate Appointment; Record; Testimony.** When it is claimed that there was error in appointing a guardian *ad litem* for a defendant alleged to be a minor, and the record fails to show any of the testimony offered on the application by the plaintiff for the appointment of such guardian, and does not purport to contain all offered on the motion to vacate such appointment, this court cannot adjudge error in making such appointment, or in refusing to vacate it, notwithstanding the claim and the oath of the defendant, that she was of age. [*Jarrett v. Apple*, 31-695; *Marbourg v. Smith*, 11-554; *McCoy v. Whitehouse*, 30-483; *Cooper v. Armstrong*, 4-80; *Thom v. Davis*, 16-22; *Moore v. Culler*, 18-607; *Murray v. Kelley*, 23-667; *Prichard v. Madren*, 31-38; *Smith v. Gill*, 10-74; *Fearns v. R. R.*, 33-275; *Paul v. Whetstone*, 28-634.]
2. **MOTION FOR NEW TRIAL; Must be Filed within Three Days.** In a case tried before a jury, a motion for a new trial must be filed within three days from the incoming of the verdict, (unless good reason be shown for the delay,) or errors alleged in the progress of the trial in the admission of evidence, etc., will be deemed to have been waived. [*Odell v. Sargent*, 3-80; *Mitchell v. Milhoan*, 11-617; *Nesbit v. Hines*, 17-316; *Clayton v. Sch. Dist.*, 20-256; *Lucas v. Sturr*, 21-480; *Atchison v. Byrnes*, 22-65; *Pratt v. Kelley*, 24-111; *Soper v. Medberry*, 24-128; *Mullen v. Mullock*, 24-774; *Kerner v. Petigo*, 25-652; *Fisher v. Stockebrand*, 28-565; *Hover v. Tenney*, 27-133; *Osborne v. Hamilton*, 29-2; *Fudge v. R. R.*, 31-146; *McDonald v. Weeks*, 32-58.]
3. **PLEADING; Petition to Set Aside a Will; Sufficiency.** A petition in an action to set aside a will, brought against the sole devisee under the will and the administrator with-the-will-annexed, which alleges the death of the deceased, his ownership of property, the heirship of the plaintiff, the forgery of the will, (a copy of which is given,) its probate and the perjury by which such probate was secured, states a cause of action, and where such petition is met only by a general denial, and the verdict is for the plaintiff, the trial court does not err in overruling a motion for judgment in favor of the defendants *non obstante veredicto*.

Error from Cloud District Court.

ACTION by Mrs. Young, as plaintiff, commenced originally against D. J. Fowler, as administrator, etc., and Anna E. Sage, as defendants. Plaintiff's petition, after the caption and title, is as follows:

"The plaintiff, *Elizabeth Young*, (formerly *Elizabeth McDow-*

Statement of the Case.

all,) complains of the defendants above named, for that, on or about the 15th of December 1871, one William McDowall departed this life at Fort Sill, in the Indian Territory, seized and possessed of the tract of land in said county of Cloud, to-wit, the W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 28, and the E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 29, all in township 8 south, range 4 west; and being also the owner and in the possession of the following personal effects and estate, to-wit, one rifle gun and one Spencer carbine gun, of the value of \$45; one bowie knife of the value of \$1.25; cash in the hands of D. J. Fowler, \$80.25, and 160 bushels of corn of the value of \$80; that said decedent, Wm. McDowall, died unmarried, and without issue, and his father having died before the death of said William, he left the plaintiff as his sole heir-at-law, she being his mother; that said William McDowall died without having made any disposition of said estate, or any part thereof, by will or otherwise; that on or about the 20th of February 1872 the defendant D. J. Fowler, fraudulently intending to cheat and defraud the plaintiff in the premises, falsely and fraudulently wrote and forged a paper in the words and figures following, and purporting to be the last will and testament of said William McDowall, to-wit:

"KNOW ALL MEN by these presents, that I, William McDowall, of Solomon township, Cloud county, State of Kansas, considering the uncertainty of life, and being of sound mind and memory, do make, declare and publish this my last will and testament. I give, devise and bequeath to my beloved intended wife, Anna E. Sage, all my estate, real, personal, and mixed, and of which I shall be entitled to at the time of my decease, (excepting the following property and money, to-wit: one large gold ring, which I bequeath to my mother, Elizabeth Young; and I also bequeath to my sister, Margaret Franklin, five dollars in money;) to have and hold the same to her [the said Anna E. Sage,] and her executors, administrators and assigns forever.

"In testimony whereof, I have to this my last will and testament, contained in one sheet of paper, subscribed my name and set my seal this 9th day of March, 1871.

WILLIAM McDOWALL. [SEAL.]

"Signed, sealed, and declared and published by the said William McDowall, as and for his last will and testament, in presence of us, who, at his request, and in his presence, and in the presence of each other, have subscribed our names as witnesses hereto.

"D. J. FOWLER, SUSAN A. FOWLER."

"I hereby certify that the foregoing will was executed on the 9th day of March 1871, signed and sealed, and deposited in the office of the probate judge in and for the county of Cloud, State of Kansas.

"D. J. FOWLER, Probate Judge."

"And plaintiff further shows and alleges that said defendant D. J. Fowler, then the probate judge of Cloud county, indorsed upon said pretended will the certificate, a copy of which is last above written, and signed the same with his designation

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of office of probate judge of said Cloud county and deposited the same in his said office, well knowing that the same was false, fraudulent, and forged as aforesaid; that on the 21st of February 1872, the said Fowler appeared before C. W. McDonald, the then probate judge of said county of Cloud, and falsely testified that said William McDowall made a will; and on the 6th day of March 1872, the said defendant Fowler, further intending to cheat and defraud the plaintiff in the premises, falsely made affidavit, and caused his wife Susan A. Fowler, falsely to make affidavit, before A. A. Carnahan the then probate judge of said county, that they each saw said William McDowall sign the aforesaid pretended will, and that they each subscribed their names thereto, as witnesses, in the presence of the said William McDowall, and at his request, they each well knowing that said William McDowall did not sign said pretended will, and well knowing said pretended will to be false, and forged as aforesaid; that on the 6th day of March 1872, the said defendant D. J. Fowler, further intending to cheat and defraud the plaintiff in the premises, caused himself to be appointed administrator of said William McDowall deceased, with-the-will annexed, thereby intending to dispose of said estate according to the terms of said forged will, and to cause the same to pass from the plaintiff to the defendant Anna E. Sage, she being privy thereto, and fraudulently intending thereby to receive and obtain the title, ownership and possession of said estate as such false and pretended devisee under said pretended will.

"Wherefore the plaintiff says she has been injured and has sustained damages in the sum of \$2,000; and she prays judgment, that said pretended will be adjudged false, fraudulent and forged, and that the same may be set aside and held for naught; that the letters of administration with-the-will-annexed, so as aforesaid, be revoked and annulled, and that said D. J. Fowler be removed from his said supposed office of administrator with-the-will-annexed; that the plaintiff be in all things restored and reinstated in her rights in the premises, as sole heir-at-law to the estate of her said deceased son, the same as if said pretended will had not been admitted to probate, and said letters of administration had not been granted; that the plaintiff have and recover \$2,000 for her damages sustained by reason of the premises, and that she may have such other and further relief in the premises as equity and good conscience may require, and as to the court shall seem meet, and that she recover the costs of this action."

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The defendants answered, filing a general denial only. Trial at the November Term 1873. The jury found all the issues in favor of the plaintiff, and assessed her damages at \$130. At the same term, the plaintiff, having ascertained that said defendant *Anna E. Sage* was an infant, under eighteen years of age, moved that said verdict be set aside, and a new trial granted, with leave to plaintiff to amend her petition averring the infancy of defendant *Sage*. Said motion was granted, and *H. A. Hunter* was appointed guardian *ad litem* of said infant defendant. At the April Term 1874, defendants moved to vacate the order appointing *Hunter* as guardian *ad litem*, upon the alleged ground that said *Anna E. Sage* had "attained her majority before the 25th of September 1873." On the hearing of this motion several affidavits were read. Among those in favor of the motion was one made by Susan A. Fowler, (wife of defendant *D. J. Fowler*,) whereby it appeared that said Susan was the mother of said *Anna*. The motion was overruled. A second trial was had at the April Term 1875. The jury found the issues in favor of the plaintiff, and assessed her damages at \$132.80. Motions for judgment, *non obstante*, and for a new trial, were overruled, and judgment on the verdict was given for the plaintiff as prayed for in her petition. The defendants bring the case here on error.

L. J. Crans, and *A. A. Carnahan*, for plaintiffs in error:

1. The appointment of a guardian *ad litem* cannot be made until after the service of the summons in the action, as directed in §§ 33 and 34 of the code. The mode of service of summons, where the defendant is a minor, is prescribed by § 71 of the code. Now in this case, *Anna E. Sage* was sued as an adult; she appeared by her attorneys, and answered. The action was tried, and afterward on plaintiff's motion a guardian was appointed. This was error; and the error was repeated when the court refused to vacate the order appointing the guardian. The appointment of the guardian was not made in accordance with the provisions of the code. It was made upon the mere motion of the plaintiff, without any showing. *Anna E. Sage*

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had attained her majority prior to the filing of the petition and commencement of the action. (16 Kas. 29.)

2. The court erred in overruling the motion of the defendants to be permitted to open the case. The proceeding was regarded as being under § 20 of ch. 117, Gen. Stat. 1110. Upon an issue out of chancery to try the validity of a will, the defendant has the affirmative. He affirms that the paper writing is the last will and testament of the testator. This fact is denied by the complainant. (*Green v. Green*, 5 Ohio, 278.) The effect of the provision, (§ 21, ch. 117, p. 1111,) that on the trial of such issue, the order of probate shall be *prima facie* evidence of the attestation, execution and validity of the will, is, after the order of probate is offered in evidence, to transfer the burden of proof, in respect to each of these subjects, from the propounders or contestees to the contestants of the will; (*Mears v. Mears*, 15 Ohio St. 90;) and when the burden of showing satisfaction is upon defendants, it is no way changed from the fact that the bill anticipates such a defense and seeks to avoid it. *Hollister v. O'Dillon*, 4 Ohio St. 197, 200; 6 Ohio St. 307; 12 Ohio St. 437, 478; 15 Ohio St. 1; Gen. Stat. of Kas. p. 681, § 275.

3. The court erred in receiving, over the objection of the defendants, evidence to impeach plaintiff's evidence, and the affidavits of D. J. Fowler and Susan A. Fowler (read by plaintiff) without the affiants' attention having been directed by cross-examination to supposed contradiction. The plaintiff had sued Fowler as "administrator with-the-will-annexed of Wm. McDowall, deceased," which was an admission on her part that McDowall was dead, that he had made a will, and that Fowler was the administrator of his estate *cum testamento annexo*; (2 Stark. Ev. 215; 1 Stark. Ev. 390, 399;) and on the trial she called T. L. Sturges, probate judge to the stand, who testified—

"I hold the office of probate judge of Cloud county, and have with me the office papers of the probate court. I find among them, these, *the will* of Wm. McDowall, deceased, a record of the probate of such will, the affidavit of D. J. Fow-

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ler on the probate thereof, and the affidavit of Susan A. Fowler on the probate thereof. I also find of record the appointment of D. J. Fowler as administrator of the estate of Wm. McDowall deceased, with the will annexed. These are the papers and records to which I refer."

Plaintiff then offered said will, and the record of the probate of the will, and the affidavit of the Fowlers. The plaintiff calling witnesses to impeach or contradict the evidence thus offered by her, the defendants objected. The party offering evidence cannot contradict or impeach it. When a party offers a paper or record in any case, for any purpose, it is *in evidence* for all the purposes of the case. When a party offers a witness in proof of his cause, he thereby, in general, represents him as worthy of belief. He is presumed to know the character of the witnesses he adduces; and having thus presented them to the court, the law will not permit the party afterward to impeach their general reputation for truth, or to impugn their credibility by general evidence tending to show them to be unworthy of belief. 1 Greenl. Ev. § 442, p. 489; 15 Ohio St. 1; 16 Ohio St. 48.

4. Defendants (plaintiffs in error) offered evidence showing the signing and execution of the will by McDowall. On plaintiff's objections, the evidence was rejected; the objection in each instance was, that it was a transaction between the parties and the deceased, and incompetent. The court erred in not receiving such evidence, unless § 322, p. 691, Gen. Stat., modifies the general rule of law. We contend, that D. J. Fowler was not testifying within the spirit or letter of § 322 in his own behalf; that to exclude, the transaction or communication must be the actual transaction involved in the issue, or a communication having direct reference to the transaction involved in the issue, and that no collateral transaction or communication can be excluded. At the probate of the will, the Fowlers were competent witnesses, and the only witnesses who could prove the due attestation, execution and validity of the will. The fact that D. J. Fowler afterward became the administrator, did not render either of them incompetent. If

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incompetent, or dead, or out of the jurisdiction of the court, under § 22, p. 1111, Gen. Stat., we were entitled to the previous testimony, which was just what we sought to establish by the rejected testimony. There was no objection made as to the competency of D. J. Fowler as a witness. He was competent for all purposes in this case. The court erred by giving too great scope to § 322 of the code. 21 Ohio St. 658.

5. The court erred in its general instruction to the jury. It permitted the jury to find a general verdict against both defendants for the personal property, when the petition charges, and the proof shows, that but one of the defendants ever had control of such property.

6. There is error in the verdict of the jury. It does not show it was found upon oath. It does not show against whom the damages are assessed.

7. The court erred in overruling the motion of the defendants for judgment, notwithstanding the verdict.

Strain & Sturges, for defendant in error:

The history of this case is the history of the forgery of a will by a probate judge of Cloud county, his resignation of his office for the purpose of taking out letters of administration with-the-will-annexed, and a dogged and persistent attempt to shield himself from infamy, as shown by the manner of his defense of this suit. Two juries of the county that elected Fowler probate judge have pronounced the will a forgery, which ought to raise a strong presumption that substantial justice has been done in the premises. We think therefore, that when we ask the court to require the plaintiffs in error to bring their cause before the court for consideration according to the rules of law, before asking the court to wade through a long bill of exceptions in search of supposed errors, we do not ask too much.

1. The question as to the appointment of a guardian *ad litem* is not properly before the court. This cause was twice tried. It was commenced September 25th 1873; at the first trial a verdict was found in favor of defendant in error, and the ver-

dict was set aside and a guardian *ad litem* appointed for Anna E. Sage. As none of the evidence or records of that trial are set out in the bill of exceptions, there is nothing to show on what evidence or grounds the court below made the appointment, and consequently this court cannot now say there was any error in making it, but on the contrary must presume there was none. And the court below having appointed a guardian, the presumption and fact is that there was sufficient and abundant evidence and grounds on which to make it, and error in making it cannot be presumed. It is true, that on the second trial before the jury, although there was no issue to that effect, the plaintiffs in error introduced some evidence, such as it was, for the purpose of showing that Anna E. Sage was then of age; but the evidence was so evidently false and fabricated that the jury could give it no weight. Besides, Anna E. Sage was present as a witness before the court and jury. They had eyes and could see for themselves, and they certainly would have been strange men if they could have found that a little girl (as she was) was of age. They found just as the court below did, that she was a minor. And the finding and appointment having been made by the court below, and the evidence and proceedings and record not being here on which it was made, this court cannot now say there was any error in making it.

2. There was no error in overruling the motion for a judgment notwithstanding the verdict. An examination of the pleadings will show that they do not bring themselves within the provisions of the statute: (§411, Gen. Stat., p. 707.) The petition alleges the pretended will of McDowall to be a forgery, and not his will; and the defendants below interposed the general denial. In the answer of Anna E. Sage by her guardian, as first filed, she alleged that she was of age, but this was afterward amended and stricken out, and the cause was so tried. There being then the allegation of the petition that the will was not McDowall's will, and the answer interposing only the general denial, we fail to see how the plaintiffs

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in error could be entitled to a judgment on this state of the pleadings notwithstanding the verdict.

8. The other alleged errors are not before the court, and cannot be considered and for this reason: the record shows that the verdict was rendered on the 7th day of June, and that no motion for a new trial was made by plaintiffs in error until the 11th day of June, and the reasons assigned for asking for a new trial, are, 1st, that the verdict was contrary to law; 2d, that the verdict was contrary to the evidence. Only this and nothing more. Sec. 308, Gen. Stat. 687, 688; 3 Kas. 80; 11 Kas. 617; 17 Kas. 316.

The opinion of the court was delivered by

BREWER, J.: This was an action to set aside a will, brought by the sole heir-at-law against the devisee and the administrator with-the-will-annexed. It was alleged that the will was a forgery, and that the probate thereof was obtained through the perjury of the subscribing witnesses. Two juries in successive trials found against the validity of the will, and from the judgment rendered upon the last verdict, this proceeding in error has been brought.

The first alleged error is in the appointment of a guardian *ad litem* for the devisee. The appointment was made upon the claim that she was a minor. The devisee was properly served with process, and the first trial was had upon the supposition that she was of age, and without any appointment of a guardian. But as the record discloses, it appeared upon the trial that she was under age, and thereupon the verdict was set aside, and a guardian *ad litem* appointed. Subsequently she moved to have that appointment vacated, and that she be allowed to conduct her own defense. This motion was overruled, and of this, complaint is now made. The record discloses none of the evidence upon which the appointment was first made, neither does it purport to contain all offered upon the motion to vacate. Clearly then it does not show error. True, she claimed to be of age; but the question was one of fact, and notwithstanding her claim and oath, *non constat* but

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that the entire testimony abundantly established the fact of her minority.

Various errors are alleged as occurring during the trial in the admission of testimony, etc., but unfortunately for the plaintiffs in error the motion for a new trial was not filed until four days after the verdict, and no reason shown for the delay. Hence, as already settled by this court, none of these questions so fully discussed by counsel are before us for consideration. *Odell v. Sargent*, 8 Kas. 80; *Mitchell v. Milhoan*, 11 Kas. 617; *Nesbit v. Hines*, 17 Kas. 316.

The only remaining matter is the error alleged in overruling a motion for judgment *non obstante veredicto*. Several grounds were stated in the motion, but the only one entitled to consideration, is, that upon the pleadings the defendants were entitled to judgment. And this cannot be sustained. The petition alleged specifically the death of the deceased, his ownership of property, the heirship of the plaintiff, the forgery of the will, giving a copy of it, and the perjury by which its probate was secured. The answer was a general denial. Clearly, the petition stated a cause of action, and no new matter was alleged in the answer. There was no error in overruling the motion.

The judgment will be affirmed.

All the Justices concurring.

J. W. BLANKENSHIP V. NANCY BLANKENSHIP.

1. **ALIMONY; Lien on Real Estate of Husband; Homestead.** Upon granting a divorce to the husband by reason of the fault or aggression of the wife, the court has power to decree the sum allowed as alimony to the wife a lien upon the real estate of the husband; and under such a decree, the premises occupied by such husband and wife as a homestead at the date of the decree of divorce may be sold in satisfaction of said lien. [*Brandon v. Brandon*, 14-342.]
2. ——— **Interest on Alimony; Penalty.** Under the provision of the statute, that the court in granting a divorce may give to the wife such share of her husband's real or personal estate as shall be just and reasonable,

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it is not an abuse of discretion for the court to allow to the wife a specific sum in money, and to provide as a penalty in the decree that if the same is not paid at once, it shall draw interest at the rate of twelve per cent. per annum until paid.

Error from Linn District Court.

At the May Term 1875 of the district court, a decree was entered in favor of *J. W. B.*, the husband, and against *N. B.*, the wife, and awarding to the wife certain alimony, etc. The terms of the decree are stated in the opinion, *infra*. In December 1875, said *N. B.* sued out an execution on such decree for alimony, by virtue of which the sheriff of Linn county duly advertised and sold the N.W. $\frac{1}{4}$ of section 28, township 19, range 25, and also forty acres off the S.W. $\frac{1}{4}$ of section 21 in said township and range. The two parcels were sold separately, both sales amounting to \$1,215. The N.W. $\frac{1}{4}$ of said section 28 was the homestead of said *J. W. B.* at the date of said decree, and at the date of said sale. The district court, at the April Term 1876, confirmed the sale, and directed that a deed be made to the purchaser. *J. W. B.* brings the case here for review.

J. F. Broadhead, for plaintiff in error.

Simpson & Brayman, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: This was an action for divorce brought in the court below by the husband, *J. W. Blankenship*, against his wife, *Nancy Blankenship*. The court granted a divorce by reason of the fault of the wife, and adjudged that the wife pay the costs of the suit. The court further decreed to the wife \$1,325 as alimony, said sum to bear interest from the date of the judgment at the rate of twelve per cent. per annum until paid, and decreed the same a lien upon *all* of the estate of said *J. W. Blankenship*. Afterward the homestead of the said *J. W. Blankenship*, who re-married in a brief time after the decree of divorce, was sold to satisfy the lien thereon. Plaintiff in error complains of the allowance of alimony to

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the wife, and specifically for making the sum granted as alimony a lien upon all the property of the plaintiff in error, allowing said sum of \$1,325 to bear interest at the rate of twelve per cent. per annum, and for confirming a sale of the homestead sold in satisfaction of said lien. None of the evidence produced on the trial of the cause is brought to this court; and as the amount of alimony to be allowed in each case is greatly in the discretion of the court, we cannot review this portion of the judgment.

This court having already decided, in *Brandon v. Brandon*, 14 Kas. 342, that upon granting a divorce on account of the fault of the wife, the court has power to award to her the possession of the homestead, necessarily settles the question now presented as to the power of the court to declare the sum allowed as alimony a lien on all the property of the husband, and to authorize the sale of such property (even if it is a homestead) to satisfy the lien. The power to take the homestead from the husband, and assign the same to the wife, is the exercise of greater power than making a sum allowed as alimony a lien upon all the property of the husband, and ordering the same sold to discharge the lien. The greater power includes the less; and we find no error as to the sale of the homestead—it appearing from the record that the plaintiff in error was possessed of this identical property at the rendition of the judgment.

The only remaining question to be disposed of is, the objection to the allowance of interest at the rate of twelve per cent. per annum upon the sum granted as alimony. The statute expressly gives to the court the power in case of a divorce by reason of the fault or aggression of the wife to give to her such share of her husband's real or personal property, or both, as to such court may appear just and reasonable. (Laws of 1870, p. 180, § 27.) The court had the right to allow the \$1,325 as alimony, and to fix the time in which it should be paid; and we think the court also had the power, as a penalty, to further provide that if the sum was not paid at once that the plaintiff in error should also pay the additional sum of inter-

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est at the rate of twelve per cent. per annum. We cannot say that the court therefore abused its discretion in the premises.

The judgment of the court below, and the order confirming the sale of the real estate, will be affirmed.

All the Justices concurring.

WM. MOK. BURNS v. HENRY BURGETT *et al.*

PRACTION, SUPREME COURT; Reviewing Alleged Error; Record Should be Complete. Where neither the full proceedings of the court below, nor a "case-made," is brought to the supreme court, but only a mere bill of exceptions, the supreme court will not reverse the judgment of the court below on such bill, where the same omits much of the proceedings of the court below which might explain the supposed erroneous rulings contained in such bill, or which might show that none of said supposed erroneous rulings affected prejudicially any of the substantial rights of the plaintiff in error, even if some of said rulings might apparently seem to be erroneous. [*Wilson v. Fuller*, 9-176; *DaLee v. Blackburn*, 11-190; *Ferguson v. Graves*, 12-39; *R. R. v. Brown*, 14-469; *R. R. v. Wagner*, 19-335; *Pfeiffer v. Evan. Ch.*, 20-102. See cases cited in *Fowler v. Young*, 19-150.]

Error from Cloud District Court.

BURGETT, as plaintiff, sued *Burns* and one Richard Coughlin. At the April Term 1875, he recovered judgment against *Burns* alone. *Burns* brings the case here, joining *Burgett* and Coughlin as co-defendants in this court.

Strain & Sturges, for plaintiff in error.

L. J. Crans, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: The plaintiff in error, who was one of the defendants below, does not file with his petition in error a full copy of all the proceedings had in the court below, nor does he file a copy of a case-made for the supreme court; but he files merely a copy of a certain bill of exceptions. This bill

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of exceptions contains a copy of the second count of the petition of the plaintiff below, Henry Burgett, who is now one of the defendants in error. But how many other counts there were in said petition, or what any of said other counts contained, is not shown. Said bill of exceptions also shows that the defendant below, Burns, demurred to said second count of the plaintiff's petition; that said demurrer was overruled; and that the defendant then answered to said second count by filing a general denial thereto. But whether he answered to any of the other counts of the plaintiff's petition, or what defenses he may have set up thereto, if he set up any, is not shown. Said bill of exceptions also shows what evidence was introduced and offered to be introduced to prove and disprove said second count of the plaintiff's petition, and how much of such evidence was excluded, and how much of the same was stricken out. But how much other evidence was introduced, or offered, or excluded, or stricken out, is not shown. Said bill of exceptions also shows that the court below gave the following instruction to the jury, to-wit: "You are instructed that you must give the plaintiff credit for the two-hundred-dollar order in dispute, *if you find payment has been demanded* of him said defendant by said plaintiff." But what other instructions the court gave, or refused, is not shown. Said instruction had reference to said second count. The bill of exceptions also shows that the jury found the following verdict, to-wit: "We the jury find for the plaintiff, and that there is due from Wm. McK. Burns to Henry Burgett the sum of \$218." But whether the jury found that any *demand* had ever been made for the payment of said \$200 order, or whether the jury gave any credit to the plaintiff on said \$200 order, is not shown. This verdict may have had no reference whatever to said second count of the plaintiff's petition. The jury may have given the plaintiff this verdict for \$218 on some of the other counts of said petition. The plaintiff may have been entitled to such a verdict on some of the other counts, and on the pleadings, without the introduction of any evidence whatever on his part; or, the evidence not brought to this court may have shown

clearly and beyond all doubt that the plaintiff was entitled to such verdict on some of the counts not brought to this court. Now if the verdict and judgment were rendered upon the pleadings, or upon the pleadings and evidence not incorporated in said bill of exceptions, then it is wholly immaterial whether the court below committed any error or not in its rulings with reference to said second count of the plaintiff's petition. Even if the court below erred in overruling said demurrer, and in permitting the plaintiff's said evidence to go to the jury, and in excluding the defendant's said evidence, and in striking out said evidence, and in giving said instruction to the jury, and in overruling the defendant's motion for a new trial based upon these supposed errors, still, if said verdict and judgment were founded upon any of the counts of the plaintiff's petition other than said second count, then all such supposed errors would be wholly immaterial and unsubstantial. And we cannot say from anything brought to this court that said verdict and said judgment were not founded upon some count or counts other than said second count.

As a rule, this court would not like to reverse a judgment upon a mere bill of exceptions; and certainly not where such bill omits much of the proceedings of the court below which might explain the supposed erroneous rulings contained in such bill, or might show that none of said supposed erroneous rulings affected prejudicially any of the substantial rights of the plaintiff in error. The office of a bill of exceptions is not to make a record of what would otherwise appear in the record, but it is only to make a record of such proceedings as would not otherwise appear in the record. These things which would otherwise appear in the record should be shown by such record only, by a case-made for the supreme court, and not by a bill of exceptions. A bill of exceptions is usually obtained upon a mere *ex parte* application, and is therefore not as likely to be correct, or to state matters as fairly, as the regular and ordinary record which (it must be presumed) is examined by both parties as the same is made up, or as a case-made for the supreme court which must be submitted to the opposite party

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before it is signed or settled. A bill of exceptions should therefore be confined to its legitimate purpose of only stating matters which would not otherwise be incorporated into the record.

The judgment of the district court will be affirmed.

All the Justices concurring.

JOHN T. MEYER V. CHARLES GRAEBER *et al.*

INTEREST, WHEN DUE AND PAYABLE; *Stipulations in Note and Mortgage.*

Where a note is given payable in four years, with interest at ten per cent., and at the same time a mortgage is given to secure the payment of the note, in which mortgage it is stipulated that the interest is payable annually, and the interest to become principal if not paid when due, and if default be made in said payment, or any part thereof, as provided, then the conveyance shall become absolute, *held*, that the interest is to be construed as payable each year, and that on default of the payment of interest, the mortgage may be foreclosed for the amount due. [*Muzzy v. Knight*, 8-456; *Bank v. Peck*, 8-660; *Darrow v. Scullin*, 19-59.]

Error from Douglas District Court.

ACTION to foreclose mortgage. At the April Term 1876, the district court sustained a demurrer to plaintiff's petition. *Meyer*, plaintiff below, brings the case here. All necessary facts are stated in the opinion.

S. O. Thacher, for plaintiff.

Joseph E. Riggs, for defendants.

The opinion of the court was delivered by

HORTON, C. J.: This action was brought in the court below to recover an installment of interest alleged to be due upon a promissory note, and to foreclose a mortgage accompanying said note, and executed to secure the same. The petition sets out a copy of the note and mortgage, from which it appears that Charles Graeber, one of the defendants, on 18th Novem-

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ber 1874, executed his promissory note for \$500 in the following words:

“LAWRENCE, KANSAS, Nov. 18, 1874.

“Four years after date, for value received, I promise to pay John F. Meyer, or order, the sum of five hundred dollars, with interest at the rate of ten per centum per annum until payment, and with ten per cent. for attorney-fees if suit is brought hereon. Stay of execution and appraisement waived. Interest to become part of principal if not paid annually.

CHARLES GRAEBER.”

The accompanying mortgage, signed by said Graeber and his wife, contains the following clause:

“This grant is intended as a mortgage to secure the payment of the sum of five hundred dollars, according to the terms of a certain promissory note this day executed and delivered by the said Charles Graeber and wife for the sum of five hundred dollars with interest at the rate of ten per cent. per annum *payable annually*. Interest to become principal if not paid when due.”

The defendants demurred, claiming that the petition stated no cause of action against them. The court below sustained the demurrer, and the plaintiff brings the action here for review.

Within the authority of *Muzzy v. Knight*, 8 Kas. 456, the note and mortgage having been made at the same time, and in relation to the same subject, are a part of one transaction, and constitute one contract, and must be construed together as if they were parts of one instrument; and so construed, the interest is payable annually, unless the terms in the note and mortgage, viz., “interest to become part of principal, if not paid annually,” and, “interest to become principal if not paid when due,” defeat this construction and make the interest a part of the principal, to become due at the election of the maker of the note four years after the date thereof. If the interest was payable annually, sufficient facts were stated in said petition to constitute a cause of action, as the mortgage contained the further stipulation that, “if default be made in said payment or any part thereof, as provided, then this conveyance shall become absolute.” And at the date of the com-

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mencement of the action, on 5th February 1876, no interest had been paid on the note, although demand had been made therefor. The rule of construction is imperative, which requires, if practicable, that construction to be given to an instrument which shall give effect to all its parts. Under this rule, it seems to us that the rational and just construction of the contract, according to the intent of the parties, is, that the interest becomes due each year, and by the provision of the contract, that the "interest is to become principal, if not paid when due," the interest overdue is to bear the same rate of interest as the principal of the note, and was meant for the benefit of the payee; and that this provision in the mortgage, and the similar one in the note, was not inserted to extend the payment of the interest till the principal became due. Any other construction would deprive of all meaning the provisions of the mortgage that the principal sum should bear interest *payable annually*, and if default be made in said payment, or any part thereof, as provided, then the conveyance should become absolute. Adopting this construction, we give effect to all parts of the contract, and, in our opinion, do no violence to the intention of the parties thereto. It is not necessary now to decide whether parties can make provisions in their contracts that interest shall become principal, because, if held they cannot, the portion of the note and mortgage containing such stipulations would be void, and therefore of no force; and the same result would be reached as to the interest being payable annually, as if we attempt to carry out the actual intention of the makers of the contract, without regard to the question of the validity of the same. In either event, there was default made in payment, as provided, and the demurrer should have been overruled. As to the question of the oppressive and illegal character of such contracts, see *Howard v. Farley*, 19 Abb. Pr. Rep. 126; *Van Benschooten v. Lawson*, 6 Johns. Ch. 313; "Interest upon interest," Albany Law Journal, vol. 16, p. 252, and the cases there cited.

The conclusion we have reached comports with the general signification of the language, "interest, to become part of

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principal," as ordinarily used and understood. Thus, in *Chesterfield v. Cromwell*, 1 Eq. Cas. Abr. 287, B. Lord Keeper WRIGHT admitted the general rule, that interest could not carry interest, but held in some cases, it would be injustice not to regard the interest due as principal. In *Lord Chancery v. Latouch*, 1 Ball. & Beatty, 480, Lord Chancellor MANNERS says: "It would be fair for the mortgagee to call for interest due at the end of the year; and if not paid, to insist on its becoming principal." In the case of *Howard v. Farley*, 19 Abb. Pr., 129, MORRELL, J., says: "If the interest is demanded, when due, it becomes principal from that time." In all of these cases, "interest regarded as principal," simply means, that the interest shall bear interest like the principal. We cite these cases, not to support the doctrine that interest is allowed upon interest, but to sustain the result we have reached, that the phrase, "interest to become a part of the principal," was never construed to mean that thereby the time of the payment of interest was extended, but that such expression is the usual form used to state that interest is to bear interest.

The order and decision of the district court will be reversed.

All the Justices concurring.

JOHN DOYLE *et al.* v. HUGH BOYLE.

1. ARREST AND BAIL; *Action on Undertaking; Imprisonment of Debtor; Section 511, Civil Code, Construed.* It is not a fatal defect in an undertaking given under section 511 of the code of civil procedure, that it fails to show that the debtor was actually in jail, provided it shows that he had actually been arrested under the writ of execution, and was then in the custody of the officer. The word "imprisoned," as used in said section, is broad enough to include any actual arrest and detention by the sheriff, whether in or out of the jail.
2. ——— The case of *Lytle, Adm'r, v. Davis*, 2 Ohio, 277, considered, and disapproved.

Statement of the Case.

Error from Saline District Court.

BOYLE filed in the district court his petition against *John Doyle and L. J. Grant*, which, after the proper caption and title, is as follows:

"The plaintiff shows to the court, and alleges, that on the 2d day of June 1874, he obtained a judgment by the consideration of the district court of Saline county, duly rendered against one James Quinn, in the sum of \$770, and the further sum of \$56.60 costs of said suit, and interest on said judgment from date thereof at the rate of ten per cent. per annum; that on the 10th of said June, by the consideration of said court, plaintiff obtained an execution against the person of the said James Quinn, on said judgment, which said execution against the person was duly issued and directed and delivered to the sheriff of said Saline county; that said sheriff, by virtue of said execution, afterward on the 11th day of said June, at 2 o'clock P. M. of said day, arrested the said James Quinn in said county of Saline; that the said James Quinn, and the said *John Doyle and L. J. Grant*, defendants herein, as his sureties, afterward on the 11th of said June, at four o'clock P. M. of said day, the said James Quinn being then in the custody of said sheriff as a prisoner as aforesaid, in Saline county, made and executed an undertaking, which was approved by the said sheriff, and the said defendants, under their hands, thereby covenanted and agreed with the plaintiff that if the said James Quinn should go beyond prison bounds, to-wit, beyond the boundary of the said Saline county, before being discharged according to law, they, the said sureties, would pay to Hugh Boyle, the plaintiff herein, the said sum of \$770, said judgment, together with \$56.60 costs therein, and all costs that should accrue on said judgment, and interest on said judgment; that by reason of said bond so given and approved, the said James Quinn was by said sheriff released from said custody, and allowed to go without hinderance from said imprisonment; that on the 12th day of July 1874, the said James Quinn went beyond said prison bounds, and left the said county of Saline for parts unknown, before being discharged according to law; that said James Quinn has never been discharged according to law; that no part of said judgment has ever been paid; that a copy of said undertaking is hereto attached and made a part of this petition; that said plaintiff on the 18th day of said July, caused an execution to be issued on

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said judgment, and delivered to the sheriff of said Saline county, which was afterward duly returned wholly unsatisfied. Wherefore, plaintiff prays judgment against the said defendants for the sum of \$826.60, and interest thereon at the rate of ten per cent. per annum from the 2d day of June 1874, with costs of suit and collection."

The undertaking mentioned in said petition, is in the words and figures following:

"WHEREAS, in a certain action in the district court of Saline county, Kansas, wherein Hugh Boyle is plaintiff, and James Quinn is defendant, the said Hugh Boyle, on the 2d day of June 1874, obtained a judgment against the said James Quinn in the sum of seven hundred and seventy dollars, and the further sum of fifty-six dollars and sixty cents costs of suit; and whereas the said Hugh Boyle, on the 10th day of June 1874, by the consideration of said court, obtained an execution against the person of the said judgment-debtor, said James Quinn, on said judgment, and whereas the said James Quinn has on said execution been arrested, and is now in the custody of the sheriff of said Saline county: Now therefore, we, the said James Quinn as principal, and John Doyle and L. J. Grant as sureties, hereby undertake to said Hugh Boyle, and promise and agree, and hereby bind ourselves, that if said James Quinn shall go beyond prison bounds, to-wit, beyond the boundary of the said Saline county before being discharged according to law, we, the said sureties, will pay to the said Hugh Boyle, plaintiff, the said sum of seven hundred and seventy dollars, said judgment, together with fifty-six dollars and sixty cents costs thereon, and all costs that shall accrue on said judgment, and all interest on said judgment.

"In witness whereof we have hereunto subscribed our names this 11th day of June 1874.

"JAMES QUINN,

"JOHN DOYLE,

"L. J. GRANT."

Doyle and Grant demurred to said petition, on the ground that it did not state facts sufficient to constitute a cause of action. This demurrer was overruled by the district court, at the November Term 1876. The subsequent pleadings and proceedings are sufficiently stated in the opinion. Defendants *Doyle and Grant* bring the case here on error.

J. G. Mohler, for plaintiffs in error.

John Foster, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This was an action on an undertaking given under section 511 of the code of civil procedure. (Gen. Stat., p. 780.) A demurrer to the petition was overruled; and this is the first alleged error: the undertaking is copied in the petition, and the specific objection is, that it does not show that the party for whom it was given was *actually in jail*. The language of the statute is, "any person imprisoned under the provisions," etc., while the recital of the undertaking, as well as the averment of the petition, is—"has been arrested and is now in the custody of the sheriff," etc. In support of this objection the case of *Lytle v. Davis*, 2 Ohio, 277, decided in 1826, is cited. And this case it must be conceded is very strongly in point. In it it was held that a bond given for prison limits was void unless the defendant was actually in prison, and that fact was recited in the bond. The binding authority of this decision is invoked upon the rule laid down in *Bemis v. Becker*, 1 Kas. 248, that where one state borrows or adopts a statute of another, it is presumed to take it with the construction placed upon it by the judiciary of that state. That rule is hardly applicable in this case, for the statute then in force in Ohio differs materially from ours, as well as from the later statute of that state. True, there is a general similarity, as there is between the statutes of many states bearing upon this subject-matter, or indeed upon almost any given subject; and the word "imprisoned," upon which special reliance was placed by the court in that case, appears in our statute as well as in the later one in Ohio. But there is no such identity, actual or substantial, that it can be presumed that our legislature simply adopted the old Ohio statute, or intended to transfer that statute, with the constructions it had received, to this state. Again, the construction of a single clause or section is often affected by the general system of the law of which

it is a part. And it will be remembered that there has been going on for years a wonderful change in the provisions of law concerning imprisonment for debt. At the time of that decision the law still allowed imprisonment for debt, though it must be conceded it was departing from the hardships of the common law. Section 15 of art. 8, of the Ohio constitution of 1802, was then in force as follows:

“The person of a debtor, where there is not strong presumption of fraud, shall not be confined in prison, after delivering up his estate for the benefit of his creditor or creditors, in such manner as shall be prescribed by law.”

Now neither Kansas nor Ohio tolerates imprisonment for debt except for fraud. Const. Ohio, § 15, art. 1; Const. Kansas, Bill of Rights, § 16. This practically excludes imprisonment except as a punishment for acts criminal, or *quasi* criminal, and leaves the unfortunate but honest debtor free from any possibility of personal restraint. Now the construction then given to words and phrases in the statutes concerning imprisonment for debt, while perhaps just and fair when considered in reference to the general policy of the law, might be open to severe criticism if insisted upon when used in statutes framed under an entirely different policy. We do not feel therefore bound to follow that decision in the meaning given to the word “imprisoned.” We see no reason why a party should be actually put into a jail, and locked up before he is permitted to avail himself of that statute. The term “imprisoned,” is not generally so limited. Does not the action of false imprisonment lie for any illegal apprehension and detention? Bouvier says in his Dictionary, vol. 1, p. 612, that “as to what will amount to an imprisonment, the most obvious modes are confinement in a prison, or a private house; but a forcible detention in the street, or the touching of a person by a peace officer by way of arrest, are also imprisonments.” It is doubtless true, that there must be an actual arrest and detention; that there is in this respect no mere constructive imprisonment; that as held in the case of *Berry v. Adamson*, 6 Bar. & Cress. 528, the mere execution and sending of a bail-bond by a defendant on receiv-

ing a message from a sheriff that he has a writ, makes no imprisonment. Again, it is a well-known fact that many counties in this state have been at different times without any jail, and special provision is made for confinement in the jail of one county of persons charged with crime in other counties destitute of jails. (Gen. Stat. 532, § 16.) But there is no such provision as to persons arrested on civil process. And as counsel pertinently asks, "must the sheriff wait till a jail is erected before he is authorized to accept the bond?" It is made the duty of the sheriff having process against the person "to arrest such debtor and commit him to the jail of the county until he pay the judgment, or is discharged according to law." (Gen. Stat. p. 728, § 505.) The sheriff is by law the keeper of the jail. (Gen. Stat. p. 530, § 3.) Now from the moment of the arrest until the final discharge, the debtor is in the custody of the sheriff, and is equally in his custody whether before or after he has crossed the threshold of the jail. What difference then whether the bond be executed before or after he has so crossed? The purpose of the statute was to give to the debtor taken under process the limits of the county in which to labor or carry on business, so as to make the debt and at the same time prevent his going beyond the reach of process and the watch of the creditor. That purpose is accomplished if the debtor is permitted to give bond as soon as taken into custody. We see no good reason for limiting the meaning of the word "imprisoned" to actual confinement in the jail, but think it may fairly be construed as denoting the actual detention by the sheriff under the writ; and when a debtor is so seized and held, it seems to us he may be considered, in the language of the statute, as one "imprisoned under the provisions of this article." There was no error therefore in overruling the demurrer to the petition.

Afterward the defendants filed an answer setting up two defenses, the first specifically alleging that Quinn was not put into jail by the sheriff, and the other alleging a surrender by the sureties to the sheriff. A demurrer to these two defenses was sustained, and this is alleged as error. But counsel in his

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brief fails to point out wherein he claims there was error other than in the matter already considered by us, and we shall certainly not seek to find errors when counsel has found none.

After the demurrer to the answer was sustained, there was no issue of fact to be tried.

The judgment will be affirmed.

All the Justices concurring.

J. M. ADAMS v. JESSE EVANS *et al.*

RESIDENCE; Domicile; Intention to Change. In order to effect a change of residence, there must exist both the intention to change, and the fact of removal. Neither is sufficient alone. [*Amesbaugh v. Bank*, 33-103; *Balinger v. Lantier*, 15-608.]

Error from Barbour District Court.

AN order of attachment, sued out by *Adams* against *Evans* and others, was dissolved by the district judge, at chambers, on the 13th of September 1876. *Adams*, plaintiff, brings the case here. The facts are stated in the opinion.

Adams & Allen, and *Van Winkle & Hurd*, for plaintiff.

J. T. Whitelaw, for defendants.

The opinion of the court was delivered by

BREWER, J.: This was an action in which an attachment was issued, and levied upon the property of the defendants. The grounds of the attachment are thus stated in the affidavit therefor:

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"That the said defendant Jesse Evans is a non-resident of the state of Kansas, and that said cause of action arose wholly within the limits of the state of Kansas, and that said defendants are about to remove their property, or a part thereof, out of the jurisdiction of this court with the intent to defraud their creditors."

A motion was made upon affidavits to vacate the attachment. This motion was sustained, and this ruling of the district court is the error complained of. As the testimony was all in affidavits, it comes before us in substantially the same manner as before that court. And the question presented for our consideration is one of fact, and that is, whether the charges in the affidavits for attachment are sustained by the testimony. And it seems to us that so far as the non-residence of the defendant Evans is concerned, it is clearly sustained. The principal testimony for the plaintiff is the following affidavit, which is signed and sworn to by eleven witnesses:

(*Title, and Venue.*) "The undersigned [*naming the affiants,*] being duly sworn, upon their oaths say, that they are each acquainted with Evans and Nelson, the defendants in the above cause; that on or about the 10th day of August 1876, and at different times at or near Sun City, Kansas, Charles Nelson, one of the defendants in the above cause, said in the presence and hearing of said affiants, that it was his intention to remove all the cattle from this county, so that if anything happened they would have no hold whatever upon him, and that he did not intend to keep said cattle in said county, but intended to remove them for the purpose above stated; that the said Charles Nelson at different times in the said county of Barbour, Kansas, and at or near Sun City, made said statements in the presence of said affiants, and other statements of like effect; and that said Jesse Evans' residence is in the state of Texas, and was at the time of the commencement of this suit, and he is now a resident of said state of Texas; and that he repeatedly said, in the presence and hearing of affiants, near Sun City, Barbour county, Kansas, in the month of May 1876, that his family were residing in said state of Texas, and that he would move his family into Barbour county if they had good school accommodations near here, and that his family were in the state of Texas, residing there; and that said

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defendants said that they would dispose of and remove their property before they could get any hold of them in any of these cases; and that the said Evans was an actual and *bona fide* resident of Texas at the time said defendant Nelson made said statements, and has been since that time, and that they could do nothing with them here. Affiants say they are all residents of Barbour county, Kansas. Affiants say that said statements were made in the presence and hearing of these affiants; and each of said defendants said in hearing and presence of these parties, about the month of May or August 1876, that if anything came up, or if any suits were to be commenced, they would remove their cattle or dispose of them so as to defeat any action that might be commenced against them."

The strongest counter testimony is the affidavit of the counsel of defendant Evans, as follows:

(*Title, and Venue.*) "James E. Whitelaw, being sworn, says, that he is counsel for Jesse Evans, one of the above-named defendants, and knows that he is a resident of the state of Kansas; that the said Jesse Evans has bought and entered a domicile and improved a homestead in Barbour county, Kansas, and is now in the state of Texas for the purpose of bringing his family into and permanently residing in said state of Kansas."

There are some affidavits more or less clearly tending to show an intention on the part of Evans to remove to Kansas; but that it was the *intention* merely, not as yet carried into effect, is shown. Now in order to accomplish a change of residence, there must be not only the intention to change, but the fact of removal. Neither is sufficient without the other. (*Ballinger v. Lantier*, 15 Kas. 608.) Hence the attachment should have been sustained as to Evans upon the ground of non-residence.

Upon the other charge, which affects both defendants, the plaintiff's case is contained in the affidavit quoted. The defendants file the affidavit of eleven persons showing acquaintance with defendants, and stating positively that defendants have no intention of removing their property, or any part thereof—the affidavit of nine other parties, substantially corroborating these statements—and the affidavit of still four

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others, tending to show a financial standing sufficient to preclude the idea of any desire or attempt to escape responsibility by a disposition of property. We cannot see that there is such a clear preponderance, if indeed there be any, as would justify a reversal of the ruling of the court in this respect.

The case will therefore be remanded, with instructions to sustain the motion and vacate the attachment so far as the defendant Nelson is concerned, and to overrule it as to the other defendant. The costs of this court will be divided.

All the Justices concurring.

B. F. HUDSON v. H. C. SOLOMON.

1. ELECTION; EVIDENCE; *Ballots Cast*; *Official Canvass*. As between the ballots cast at an election, and a canvass of those ballots by the election officers, the former are the primary, the controlling evidence.
2. ——— In order to continue the ballots controlling as evidence, it must appear that they have been preserved in the manner and by the officers prescribed in the statute, and that while in such custody they have not been so exposed to the reach of unauthorized persons as to afford a reasonable probability of their having been changed or tampered with. [*State v. Marston*, 6-524; *State v. Stevens*, 23-458; *Jones v. Caldwell*, 21-189; *Dorey v. Lynn*, 31-758.]

Original Proceedings in Quo Warranto.

ACTION in the nature of *quo warranto*, brought originally in this court by *Hudson*, as plaintiff, to try the title to the office of city attorney of the city of Atchison, held and occupied by *Solomon*, defendant. An election was held in said city for city officers on the 8d of April 1877. Plaintiff and defendant were opposing candidates for city attorney. The city council, sitting as a board of canvassers, canvassed the returns from the several wards, and declared the result for city attorney as follows:

	First Ward.	Second W.	Third W.	Fourth W.	TOTALS.
B. F. HUDSON,.....	90	120	197	254	661
H. C. SOLOMON,.....	137	100	200	244	681

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The plaintiff in his petition alleges that he received 148 votes, and defendant 100 votes, in the *second ward*; that the judges and clerks of election through mistake, misconduct, or fraud, failed, refused, and neglected to count or record 28 votes legally and lawfully cast for said plaintiff for said office, and that said judges and clerks of election in said second ward through mistake, misconduct, or fraud, reported and returned that plaintiff received only 120 votes in said ward, when in truth and in fact he received in said ward 148 votes, and was duly and legally elected to said office of city attorney, and is duly entitled to said office, and authorized to discharge the duties of and to hold and enjoy the same, by reason of said election; that the defendant, well knowing the fact, wrongfully and unlawfully obtained the certificate of election to said office, usurped and intruded himself into said office, and ever since the 7th of April 1877, has unlawfully held, used and exercised the said office, and the franchises and privileges thereto belonging. Plaintiff demanded that judgment of ouster from said office be pronounced against the defendant, and that plaintiff be adjudged to be entitled thereto, and put into possession thereof. Judgment was also asked in favor of plaintiff and against defendant for \$1,000 damages. The defendant answered, denying all fraud, mistake, and misconduct on the part of the election officers, and in the count and return of the vote in said second ward, alleging that plaintiff received only 120 votes therein, and not 148 votes, as claimed. It was admitted that there were only four wards and voting precincts in the city, and that the returns from the first, third, and fourth wards were correct. Defendant claimed to be elected by a majority of 20 votes. Defendant's answer also alleges, that after the election the ballots were taken, exposed and altered by unauthorized persons, and carelessly left open in the office of the city clerk of said city for the unauthorized inspection and manipulation of any person who might choose to change, erase, or interfere with said ballots, and by reason thereof defendant claims this court cannot go behind the count and result as certified to by the election officers. The answer then

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alleges that a certificate of election was issued to defendant, and that he qualified and entered upon the duties of said office on April 7th, and has ever since occupied and held the same. It also denies the right of plaintiff to said office, and prays judgment for defendant. By stipulation of parties, a reply to said answer was considered as being filed, denying all allegations or averments of any new matter, or any matter inconsistent with the plaintiff's petition, or set up as constituting any defense to said action, or as contradictory thereto.

A trial was had before the court, upon oral and written testimony, and the ballots cast at such election in said second ward were produced and recounted and canvassed. The count made under the direction of the court, and the material facts, are fully stated in the subjoined opinion. Elaborate briefs were filed, discussing many questions incident to the case besides those decided by the court.

Everest & Waggener, for plaintiff.

H. C. Solomon, and *Wm. R. Smith*, for defendant.

The opinion of the court was delivered by

BREWER, J.: The question in this case is as to the number of votes received by the two gentlemen, parties to this action, respectively, in the second ward of the city of Atchison, at the last city election, for the office of city attorney. The canvass as made by the judges and clerks of election on the night of the election gave Mr. Hudson one hundred and twenty, and Mr. Solomon one hundred votes. This, in conjunction with the votes in the other wards, elected Mr. Solomon by twenty majority. A recount of the ballots made in the presence and under the direction of the justices of this court gave Mr. Hudson 143 and Mr. Solomon 100 votes. In addition, there was found one ballot probably intended for Mr. Hudson, but which owing to the manner in which different parts of it were pinned together was not counted by us as cast for either. This would elect Mr. Hudson.

The question then is, which should obtain—the canvass of

the election officers, or the result as shown by the ballots themselves? It is a primary rule of elections, that the ballots constitute the best, the primary evidence, of the intentions and choice of the voters. *State ex rel. v. Judge, &c.*, 13 Ala. 805; *People ex rel. v. Holden*, 28 Cal. 123; McCrary on Elections, §§ 291, 439; Cooley's Const. Lim., p. 625. In the case from California, the court uses this language: "Intrinsically considered, it must be conceded that the ballots themselves are more reliable, and therefore better evidence than a mere summary from them. Into the latter, errors may find their way; but with the former this cannot happen. The relation between the two is at least analagous to that of primary and secondary evidence." A canvass is but a count of the ballots, a convenient and expeditious method of determining the choice of the people as disclosed by the ballots, and therefore but secondary evidence. The necessities of the case make it *prima facie* evidence, but unless expressly so declared by statute, it is never conclusive. *The State ex rel. v. Marston*, 6 Kas. 524; *Russell v. The State*, 11 Kas. 308. As between therefore the ballots themselves, and a canvass of the ballots, the ballots are controlling. This is of course upon the supposition that we have before us the very ballots that were cast by the voters. And this presents the difficult question in this case. For, as under the manner of our elections there is nothing upon the face of a ballot to identify it as cast by any particular voter, or even as actually used at any election, nothing to distinguish one ballot from another of those cast by the members of the same party, as no file-mark or other mark is made in the canvass or otherwise after the election upon any ballot by which its actual use at such election may thereafter be established, and as at any election there is always a large surplus of unused ballots, it is evident that if opportunity were offered ballots might be withdrawn from the box and others substituted with but little chance of detection. Thus in the case before us, if there was but a single officer to elect, and but a single name on the ballot, how easily could one having access to the box throw in twenty-three or four additional ballots, and thus bring about

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the very difference that appears before us now? And who could thereafter tell which were actually voted, and which subsequently thrown in? The ballot then upon its face containing no marks of identification, we must look *aliunde* for evidence of the identity of those offered and counted before us with those actually cast at the election. And this evidence we find in the testimony as to the manner in which the ballots have been preserved, a comparison of the canvass made as to all the officers voted for at that election with the result as shown by the ballots, and certain other circumstantial evidence.

And first, as to the preservation of the ballots. It appears that at the night of the election, as the ballots were called off they were strung on a thread, as prescribed by the statute; (Gen. Stat., p. 403, § 20;) that this was done publicly by the judges, in presence of several spectators; that after the canvass thus publicly made had been completed, the ballots as strung together were sealed up in an envelope, duly marked and directed to the city clerk, and with the poll-books deposited in the ballot-box. This box had two covers—one an inside sliding cover, fastened by a screw, and the other an outside lifting cover, fastened by a padlock. Both covers were fastened, and the box and key entrusted to Mr. N. A. Maher, one of the judges of election, to be by him delivered to the city clerk. It appears that after the canvass, which was finished late in the evening, he carried the box with him to the office of "The Champion," where were gathered quite a number of persons to hear the election news. After tarrying there awhile he went home, taking the box with him. He kept the box in his house until the afternoon of the next day, when he carried it to the office of the city clerk, and delivered it to him. While Mr. Maher had it in his house it was deposited in his sleeping-room, and the key carried in his pocket. Mr. Barker, who was city clerk at the time, retained it in his office and custody for six days, when he was succeeded in office by the present incumbent, Mr. White, by whom it has since been kept, part of the time in his office, and part of the time in the vaults of a bank. Four days after Mr.

White received it, he placed some tape around the box, and sealed it at the corners, and the seals were unbroken when brought into our presence. It thus appears, that from the time of the canvass to that of our examination the ballots were only in the custody of three persons, each of whom testifies that they were not handled by any one while in his custody. It appears also, that the box in which were these ballots was itself unlocked and opened but four times, and then only for the purpose of taking out the poll-books. Now unless we impute to some one of these three parties intentional wrong in opening or permitting to be opened the box, and changing or permitting to be changed the ballots, and in willful false swearing upon this trial—and there is not the least foundation for such an imputation—it would seem that there could be little doubt that the identical ballots cast at that election have been preserved, and preserved unaltered, and were those examined by us. But it is said that there were opportunities for reaching and opening this box, and changing the ballots; that this might have been done at the “Champion” office, at the house of Mr. Maher, or in the city clerk’s office prior to the sealing of the box by Mr. White. It is true, there is a possibility of such a thing; but is there any probability of it? Take the “Champion” office first, and see what must be assumed. This was the same night, and immediately after the canvass. It must be assumed that some one had a motive. This implies knowledge of the result of the canvass in the four wards, and of the number of ballots that must be changed. It must be assumed also, that the party having motive had knowledge of the presence of the judge of the second-ward election, with the box and ballots, in the “Champion” office, and had possession of a key fitting the lock of the box—that he could take the box off from the desk of Col. Martin, upon which it was placed by Mr. Maher, in the presence of Mr. Maher and a large number of parties eager about election matters, that he could take the box out of the room, unlock it, make the changes, and return it to its place upon the desk, and all this without detection and ex-

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posure. This is so near the impossible as to be of little moment. Perhaps the improbability may not be so striking as to the other places named, but the opportunity afforded was so slight, that it seems almost like trifling with language to speak of it as an opportunity.

But beyond the direct testimony as to the manner of keeping of the box and ballots, there is indirect evidence of value as to the identity of the ballots. The testimony shows that they were strung on a thread, and then placed in a sealed envelope. They were so found by us. It also shows that the straight republican tickets were counted first, then the straight democratic, and then the scratched. And so we found the ballots arranged on the thread. Again, there were several offices to be filled at that election, and each ballot had the names of candidates for the respective offices. So we had a count made of the votes cast for all, so as to compare the result with the canvass. We found the proper number of ballots in the box, so that if any had been put in an equal number had been taken out. For mayor, the canvass gave Mr. Downs 282 votes; our count, 280. For police judge, the canvass gave A. Spalding 164, and G. Scoville 79 votes; our count the same. For marshal, the canvass gave Tofte 180, and Dobson 111 votes; our count, Tofte 129, and Dobson 109. For treasurer of board of education, the canvass gave A. H. Lanphear 285, and our count 286 votes. For member of the board of education, the canvass gave A. F. Martin 240, and our count 235 votes. For city treasurer, the canvass gave Wm. Bowman 142 votes, and J. M. Lindley 82; our count, Bowman 168, and Lindley 82. So that except as to Bowman for treasurer, and Hudson for city attorney, the canvass and our count substantially agreed. If any change therefore had been made in the ballots as to plaintiff, it must have been so made as not to increase the total number of ballots, as to preserve to Mr. Solomon the same number of votes, to add 23 votes to Mr. Hudson, and leave unchanged the votes for all the other officers except one of the candidates for city treasurer. The difficulty of accomplishing this can only be fully appreciated by one who sits

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down with 240 ballots, nearly half of which are scratched, and attempts to make the changes.

But again, it will be perceived that the only substantial differences between the canvass and our count are in the votes cast for plaintiff and for Mr. Bowman. Now the testimony, taken by deposition long before our count, shows that at the time of the canvass there was some discrepancy between the two clerks in tallying the votes for these officers, and that it was claimed that Mr. Tibbals, one of the clerks, had tallied too many votes for these gentlemen, and an attempt was made to correct his tally-sheets. An examination of the tally-sheet kept by Mr. Tibbals shows that he tallied 155 votes for Mr. Hudson, and 157 for Mr. Bowman; but the tallies made by the other clerk, Mr. O'Keefe, were accepted as correct, and Mr. Tibbals' sheet corrected accordingly. It is not pretended that the correction was made by a recount of the votes, but simply that the tallies were fixed up to the satisfaction of the judges. Over the tallies for these two gentlemen (as they appear on the sheet of Mr. O'Keefe) appears a series of dots, corroborating the testimony that at the time of the canvass there was some trouble about the tallies for these officers. All this testimony taken together forces the conviction on our minds that the ballots have not been changed or tampered with. It is true, there is testimony tending in the other direction, the strongest perhaps being that of a disinterested party, who was present at the night of the canvass and kept a tally of the votes for three of the offices, including that of city attorney, as called off by the judges, and testifies that his tally corresponded with the result as shown by Mr. O'Keefe's sheet, and as returned by the canvassing officers. But it is not to be presumed that an outsider, having no interest in the matter, would be as careful as the sworn officers; and the fact is established by the testimony, and patent from the tally-sheets, that there was a discrepancy between the two clerks as to these two offices; and it is undisputed that the discrepancy was attempted to be corrected without a recount. Other testimony of the judges and clerks, that they made an honest canvass, while it is good and

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satisfactory evidence of the honesty of their intentions, does not preclude the possibility of a mistake, a mistake which their own tally-sheets show was made by one or the other of their clerks, and which the count made by us shows resulted to the prejudice of the plaintiff's rights.

Some days after the trial had been completed, and the case submitted to us for decision, an application was made by defendant to reopen the trial for the admission of further testimony. The application was based upon these facts: The poll-books show the casting of 245 votes. It appeared that one ballot was rejected. Our count gave to the two candidates 243 votes. Now the defendant files affidavits to the effect, that several ballots were cast upon which there was no name for city attorney. Such testimony might be very important. If for instance it could be clearly established that five ballots were cast with the name of no one thereon for the office of city attorney, the inference would seem irresistible, that the ballots before us were not the same as those canvassed, or at least not untampered with. After reflection, and with some hesitation, we feel constrained to overrule the application. It was not claimed as a right, but was an appeal to the discretion of the court, and was refused principally for these reasons. The plaintiff's petition distinctly gave notice of this question. It conceded that 100 votes were cast for Mr. Solomon, and alleged that 148 votes were cast for Mr. Hudson. So that it would plainly tend to defeat the plaintiff's case to show that there were several ballots upon which was the name of neither candidate, and reference was made to this fact in the testimony. Now, there is nothing in the affidavits to show any good reason why this testimony was not introduced upon the trial. Some of the gentlemen whose affidavits were filed were witnesses already sworn and examined. The defendant is too good a lawyer not to have seen the value of such testimony. The manner in which he has conducted this case shows that he thoroughly understands the strong points in his favor, and that he has prepared his defense with care and industry. Again, to open the case for new testimony would naturally

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work delay, and already half the term of office has expired. Further delay should only be granted upon the clearest showing. And again, the testimony offered is of a character which, conceding the utmost good faith, and entire honesty of the affiants, our knowledge of elections, and the manner of conducting them, satisfies us is very liable to be weakened if not entirely overthrown upon cross-examination.

We have given to this case more attention than perhaps the importance of the office justifies. The contest is about a city office, of small salary, short term, and not the highest importance. It is a contest which we think ought to have been commenced and terminated in the district court. But having been brought in this court, it has given us an occasion for examination of some matters of importance in reference to elections, and enables us to lay down these as cardinal rules governing elections and election contests:

1st. As between the ballots cast at an election, and a canvass of these ballots by the election officers, the former are the primary, the controlling evidence.

2d. In order to continue the ballots controlling as evidence, it must appear that they have been preserved in the manner and by the officers prescribed in the statute, and that while in such custody they have not been so exposed to the reach of unauthorized persons as to afford a reasonable probability of their having been changed or tampered with.

Judgment will be entered in favor of the plaintiff for the possession of the office, and \$473, the amount of salary and fees admitted to have been received by the defendant as city attorney.

All the Justices concurring

C. W. MOORE v. E. R. CUTLER.

APPRAISEMENT OF LANDS, Sold Under Order of Sale, or Execution. Where real estate is attached in an action instituted upon a promissory note containing no waiver of appraisement, and neither the judgment nor the order of sale provides that such real estate shall be sold without appraisement, and the proceedings of the officer making the sale fail to show any appraisement of the property, *held*, that the district court erred in confirming a sale of real estate sold under such order of sale without any valuation as required by statute.

Error from Chautauqua District Court.

ALL the facts of this case are stated in the subjoined opinion. Section 453 of the civil code, Gen. Stat. 716, provides for the appraisement of lands and tenements taken in execution; and §455 provides that no such property shall be sold for less than two-thirds of the appraised value. But these provisions are now subject to the provisions of ch. 66, laws of 1872, page 105. This latter act was passed and approved March 1st 1872, and provides that where the words "appraisement waived," or words of similar import, are inserted in any mortgage, bond, note, bill, or written contract thereafter made, the court rendering judgment thereon shall order as part of the judgment that the same and any process thereon shall be enforced, and that lands and tenements may be sold thereunder, without appraisement, etc. *Moore's* property was sold at the suit of *Cutler*, without appraisement. Such sale was confirmed at the March Term 1877 of the district court. From the order of confirmation *Moore* appeals, and brings the case here.

S. P. Moore, for plaintiff in error.

The opinion of the court was delivered by

HORTON, C. J.: The question presented in this case is, whether the district court committed error in confirming the sale of real estate had in the action. An examination of the

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order of sale shows, that said order was issued August 15th 1876, on a judgment rendered 3d November 1875, and that the property sold consisted of certain real estate, described as lot No. 4, in block No. 44, with all the improvements thereon, situated in the town of Peru, Chautauqua county; that nothing was stated in the order as to any waiver of appraisement. The proceedings of the officer do not purport anywhere to show that any appraisement of the real estate was had, nor that said property was sold for two-thirds of any appraised value. If we go further, and inspect the judgment in the case, we ascertain that the action was upon a promissory note, of the date of February 1st 1874, and that there was no waiver of appraisement in said judgment. In the action, an order of attachment was issued, and the real estate sold was attached under said process, and ordered sold to satisfy the judgment. Upon these facts, the order of the court confirming the said sale of real estate was erroneous. The proceedings of the officer were not in conformity with the law. In the absence of a waiver of appraisement in the written contract on which judgment is rendered, and from the journal entry of such judgment, the statute prescribes that the officer levying an execution upon lands and tenements shall have the same valued by three disinterested householders of the county where the lands are situate, and that no such property shall be sold for less than two-thirds of the value returned in the inquest. This law is as applicable to orders of sales as to executions, and therefore the order of confirmation in the case will be reversed.

All the Justices concurring.

THE STATE OF KANSAS V. H. D. GREWELL.

INFORMATION; Trespass on School Lands; Necessary Averments. An information attempting to charge an offense under section 26 of chapter 122, Laws of 1876, p. 287, to authorize a conviction of a defendant should contain an averment of the amount of damages committed, or the value of the property injured. [*State v. Armell*, 8-288; *Manville v. Feller*, 19-255; *Reisner v. U. D. & R. R. Co.*, 27-390; *State v. Crawford*, 28-744; *Sullivan v. Davis*, 29-30.]

Appeal from Osborne District Court.

INFORMATION filed in the district court in April 1877, charging *Grewell* with cutting timber on school lands in violation of sec. 26 of art. 14, ch. 122, Laws of 1876, (p. 287.) Trial at April Term 1877. The jury found the defendant guilty of cutting and taking away one load of wood. Whereupon he moved the court to arrest the judgment for the reasons, 1st, that the county attorney has no authority to present an information for said offense; 2d, that the facts stated in the information do not constitute a public offense; 3d, that the verdict of the jury does not find any amount of damages. This motion was sustained by the court, and *The State* brings the case here on appeal.

Willard Davis, Attorney General, for The State;

An information is a proper proceeding to charge the defendant with the alleged offense. The word "indictment" (in § 26, page 287, Laws of 1876,) is not used in its technical sense, but as a generic term, and means that the party may be charged with crime either by indictment of a grand jury, or by information by the county attorney. This question was raised by the first ground stated in arrest of judgment, but counsel for appellee make no point on that proposition in their brief, and I presume have abandoned it, as being of no force.

The information is as explicit and comprehensive as is required by the statute, and is sufficient. It alleges all the necessary facts to constitute the charge, and apprise the defendant

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fully of the defense charged against him, with all the certainty and particularity now required by law. (*The State v. Armell*, 8 Kas. 288.) "It is sufficient to charge the offense generally in the words of the statute." (*The State v. Watson*, 5 Blackf. 154; 8 Kas. 232.) A count which charges an offense in the language of the code is sufficient. (*Mohler v. The State*, 24 Ill. 26.) Where an offense is created by statute, an information setting forth the crime in the words of the statute is sufficient. (*Harrison v. The State*, 2 Cold., Tenn. 232.) The section of the statute in question recites certain acts, which when proven to have been committed constitute the offense, independent of damages which may have resulted from the acts. The damages are only an incident, appended for the purpose of enabling the court to fix the fine, which fine is not all, but only a part of the punishment. The damages resulting from the commission of the acts recited, are in no sense an element or ingredient of the offense or crime. If all the words of the section which follow the word "misdemeanor" had been omitted, everything necessary to constitute the misdemeanor would remain, and the defendant could be punished under § 294 of the crimes act, which provides for punishing a misdemeanor, when there is no other punishment named. The sole purpose being to enable the court to do its duty after conviction, the state during the trial would have the right to show what damages were the result of the acts charged, which constitute the crime, without any allegation of damages in the information; or this ascertainment of damages might be omitted by the state till after a verdict of guilty, then the court by the inherent powers with which it is invested could, in some proper mode, ascertain the damages done, to enable it to fix the amount of the fine. It is never necessary to allege damages in charging a crime, where damages or value are not necessary to determine the jurisdiction or the punishment. The true rule seems to be well stated in *Whiting v. The State*, 14 Conn. 487. In the case at bar, the damages are not to be ascertained either for the purposes of jurisdiction or punishment. The punishment is not double the damages, as stated by coun-

Brief of Defendant.

sel for appellee. The order of the district court sustaining the motion in arrest of judgment should be set aside, and the cause remanded for such further proceedings.

R. G. Hays, and C. Reasoner, for defendant:

The information charges trespass upon school lands, under sec. 26, p. 287, laws of 1876, and alleges no amount of damages, or any value whatever, as the result of such alleged trespass, and herein fails to allege the facts necessary to constitute a public offense. The facts necessary to sustain a judgment must be alleged, before proof can be given, or a judgment rendered: *Pomeroy Rem.* 84; *Bishop Proc.* 505, 507. The particular statute under which the information is drawn expressly contemplates damages as an essential ingredient of the offense therein prohibited. An act which causes no damages whatever, such as stepping on the land and breaking off a riding-switch, or carrying away a curious specimen of rock, or any other harmless and innocent act, cannot become, under this section, a public offense. Criminality is the result of pecuniary injury to the land. The sole object of the statute is to protect the school fund. A fundamental principle of criminal procedure, one which lies in reason and the nature of things, no less really and fully than it does in the adjudged cases, is, that the indictment must allege whatever is necessary in order to determine the punishment sought to be inflicted. "This doctrine pervades the entire system of the adjudicated law of criminal procedure." "It is not made apparent by a single case, but by all the cases." 1 *Bishop Proc.* 77-88, 588-542, 393, 571, 578, 586; 2 *id.*, pp. 48, 177, 568, 578, 586. The offense must be charged with such a degree of certainty that the court may pronounce judgment upon conviction according to the right. (*Crim. Code*, §109, 5th sub.) The punishment is double the damages caused by the trespass; and the information alleging no damages as a predicate for proof, and none being found in the verdict, the court can pronounce no judgment. It is of necessity arrested.

It is generally sufficient to draw an information in the lan-

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guage of the statute; but in all those cases where punishment depends on damages caused, or losses inflicted, "*value*" becomes a *material averment*. It cannot be dispensed with. From the very nature of the case it enters essentially into the *idea* of an offense; 8 Ill. 293.

The opinion of the court was delivered by

HORTON, C. J.: The question to be determined in this case is, as to the sufficiency of an information purporting to charge defendant Grewell with the offense of violating the provisions of section 26 of ch. 122, laws of 1876, p. 287, relating to trespasses on school lands. The information states the offense in the words of the statute, but alleges no amount of damage, nor any value whatever, as the result of such alleged trespass. Said section 26 provides among other things, that "the person committing such trespass shall be deemed guilty of a misdemeanor, and may be indicted and fined in a sum not less than double the amount of damage proved to have been committed, and not exceeding one thousand dollars, and confined in the county jail not less than one month, and not more than six months." As the plain requirement of the statute is, that a part of the punishment to be inflicted is a fine, and as such fine cannot be less than double the amount of damage proved, said fine is to some extent measured by the proof of the damage committed by the trespass, and therefore it seems the necessities of the case demand an averment of the value of the thing injured, or the amount of the damage committed. Unless such an allegation is made, no proof of damages can be given. In the absence of such proof, no fine can be inflicted; and thus, in no event could the penalties provided by the law be adjudged against a party upon an information like the one filed in this case. This condition of things brings this case within the exception to the general rule, that it is sufficient to describe a misdemeanor created by statute in the words of the statute, if this law is to be fully enforced, as an averment of value is necessary to determine a part of the punishment. (*The State v. Armell*, 8 Kas. 288.) While the statute provides for imprison-

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ment in the county jail, as additional penalty for a violation of the statute, and thereon may be based some argument in favor of the sufficiency of the information, still, construing all of the section together, and considering the fact that the legislature clearly intended in such an action to obtain damages proportionate to the injury committed, and to accomplish this a fine not less than double the amount of damage proved, and not exceeding \$1,000, must accompany the imprisonment, we think the true construction of the law applicable to the case to be, that all informations under said section should contain an allegation of the amount of damages alleged as committed by the defendant violating the provisions of such section.

The statute contemplates damages as an essential ingredient of the acts prohibited, as it expressly states damages are to be proved. If no damages can be proven, no conviction should be allowed; and no damage can be proven, if no averment is made thereof. If no damages can be adduced upon the trial of a defendant charged with the acts prohibited by this statute, it would seem wrong, almost malicious, to institute a public prosecution; and if damages can be proven, it would be also impolitic to permit the county attorney to omit such proof, and thereby waive so much of the penalty as requires the infliction of a fine on conviction. The learned attorney general, representing the state, suggests in his brief that the "ascertainment of damages might be omitted by the state until after a verdict of guilty, then the court by the inherent powers with which it is invested, could, in some proper mode, ascertain the damages done, to enable it to fix the amount of the fine." This, to us, seems a confession of the necessity of making proof of the amount of the damage to determine the punishment; and if this much is conceded, the argument is conclusive against the sufficiency of the information. In this case the court is restricted as to its infliction of punishment; and if proof must be submitted to determine the same, a defendant has the right to have a jury pass upon that proof, and decide whether the damage is one dollar, or \$500, or nothing. Where a court may, upon a plea or verdict of guilty, pass sentence

without any proof, of course, in its discretion, it may examine witnesses, or take the statements of the counsel on either side, as means to inform itself as to the true character of the offense committed, and as to what should be the sentence, within the limitations of the law; but when a court is bound to receive proof in a case to determine the punishment, and cannot inflict the punishment until such proof is received, the information or indictment should contain the averments upon which the proof is to be submitted. In all prosecutions, the accused shall be allowed to demand the nature and cause of the accusation against him; and can it be said that a defendant was fully informed of the nature of the charge, if after being convicted upon an information like the one in controversy, the court could by its inherent powers take testimony and find, perhaps upon the evidence of the complaining witness alone, that the amount of damage committed was \$500, when such a finding must result in assessing the defendant to pay a fine of \$1,000, and committing him to jail until such fine was paid? With such a construction of the law, and such results to be obtained, could we say a defendant had had a trial by an impartial jury? We answer no. The guaranty of a trial by a jury to a person charged with a crime, is not complied with by permitting only a portion of the facts constituting the offense to be submitted to the jury, and leaving important questions, which are to be settled by proof, to be disposed of by the court in its own way, and according to its own chosen methods, regardless of the provisions of the constitution.

The order of the court arresting judgment upon the verdict will be affirmed.

All the Justices concurring.

JOHN EVERETT V. LEVI H. LUSK.

1. FINDINGS, INSUFFICIENT; *Error*. Where a case is tried by the court without a jury, and the findings of the court are not sufficient to sustain a judgment, it is error for the court to render judgment upon such findings, against a party, over his objections and exceptions. [*Benz v. Hines*, 3-390; *Rice v. Poynter*, 15-269; *Hoge v. Norton*, 22-377; *Comm'r's v. Sergeant*, 24-574; *Rathbone v. Sterling*, 25-448; *Comm'r's v. McIntosh*, 30-234, 235.]
2. EJECTMENT; *Extent of Recovery*. In an action in the nature of ejectment the plaintiff may recover any part or portion of the land which he claims, the verdict and judgment corresponding with the proof in the case. [*Benz v. Hines*, 3-390; *R. R. v. Walker*, 12-604; *R. R. v. McBratney*, 12-9; *Duffy v. Rafferty*, 15-9; *Piper v. R. R.*, 14-574; see cases cited in *Simpson v. Boring*, 16-248.]

[As to discussion, page 199, see *McAlpine v. Reicheneker*, 27-257; *Tarpenning v. Cannon*, 28-665; *Shaffer v. Weech*, 34-599.]

Error from Barton District Court.

EJECTMENT, brought by *Everett*. The facts sufficiently appear in the opinion. Second trial at September Term 1876. Judgment in favor of defendant *Lusk*, and plaintiff brings the case here.

Clayton & Clayton, for plaintiff.

The opinion of the court was delivered by

VALENTINE, J.: This was an action in the nature of ejectment, brought to recover a certain strip of land. It is admitted by the parties that the plaintiff owns the N.E. $\frac{1}{4}$ of section 9, in township 19 south, of range 14 west, in Barton county, and that the defendant owns the N.W. $\frac{1}{4}$ of section 10 in said township and range. The strip of land in controversy is a part of either one or the other of said quarter-sections, or belongs partly to one and partly to the other. It lies along the common boundary between them; and to which it belongs, or how much to one, and how much to the other, are the only questions in the case. It will therefore be seen that the only question in the case is one with respect to the boundary-line between said quarter-sections. This question depends upon

these two other questions, to-wit: Where is the exact location of the quarter-section corner between sections 9 and 10? and where is the exact location of the section corner between sections 3, 4, 9 and 10? All other questions that may be involved in the case are only incidental and subsidiary. The case was tried twice in the court below — each time by the court without a jury. On the second trial, of which we shall more particularly speak, a vast amount of evidence was introduced, all of which evidence is brought to this court; and upon this evidence the court below made certain findings, and then rendered judgment upon these findings in favor of the defendant and against the plaintiff, and plaintiff now brings the case to this court. The record of said findings and judgment, as made and rendered at said second trial, reads as follows:

“Be it remembered, that on the 11th day of September 1876, it being a regular term of this court, came the parties herein, the plaintiff by G. W. Nimocks, S. J. Day, and Joshua Clayton, his attorneys, and the defendant in person, and by C. P. Townsley, his attorney; and thereupon this cause came on for trial, and a jury having been waived by the parties, said cause was tried by the court. And the court having heard the evidence and the arguments of counsel, and being fully advised in the premises, doth find the facts and conclusions of law to be as set forth in the opinion rendered and filed by the court on this trial of this cause, which opinion is in the words and figures following, to-wit:

“After a careful reëxamination of the legal points governing this case, I am satisfied with the law as set forth in my opinion filed on the former trial, which was as follows: ‘The principles of law are—1st, section and quarter-section corners, as established by the government survey, must stand as the true corners; 2d, must be reëstablished at the identical spot where the original corner was located by the government; 3d, when this cannot be done, then they must be established according to the field-notes.’ Then, as coöperative principles of law, we state that the legal and proper evidence by which this court must be governed may be classed and ranked—1st, the original corner-stone or stake as established by the government is the primary and best evidence of the existence of the corner; 2d, in the absence of the stone or stake, etc., the next best evidence is the witnesses, or the juts, or witness-trees or objects;

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3d, in the absence of corner-stones, or witness objects, then the next best evidence is oral testimony of parties who can testify from memory as to the location or spot at which the corner was located; 4th, and last, in the absence of the corner indications, or witness objects, or any credible witness who can testify as to where the corner-stone was, then the next best evidence is the field-notes; and a presumption of law then becomes operative, viz., that in the absence of any evidence under the 1st, 2d, or 3d classes, then the corner is presumed by law to be at the distance indicated by the field-notes.

"The evidence introduced during the last trial of this cause differed somewhat from that introduced on the first trial; but conceding that the evidence establishes a government corner at some point within a circle of 20 feet at s.e. of sec. 8, t. 19, r. 14, yet the lost corner at s.e. of 9, or s.w. of 10, was not restored or reset by such government corner at the s.e. of 8. In fact, the exact locality of that government corner at s.e. of 8 is not established by the evidence. It has been established at some point within a circle of 20 feet, but whether at the point indicated by Howard, or Heizer, or Chamberlain, in their respective surveys, I am unable from the evidence to decide. Conceding that surveys had been made from s.e. of 8, to s. e. of 9, then there would necessarily be the same variation at the latter point; and from the evidence I could only find that the corner at the s.e. of 9, was somewhere within a radius of 20 feet. The plaintiff in his action in ejectment claims the land to a certain corner-stone established by surveyor Chamberlain. He must establish his legal right to all of the land lying west of the line as indicated by Chamberlain's corners, or he must fail in the action. This court from the evidence could find that the exact location of the original government corner at the s.e. of 8 is within a circle of 20 feet, which circle embraces the three corners of three different surveyors at that point, and might also find that the exact location of the original corner at s.w. of 10 is somewhere within 20 feet of the point as claimed by plaintiff; but such a finding, and a judgment based upon such finding, could not be made effective. If a writ of restitution was placed in the hands of the officer he could execute the same by saying to the plaintiff, 'I restore to you about so much land, including all of east-half of section 9, west of some unascertained point within a circle of 20 feet.' Nothing could be accomplished by such a decree, except to make confusion more confounded. The survey as made by Mr. Chamberlain makes an equitable division of the land, and gives

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symmetry to the sections. These would be weighty reasons in an equity proceeding; but all of the reasons of this kind that could be suggested, could not make a legal title. It is therefore considered, ordered, and adjudged, that the defendant go hence without day, and that he have and recover of and from the plaintiff his costs in this behalf expended."

Now the law as enunciated by the court below in the foregoing findings and conclusions, with one or two fatal exceptions which we shall hereafter mention, we think is correct. But the court has failed to fully find the facts of the case. Who can tell from the foregoing findings where the boundary line between the N. E. $\frac{1}{4}$ of section 9 and the N. W. $\frac{1}{4}$ of section 10, is? or who can tell where the quarter-section corner between sections 9 and 10, or the section corner between sections 3, 4, 9 and 10, is located? Neither said boundary-line, nor either of said corners, is mentioned in said findings. And yet the location of this boundary-line, and the location of these corners, are really the only contested questions in the case. Neither can any one tell from said findings how much of said disputed strip belongs to the plaintiff, and how much of the same belongs to the defendant. Indeed, from anything appearing in the findings, the plaintiff may own the whole of said strip. Now such defective findings will hardly sustain a judgment, and particularly a judgment against the plaintiff; and it was error for the court below to render the judgment it did render on such findings, over the objections and exceptions of the plaintiff. Such judgment could be sustained only upon a finding or findings establishing in effect that *none* of the land in controversy belongs to the plaintiff. Now the findings in this case do not establish any such thing. On the contrary, they may all be strictly true, and yet the plaintiff may be the owner of every foot of the land in controversy. And according to said findings, and the evidence in the case, the plaintiff unquestionably does own some of the land in controversy. But just how much of it he owns, we cannot tell. His claim to said strip is sustained by a survey made by Charles Chamberlain, the county surveyor of Barton county. It would seem from the evidence in the case, that the corners

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between sections 9 and 10, as originally established by the U. S. government survey, are now so obliterated and destroyed as to be wholly undiscernible and undiscoverable. And probably no evidence can now be found to show precisely where they were originally located. If any such evidence could be found, of course it would govern. Even if the evidence, with respect to any one of such corners should show merely that it was located within any given circle of definite location, the corner should be reestablished within such circle. But in all cases, where the evidence does not show definitely and precisely where the original corner was established, such corner must be reestablished by appropriate surveys. The county surveyor in this case reestablished the missing corners between sections 9 and 10. Probably he did not place them far out of the way. But his survey was not as extensive as it should have been under the circumstances in order to insure accuracy to a reasonable certainty. He should have reestablished said missing corners from all the nearest known original corners, in all directions, following section lines. And where a government survey has been made, as the government survey in this case was made, (that is, under the instructions of the commissioner of the general land-office to the surveyor general, dated Feb. 22d 1855 and June 1864, and establishing the quarter-section corners alternately with the section corners,) quarter-section corners as well as section corners are to be considered in reestablishing lost corners. According to the survey made by the county surveyor, the defendant was in possession of a strip of land belonging to the plaintiff, 88 feet wide at the north end, and 103 feet wide at the south end, and extending all the way along the east side of the said N. E. $\frac{1}{4}$ of said section 9. Now the court below says in its findings, that it "might also find that the exact location of the original corner at s. w. of 10 is somewhere within 20 feet of the point as claimed by plaintiff."

Now suppose we consider the southwest corner of section 10 as reestablished 20 feet west of where the plaintiff claims that it should be, and the northwest corner of section 10 as

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reestablished 88 feet west of where the plaintiff claims that it should be, and the quarter-section corner between sections 9 and 10 as reestablished equidistant and on a straight line between said s. w. and n. w. corners of section 10, and still the plaintiff would be entitled to a portion of said strip of land 76½ feet wide at the south end and running to a point at the north end. The court below seems to have decided this case upon the erroneous theory that the plaintiff must recover all he claimed, or nothing. The court in its findings says:

"The plaintiff in his action in ejectment claims the land to a certain corner-stone established by surveyor Chamberlain. He must establish his legal right to all of the land lying west or the line as indicated by Chamberlain's corners, or he must fail in the action. This court * * * might also find that the exact location of the original corner at s. w. of 10 is somewhere within twenty feet of the point as claimed by plaintiff; but such a finding, and a judgment based upon such finding, could not be made effective. If a writ of restitution was placed in the hands of the officer he could execute the same by saying to plaintiff, 'I restore to you about so much land, including all of east-half of section 9, west of some unascertained point within a circle of 20 feet.' Nothing could be accomplished by such a decree, except to make confusion more confounded."

We think the court below committed error in holding that the plaintiff must recover all the land he claimed; or nothing. The plaintiff may in an action of this kind recover any part or portion of what he claims. (*Benz v. Hines*, 3 Kas. 390; *McArthur v. Porter*, 6 Peters, 205; Tyler on Ejectment, 580; 5 U. S. Dig., first series, 208 to 218, and cases there cited.) The verdict and judgment should in all cases correspond with the proof; and the plaintiff should be allowed in all cases to recover just so much of what he claims as the proof shows that he is entitled to recover. Of course, he would not be allowed to recover anything not claimed by him.

The judgment of the court below will be reversed, and cause remanded for a new trial.

All the Justices concurring.

DANIEL A. HANSON v. ANDREW LAWSON.

1. **JUSTICE OF THE PEACE; Jurisdiction; Actions for the Recovery of Money Only.** A justice of the peace has original jurisdiction of the subject-matter of an action commenced before him to recover damages for a breach of a personal contract to cut and reap certain rye and wheat, where the amount claimed does not exceed three hundred dollars.
2. **EVIDENCE; Damages on Breach of Contract; Market-Value.** In an action brought by A. against B. to recover damages for the failure of B. to cut and reap certain rye and wheat belonging to A. according to a contract between A. and B., whereby A. was greatly damaged by the loss of his grain, it is not error to allow A., on the trial, to show the worth of wheat at the county-seat of the county where the case is tried, and in which the grain was to have been cut, when such county-seat is the nearest market to where the grain grew.
3. **VERDICT—To be in Writing, and Signed.** In an action before a justice of the peace, the verdict of the jury should be in writing, and signed by the foreman of the jury. It is not necessary that all the jurors should sign their names to the verdict.

Error from Cloud District Court.

ACTION by *Lawson*, to recover damages for an alleged breach of contract. *Hanson*, defendant, removed the case from a justice's court to the district court, where, at the October Term 1876, the justice's judgment was affirmed. *Hanson* now brings the case here.

L. J. Crans, for plaintiff in error.

M. V. Jones, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: This action was originally commenced before a justice of the peace, to recover the sum of \$192 for damages resulting to Lawson for a breach of a contract on the part of Hanson in failing to cut certain rye and wheat belonging to Lawson in accordance with an agreement existing between said parties. Judgment was rendered in favor of Lawson, by the justice, and after a motion for a new trial

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was overruled, the case was taken to the district court by a petition in error; and that court having affirmed the judgment of the inferior court, the case is now here for review. The objections to the proceedings of the justice are trivial and unimportant, and none of them justify any lengthy comment.

The first complaint made is, that the justice had no jurisdiction of the subject-matter of the suit. A complete answer to this objection is contained in section 1, ch. 88, laws of 1870, p. 181, which prescribes that, "Under the limitations and restrictions herein provided, justices of the peace shall have original jurisdiction of civil actions for the recovery of money only, and to try and determine the same, where the amount claimed does not exceed three hundred dollars." An action to recover damages for a breach of personal contract, is a civil action for the recovery of money only, within the statute; and as such is not one of those which justices are prohibited from having cognizance of by the provisions of the justices act of 1868. The justice of the peace had full jurisdiction of the cause.

The second complaint made is, that the defendant in error was permitted to prove the price of wheat at a different place than where the damage occurred. Waiving the question whether a new trial can be granted by a justice on account solely of the admission of irrelevant and incompetent testimony, we think no error was committed by the justice in the admission of the evidence excepted to. To establish damages in the case, it was competent to prove the value or worth of the wheat at the place of Lawson at the time of the injury complained of. As it appeared from the answer to the question, as to the worth of wheat, that there was no market for the sale of wheat where it grew, and as Concordia—the county-seat of the county where the case was tried—was the nearest market, it was not improper for the witness to state its worth at that place. Of course, the opposing party had the right by cross-examination of the witness, and by other evidence, to prove the cost of harvesting and transporting

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the wheat to Concordia, so that the actual value of the grain at the farm of Lawson could be ascertained. Under the circumstances, the evidence was relevant, and was properly received. It tended to furnish the basis for the measure of damages in the case; and, if not directly, it indirectly tended to prove the value of the grain at the place where it was alleged that Hanson was to cut and harvest the same.

The third complaint made is, that the justice accepted the following verdict, viz.:

(*Title.*) "We the jury by our foreman find for the plaintiff, and assess his damages at \$93.50.

"NOAH H. EAVES, *Foreman.*"

And it is contended, that the form of the verdict was defective, as being the verdict of the foreman only, and not that of the jury. It is also claimed that all the jurors should have signed their names thereto. The first objection is insufficient to reverse the judgment, and the second point is not tenable. After the plaintiff in error refused, on inquiry of the justice, to have the jury polled, no material error was committed in accepting the verdict, although somewhat defective in form. The justice should have had the jury correct it before it was received as the verdict, by striking out the words, "by our foreman;" but the failure so to do, under the circumstances, was not prejudicial to the rights of plaintiff in error. The code provides that the verdict shall be written, signed by the foreman, and read to the jury, and the inquiry made whether it is their verdict. The procedure for justices in civil cases makes the provisions of the code applicable to proceedings before justices, where no special provision is made by statute; and as nothing is contained in the procedure before justices as to the form of the verdict, and the manner in which it shall be signed, it is controlled in these respects by the practice adopted in the code.

The final complaint is, that the court overruled the motion for a new trial; and under this objection an attempt is made to show that the verdict was not sustained by the evidence. As the record shows that evidence was introduced by both

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parties on the trial for and against the claim of the defendant in error, and as sufficient evidence was introduced to sustain the verdict of the jury, if uncontradicted, and as the verdict has had the approval of the justice hearing the witnesses, and of the district court upon proceedings of review, we cannot, according to the repeated decisions of this court, disturb the verdict, or set aside the judgment.

The judgment of the district court will be affirmed.

All the Justices concurring.

DAVID WANDS *et al.* v. SCHOOL DISTRICT No. 71.

1. **PIRADING; Allegations of Organisation of School District, and of Execution of Official Bond of Treasurer, Admitted unless Denied on Oath.** In an action on the official bond of the treasurer of a school district, where the petition sets forth a copy of the bond executed to the district in accordance with the statute, and contains allegations of the organization and existence of such school district under the laws of the state, and alleges also the election, qualification, and action of the principal on the bond as such treasurer, and the receipt by him of moneys belonging to the school district, and his refusal to pay the same over to his successor in office on demand, and the answer filed thereto is not verified, *held*, not error for the district court to reject all testimony showing the non-existence of the school district, and that it had been divided up and blotted out, and that such treasurer had paid over all the money received by him officially to another district, without the assent of the district of which he was treasurer, and that such treasurer had no knowledge of the organization of any such school district to which he had executed his bond.
2. **AMENDMENT, of Answer; Terms Imposed.** Where during a trial a defendant asks leave of the court to amend his answer by a verification thereof, which motion is denied by the court except upon the payment *instantly* of all the costs of the suit up to the time of such application, such requirement is not such an abuse of discretion on the part of the court as to be any ground of error demanding a reversal of the judgment in the case. [*Casterline v. Day*, 26-309; *Pierce v. Butters*, 21-125.]

Error from Crawford District Court.

ACTION by the *School District* as plaintiff, against *Wands* and his sureties, to recover money alleged to have been received by *Wands* as treasurer of said school district, and unlawfully retained by him. All the facts, and the character of the pleadings, are set forth in the opinion. The district court, at September Term 1876, gave judgment in favor of the *School District*, and defendants bring the case here on error.

Daniel Scott, for plaintiffs in error.

John T. Voss, for defendant in error.

The opinion of the court was delivered by

HORRAN, C. J.: This was an action on the official bond of the treasurer of School District No. 71, of Crawford county, to recover the sum of \$486.86 on account of moneys collected by said treasurer, which he wrongfully refused to pay over, as a faithful discharge of his duties required. The petition alleged among other things, that the said school district was a duly-organized school district under and by virtue of the laws of the state of Kansas, and as such school district was doing business under the name and number of "School District No. 71, Crawford county," and that the defendant, David Wands, was the duly-elected, qualified and acting treasurer of said School District No. 71 from the 7th of April 1873 until the 13th of August 1874, at which last-mentioned time the said Wands ceased to be treasurer of said district. The answer in the case was not verified; and on the trial an attempt was made to introduce in evidence, on the part of the plaintiffs in error, (said treasurer and his sureties,) the record of a judgment of the district court of Crawford county, rendered at the May term 1873, in a certain action then pending in said court, wherein "Union School District No. 11, of Crawford, Labette, and Neosho counties," was plaintiff, and said "School District No. 71" was defendant, to prove that all the territory claimed by said School District No. 71, except one section, had been ad-

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judged by said court to belong to said School District No. 11, and that said judgment remained unreversed; also, to prove by the county superintendent of schools for said Crawford county that said remaining section of territory claimed by School District No. 71 had been attached to an adjoining school district in said county of Crawford prior to the commencement of this action, and that "School District No. 71" had been blotted from the school maps of said Crawford county in obedience to the judgment of said court before the commencement of this suit; and to further prove, that all the money now claimed by said "School District No. 71" was the legally-assessed and collected school-tax of the territory and inhabitants of said School District No. 11, and that as such treasurer Wands had in good faith paid the sum sued for to said School District No. 11 prior to this action, having no knowledge that said money then had any other legal owner, or that School District No. 71 had any organization as a school district under the laws of Kansas. To the introduction of all of this evidence, the defendant in error objected, and the court sustained such objection, holding the offered proof inadmissible in the case. Complaint is now made of this action of the court by the plaintiffs in error. In said ruling of the district court there was no error, as under the pleadings the existence of the said School District No. 71, and the election and qualification of said Wands as the treasurer thereof, were confessed as true. (Sec. 108, civil code, Gen. Stat. 650.) The existence of such school district, as also the official position of Wands, as its treasurer, being admitted in the pleadings, and in the official bond signed by all the plaintiffs in error, it was no defense to the action to prove that the money collected by Wands as such treasurer had been paid to another school district without the assent of School District No. 71, or that such treasurer had no knowledge of the existence of said School District No. 71. The evidence presented was not in support of any issue tendered in the case, and was properly rejected.

During the trial, the plaintiffs in error moved the court for leave to amend their answer by a verification thereof, which

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was denied by the court, except upon the payment instant of all the costs of the suit up to the time of such application. Under the law, defendants have no absolute right to amend their answers whenever they may choose so to do; and as they can amend only upon leave of the court, and upon such terms as may be just, we see no abuse of discretion in the court as to the terms imposed. By the payment of the costs, the plaintiffs in error could have obtained leave to make the amendment asked; but this they refused to do, and cannot now complain because they were not permitted to verify their answer.

The other exceptions in the case referred to in the brief of counsel for plaintiffs in error are not sufficiently presented in the record for this court to take cognizance of, and hence cannot be considered.

The judgment of the district court will be affirmed.

All the Justices concurring.

HANS HANSON V. A. L. WOLCOTT.

1. **VOID JUDGMENT, May be Vacated on Motion, at any Time.** A void judgment may be vacated and set aside at any time, on motion of the defendant, without advising the court that the defendant has a valid defense to the action in which the pretended judgment is rendered. [*Bond v. Wilson*, 8-228; *Chambers v. Bridge Man'y*, 16-276; *Gapen v. Stephenson*, 17-616; *Martin v. Gray*, 19-461, 468; *Kirkwood v. Reedy*, 10-455; *Green v. McMurtry*, 20-193; *Pierce v. Butters*, 21-124, 125; *McNeill v. Edie*, 24-110; *Bank v. Sewing Society*, 28-424; *Tracy v. Green*, 29-510; *Reynolds v. Fleming*, 30-108; *Williams v. Moorehead*, 33-618.]

Error from Wyandotte District Court.

In January 1874, Wolcott commenced an action in the district court against two parties, each named *Hans Hanson*. The summons in the action was in due form against both de-

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endants, and was directed to the sheriff of Wyandotte county, whose return on said summons is as follows:

"Received this summons on the 9th of January 1874, and served the same in my county by giving to and leaving with Hans Hanson personally a true copy thereof, and by leaving at the usual place of residence of Hans Hanson a true copy thereof, on the 17th of January 1874."

Defendants having made default, judgment in favor of Wolcott and against both *Hansons* was rendered on the 9th of March 1874.

On the 8th of December 1875, "*Hans Hanson*, defendant second named in the above entitled cause," appeared "specially to contest the jurisdiction of said court over his person," and filed his motion "to set aside the judgment rendered by default on the 9th of March 1874 against this defendant," alleging that no service of summons had been made on him. On the hearing of this motion it was shown that "*Hans Hanson*, defendant first named," had resided in Wyandotte county in 1873 and 1874, and that "*Hans Hanson*, defendant second named," had not been personally served, and had never resided in Wyandotte county, but had resided at Kansas City, Mo., from July 1873, until late in the fall of that year, and then went to Wisconsin, where he remained a long time, being in Wisconsin during the whole of the month of January 1874. He made proof also, that he did not know of the existence of the suit against him, nor of said judgment, nor of any proceedings therein, until shortly before he filed his motion to set such judgment aside. Said motion was heard at the December Term 1875 of the district court. The motion was overruled and denied, and *Hanson* brings the case here on error.

Milton Campbell, for plaintiff in error.

Cobb & Alden, for defendant in error.

The opinion of the court was delivered by

HORRIN, C. J.: It is conclusively shown in this action, with-
in the decision of *Bond v. Wilson*, 8 Kas. 228, that the judgment

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of the court below was rendered against the plaintiff in error without any service of summons upon him, and that the judgment is void, as the district court had no jurisdiction of the person of said Hans Hanson. Under these circumstances, the district court erred in refusing to vacate said judgment on the motion of the plaintiff in error. Counsel for defendant in error contend, that the motion to vacate the void judgment was properly overruled, because the court below was not advised of any valid defense. It is true, that section 572 of the civil code provides that a judgment shall not be vacated on motion, or petition, until it is adjudged that there is a valid defense to the action; but this section in the nature of things does not apply to judgments rendered by a court having no jurisdiction of the person of the defendant, and where the judgment, so called, is a nullity. Independent of sections 572 and 575, the court has the power to vacate void judgments. The addition of the clause in section 575, gives no additional power to the court. It simply enunciates a power it always possessed. The previous decisions of this court fully sustain this conclusion, if any authorities need be cited in favor of so salutary a determination. *Foreman v. Carter*, 9 Kas. 674; *Chambers v. King Wrought-Iron Bridge Manufactory*, 16 Kas. 270.

The order of the district court, overruling the motion to set aside the judgment, will be reversed.

All the Justices concurring.

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Hubbard v. Cowan.

J. A. HUBBARD v. W. E. COWAN.

PRACTOR, SUPREME COURT; To Review Alleged Errors, Record Must be Full and Complete. H. was declared elected to the office of county commissioner for one of the districts of Cherokee county. O. contested his election before a court of contest of that county, and on the trial thereof, the court of contest decided in favor of O. the contestant and against H. the contestee. Afterward H. attempted to have the proceedings of the court reviewed by proceedings in error in the district court of said county. The district court affirmed the judgment of the court of contest. H. brings the case to the supreme court on error, to reverse the action of the district court, but fails to show *by the record* that any petition in error was filed in the district court, and there is nothing in the record to inform this court upon what assignments of error, if any, the district court acted. *Held*, that the supreme court cannot adjudge that the district court committed error in the case. [*George v. Hutton*, 2-333, 337; *Swank v. Holland*, 6-144; *Ephraim v. Garlick*, 10-280; *Burns v. Burgett*, 19-162; *Keeling v. Kuhn*, 19-441; *Martin v. Graham*, 20-304.]

Error from Cherokee District Court.

HUBBARD, as plaintiff in error, brings this case here. All necessary facts and proceedings are sufficiently stated in the subjoined opinion.

John R. Ritter, for plaintiff in error.

Hallowell & Anderson, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: At the election held on November 2d 1875, J. A. Hubbard and W. E. Cowan were candidates for the office of county commissioner for the third district in Cherokee county. Hubbard was declared elected, and Cowan contested the election. Upon a trial before the probate judge and two disinterested persons, constituting a court for the trial of said contest, judgment was rendered in favor of Cowan, contestant, and against Hubbard, the contestee. From this judgment, we suppose from the briefs filed, and from the record presented, that an attempt was made in the district court, at the April term 1876, to review the proceedings of said court of

Opinion of the Court.

contest on the application of Hubbard. In what manner this review was attempted, or upon what grounds, if any, the action of the court of contest was challenged, we are not informed, and cannot ascertain from the record. There is nothing before us to show that any petition in error was ever filed in the district court. A copy of the proceedings of the court of contest seems to have been filed in the district court, and the latter court seems to have affirmed the proceedings of that court; but no application or petition in error filed or presented to the district court is preserved in the record, and if any was filed it has been omitted from the proceedings certified to us. An attempt is now made by Hubbard to have the action of the district court reviewed and its judgment reversed. Unfortunately for the plaintiff in error, we have nothing here to warrant us to interfere in the case. We cannot tell upon what the district court acted, if the record brought to us is not complete. If it is complete, as the clerk of the district court certifies, then as the attention of the district court was not called to any alleged errors in the court of contest by any petition in error, and as no proper proceedings were filed to review the judgment of that court, the district court committed no error prejudicial to said plaintiff in error in affirming its action. Upon the record presented to us, of necessity the judgment of the district court must be affirmed.

All the Justices concurring.

J. M. DICKSON V. ANNA RANDAL.

1. **JURISDICTION; Appearance to the Merits; Appeal.** Where a defendant in a replevin action pending before a justice of the peace appears on the return-day of the summons served upon him in the case, and obtains an adjournment of the trial to a future time on his application, and on the trial thereafter before such justice judgment is rendered against the defendant in said action, and such defendant takes the case on appeal to the district court, and the case is duly docketed there for trial, the district court commits no error in overruling a motion made by such defendant to dismiss the action on the ground that the justice before whom the case was tried had no jurisdiction because no sufficient replevin bond and affidavit had been filed with him at the institution of the suit. [*Casey v. Kilgore*, 15-478; *Haas v. Lees*, 18-449; *Shuster v. Finan*, 19-114; *Hodgin v. Barton*, 23-741; *Pierce v. Myers*, 28-364; *Comm'r's v. Heed*, 33-37.]
 2. **MARRIED WOMEN; Purchases by Wife from Her Husband.** Under our statutes, a married woman who purchases personal property from her husband, or other person, in good faith, and for a good and sufficient consideration, is the owner of the property, and may maintain in her own name an action of replevin therefor against an officer who levies on the same under an execution to satisfy her husband's debt. (*Going v. Orns*, 8 Kas. 85, cited, and followed.) [*Furrow v. Chapin*, 13-107; *Miner v. Pearson*, 16-28; *Faddis v. Woollomes*, 10-57; *Sproul v. Bank*, 22-339; *Horder v. Horder*, 28-392; *Bricker v. Ledbetter*, 28-271; *Parker v. Bates*, 29-599; *Bailey v. Mfg. Co.*, 32-82.]
 3. **REPLEVIN; When Demand Not Necessary.** Where a constable under an execution against the property of A., levies upon and seizes the property of B. and takes the same into his possession without the authority or knowledge of B., and asserts a claim to the property by virtue of the process in his hands inconsistent with the owner's right of property and right of possession, B. can commence an action of replevin for the recovery of the same without making any demand of the officer therefor. [*Mayberry v. Kelley*, 1-118, 119, 120; *Shoemaker v. Simpson*, 16-43; *Stone v. Bird*, 16-489; *Meizell v. Kirkpatrick*, 33-295.]
- [See, in reference to discussion on page 214, *Mayberry v. Kelley*, 1-117; *Topeka v. Tuttle*, 5-429; *Douglas v. Wolf*, 6-92; *Ins. Co. v. Berry*, 8-160.]

Error from Nemaha District Court.

Two ACTIONS of replevin were brought against *Dickson*, a constable—one by *Anna Randal*, and the other by *M. B. Casey*. Both cases were tried together, at the May Term 1876 of the district court. Verdicts and judgments for plaintiffs, and

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Dickson brings the cases here. The facts and proceedings are stated in the opinion.

Joseph Sharpe, for plaintiff in error.

Simon Conwell, for defendants in error.

The opinion of the court was delivered by

HORTON, C.J.: On January 18th 1876, Anna Randal and B. M. Casey commenced their separate actions in replevin against Dickson, before a justice of the peace of Nemaha county, to obtain the possession of two calves, levied upon by Dickson, as constable, under an execution in his hands issued upon a judgment against J. H. Randal in favor of Wolfley, Morris & Co. The calves were only worth \$10 each. On the return-day of the two summonses the said Dickson appeared in each case before the justice and obtained an adjournment of the trials to February 1st. Upon judgments being rendered in the cases before the justice against plaintiff in error, he appealed both actions to the district court, and after the causes had been duly docketed there for trial, he moved

1. Appearance;
jurisdiction.

the dismissal of the actions on the ground that the justice before whom they were tried had no jurisdiction, as sufficient bonds and affidavits were not filed with him at the commencement of the cases. The objections came too late, and the district court committed no error in overruling the motions. *Haas v. Lees*, 18 Kas. 449; *Shuster v. Finan*, ante, 115.

After the motions to dismiss had been overruled, with the consent of all parties both cases were tried at the same time and by the same jury. Verdicts and judgments

2. Married
women; sales
by husband
to wife.

were again rendered against the plaintiff in error; and he now complains of the instructions given by the court, and of the refusal of the court to charge the jury as prayed for by him. The instructions objected to were as follows:

"1st. A married woman can hold property separate and apart from her husband, and the same is not subject to the payment of his debts; and she may purchase the same from her husband, or any one else she may choose.

"2d. A married woman in this state has the same right to buy, sell, exchange, and in any way to dispose of or receive property by sale or gift from her husband, or other person, that a man has, so the sale is made in good faith."

These instructions, except as to the right of a married woman to receive a gift from her husband, are in accordance with the statute, and the decisions of this court: Secs. 1 and 2, ch. 62, Gen. Stat. 1868, p. 568; *Going v. Orns*, 8 Kas. 85; *Faddis v. Woolomes*, 10 Kas. 56; *Furrow v. Chapin*, 13 Kas. 107; *Monroe v. May*, 9 Kas. 466; *Shellabarger v. Nafus*, 15 Kas. 547. Waiving the question whether, independent of the statute, the husband, when out of debt, could not have given a calf to his wife, freed from the claims of his subsequent creditors, in this case the introduction of the word "gift" in the last instruction could not have misled the jury. It seems to have been incidentally, almost accidentally, used, and could not have made any impression on the jury under the issues. The wife did not claim the property by gift from her husband; and the evidence presented by her tended to show that she sold geese, ducks, and chickens to purchase of one Allen a cow from which came the calf claimed by her.

The instructions refused were properly rejected. The first one was clearly in opposition to the statute of the state, and to the construction thereof by this court. It was substantially to the import, that a married woman cannot take title to personal property by sale, or exchange, from her husband during coverture. Such is not the law in Kansas, and we are surprised that such doctrine should be asserted by a practitioner of this court at this late day. If the instruction had omitted all reference to acquiring title by the wife by sale and exchange, a different question would be presented than the one we are now called upon to decide. The second instruction refused was a partial attempt to produce section 8, Gen. Stat. 504; but the section was incorrectly copied. The counsel for the plaintiff is in error in assuming the instruction was a transcript of the law, as the fact is, by omitting therefrom the word *actual*, and inserting *immediate*, the instruction was in di-

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rect conflict with the statute. As asked, the instruction was improper. An instruction must be good as asked, or it is not error to refuse it. This principle is alone a sufficient reason for rejecting both of the above-mentioned instructions presented to the district court by plaintiff in error.

The third instruction rejected was in reference to a demand being necessary in the cases before the actions of replevin could be maintained. No demand was requisite.

a. Replevin;
demand.

The calves were wrongfully taken by the constable, without the authority or knowledge of the owners, and the constable asserted a claim to the property by virtue of his legal process inconsistent with the owners' rights of property and possession. The constable had no right, writ, or authority to seize the property of either Anna Randal, or M. B. Casey. Neither of these parties were bound in law to take any notice of executions in his hands against other persons; nor were they bound to know that the property was taken under any legal process. Both parties had the right to sue for the possession of the calves without alleging any demand, or proving one. *Shoemaker v. Simpson*, 16 Kas. 43; *Stone v. Bird*, id. 488.

As to the allegation that the verdicts were against the weight of evidence, we need only answer, that as there was direct and positive evidence introduced showing that the property claimed by each defendant in error belonged to such party, which if uncontradicted, was sufficient to support the verdicts, we cannot now interfere.

The judgments of the district court will be affirmed.

All the Justices concurring.

M. D. FESSLER v. M. B. HAAS & Co.

1. **SETTLER ON PUBLIC LANDS; Interest, Subject to Attachment.** Where an attachment is levied upon lots in a town, and the buildings thereon, a motion to discharge the attachment will not be sustained upon the ground, as shown by affidavits, that the town site was public lands of the United States and had not yet been proved up upon by the probate judge of the county in trust for the occupants. [*Foster v. Brost*, 11-351; *Lapham v. Head*, 21-338; *Reasoner v. Markley*, 25-688; *Sutphen v. Sutphen*, 30-510.]
2. **HOMESTEAD; Abandonment.** Testimony showing that a husband deserted his family in this state and took up his residence in another state, and that thereafter the wife removed from the residence upon particular lots or lands occupied by herself and family at the time of her husband's leaving, onto other lands which she preëmpted as and for a homestead, and that subsequently to such removal and attempt to secure a homestead for herself she removes with her children from this state and takes up her residence in the state to which her husband had gone and still remained, held sufficient to show an abandonment by the husband of his homestead on the lots and lands first mentioned.

Error from Osborne District Court.

HAAS & Co. sued *Fessler*, and obtained an order of attachment which was levied on certain property. *Fessler* moved to dissolve the attachment. The district court, at April Term 1876, overruled said motion, and *Fessler* brings the case here on error. The facts and proceedings are stated in the opinion.

A. J. Banta, for plaintiff in error.

R. G. Hays, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: Proceedings in attachment. The ground of the attachment was, the non-residence of the defendant. Service was sought by publication. Defendant appeared specially, and moved to set aside the attachment on several grounds. The motion was overruled, and judgment, and order of sale of attached property, entered. Of these the defendant complains, and brings the record here. He claims that the property attached was at the time the property of the United States, and

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therefore not subject to attachment. It consisted of two lots in Osborne City, and the improvements. Two affidavits were filed, that the improvements were made under the laws of congress respecting town sites, and that the town site had not been proved up upon by the probate judge of the county in trust for the occupants thereon. It was not pretended that Fessler had no interest in these lots and the buildings thereon, nor that he did not own the improvements. Indeed, another of the grounds presented for setting aside the attachment was that the property was Fessler's homestead. The two claims seem a little inconsistent. One, that Fessler did not own the property, and therefore there was nothing to attach; and the other, that it was exempt from attachment because it was his homestead.

It seems to us, under our statutes respecting contracts for the sale or purchase of public lands and conveyances of improvements upon such lands, (Gen. Stat., p. 184, §§ 9 and 10,) and the laws of the United States respecting the proving up of town sites for the benefit of the occupants, that it must be held that Fessler had sufficient interest in the property to be reached by the process of the courts, and to sustain the attachment. By those sections, his contracts and conveyances as to such property would be good. If his voluntary conveyance is good, why may not an involuntary conveyance be sustained? If he owned nothing, he has lost nothing.

A second claim is, that the property was occupied as a homestead by the family of Fessler, and therefore exempt. The testimony abundantly supports the finding of the court against this claim. The only testimony in favor of it was the affidavit of Mrs. Fessler, that it was so occupied and that any absence therefrom was only temporary. As against this, was the affidavit of the plaintiffs' attorney, that Fessler was a non-resident; the affidavits of two witnesses, showing that one Dr. Gibboney was in the actual occupation of the premises, that M. D. Fessler had left the state some months before, and gone to Missouri, and that Mrs.

1. Interest of settler on town site.

2. Homestead claim; abandonment.

Stewart v. Waite.

Fessler stated that her husband had deserted her, and that she had sent her children to her own mother because of such desertion, and that she thereafter moved onto a tract of land for a preëmption, and then, prior to the attachment, went to Missouri, taking all her household goods, and returning some months thereafter, and a short time prior to the hearing of the motion, and without her children, stated that she only intended to stay until after the settlement of this case, and then intended to return to Missouri. Upon this testimony we think the ruling of the court was correct.

The remaining claim of counsel, as to the insufficiency of the affidavit for and notice of publication, is not borne out by the record. At least he has made no specification of any defect.

Upon the whole record, we see no error, and the judgment will be affirmed.

HORTON, C. J., concurring.

GEORGE STEWART V. RUFUS B. WAITE.

1. TRIAL BY JUSTICE; *Taking Case Under Advisement; Time.* In cases tried by a justice of the peace without a jury, in which there has been no arrest or attachment, the justice may withhold judgment if he desires until the fourth day after the close of the trial; (General Statutes, p. 799, section 115;) but in the computation of time under said section both the day of trial and the day of entering judgment must be counted.
2. ——— *Judgment Not Entered on or Before Fourth Day, Void.* If the justice fails to enter judgment by the fourth day, as above, but does enter it thereafter, it is error, and such error may be corrected by petition in error; and being an error appearing in the final judgment, may be taken advantage of without exception. [*Cornell v. Kuykendall*, 29-709.]

Error from Cowley District Court.

THE only question here is as to the construction of section 115 of the justices act. The facts are fully stated in the opinion. *Stewart* brings the case here on error.

L. J. Webb, and *E. S. Torrance*, for plaintiff in error.

Pryor, *Kager* & *Pryor*, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This action was originally brought by *Waite* before a justice of the peace. The parties appeared before the justice on the 18th of August 1874, and on that day the trial was had and concluded, and the justice held the case under advisement until the 22d of that month. On the day last mentioned the justice rendered and entered judgment in said action in favor of *Waite*. *Stewart* filed a petition in error in the district court asking that the judgment of the justice be reversed, assigning as error, that said judgment had been both *rendered* and *entered* one day later than the fourth day after the day on which the cause had been tried by the justice, both days inclusive. At the September term of the district court, on motion of counsel for *Waite*, the court dismissed the petition in error, on the ground that the judgment of the justice was void, and rendered judgment against *Stewart* for costs.

It is insisted on the part of the plaintiff in error that the district court erred in dismissing the petition in error, and in not reversing the judgment of the justice for the reason that said judgment was erroneous, in that it was both rendered and entered by the justice subsequent to the time within which it should have been entered in compliance with the requirement of the statute. Sec. 115, ch. 81, of Gen. Stat. reads as follows:

"Upon a verdict, the justice must immediately render judgment accordingly. When the trial is by the justice, judgment must be rendered immediately after the close of the trial, if the defendant has been arrested, or his property attached. In other cases it must be entered either at the close of the trial, or, if the justice then desires further time to consider, on or by the fourth day thereafter, both days inclusive."

Stewart v. Waite.

We think the plaintiff in error is right in his construction of the statute. In order to give force to the last three words of the section, both the day of trial and the day of judgment must be counted. Leaving those words out, and the ordinary rule of computing time, the rule prescribed by statute, (Gen. Stat., p. 771, § 722,) would obtain, and the day of trial would be excluded. Under such a statute the judgment rendered would have been in time. But these words are in the statute, and cannot be ignored. Effect must be given to every word if possible; and effect can be given only by including *both* days; and the only days named, the only days to which reference is had, are that of trial and that of entering judgment. The judgment therefore was not entered in time. We think too that having been entered out of time, the entry was error compelling a reversal. True, the delay of the justice was but for a single day; but if he may delay one day, he may more, and a party, if that latitude was once given, might find himself compelled to watch from day to day, for weeks or more, or else run the chance of losing his appeal. The true way is, to hold to the plain provision of the statute. The authorities also favor this rule. Sec. 115, above referred to, was adopted *verbatim* from the laws of the state of Ohio, being section 107 of the justices code of that state; and the supreme court of Ohio, at its December Term 1855, in the case of *Robinson v. Kious and Rowe*, (4 Ohio St. 593,) construed the first clause of that section, viz., that "upon a verdict, the justice must immediately render judgment accordingly." Chief Justice Thurman, delivering the opinion of the court, says: "But judgment must be entered, and that immediately, in compliance with section 107, whether the jury fee be paid or not. The justice has no discretion to postpone judgment upon a verdict to a future day, and if he do so, his judgment, although it may not be void, will be erroneous, and reversible for irregularity and non-compliance with the statute. The court of common pleas was, therefore, right in reversing the judgment in question, and it properly retained the cause, as required by the 532d section of the civil code." This decision is clearly in point, and sus-

Neitzel v. Hunter.

tains us in the opinion we have expressed, that the judgment was not void, as seems to have been the view of the district court, but simply erroneous. The record discloses no waiver of this error, or consent to such adjournment.

The judgment of the district court will be reversed, and the case remanded with instructions to sustain the petition in error filed therein, and to reverse the judgment of the justice.

All the Justices concurring.

F. W. NEITZEL *et al.* v. HENRY A. HUNTER *et al.*

1. **ANSWER-DAY; Twenty Days after Return-Day; Computation of Time.** Where a summons in a civil action was made returnable on March 23d, and the answer-day was fixed for April 12th next thereafter, the district court properly overruled an objection to the summons based on the ground that the twenty days after the day on which the summons was returnable were not given therein in which to answer.
2. **DEFAULT; Leave to Answer; Discretion of Court.** When a party defendant makes a motion to set aside a summons on account of some alleged irregularity, and for good reasons the motion is overruled, and the defendant is in default of an answer at the time of the hearing of such motion, and upon the motion being overruled makes an application for leave to answer, but makes no showing that he has any valid defense, the district court may properly refuse the application for leave to file an answer. . [*Swerdsfeger v. State*, 21-478.]
3. **FORECLOSURE; PARTY; Interest of Incumbrancer, to be Stated with Certainty.** Where in an action against the mortgagors to foreclose a real-estate mortgage to secure the note of one of the mortgagors, a third party is joined as co-defendant, and as to such third party the only allegations in the petition are, "that he claims an interest in said premises to the amount of \$500, and that said claim consists of a mortgage-lien on said premises to secure the payment of the said money," and no judgment is demanded in the prayer of the petition against him, said petition does not state facts sufficient to sustain or uphold a judgment against such third party defendant, barring and foreclosing him from setting up or claiming any right or title, legal or equitable, in or to the mortgaged premises. (*Short v. Nooner*, 16 Kas. 220, approved and followed.) [*Delahey v. Goldie*, 17-263; *Nooner v. Short*, 20-625.]

Neitzel v. Hunter.

4. **ANSWER-DAY; DEFAULT; Action, When Triable.** Where the answer-day in a civil action is on April 12th, and the defendant is in default of an answer, and the next term of the court after the default commences on the 26th day of said month, the action is triable at said April term. [*Dougherty v. Porter*, 18-206; *Lanoue v. McKinnon*, 19-411; *Reed v. Sexton*, 20-201; *Garvin v. Jennerson*, 20-373; *Stillings v. Porter*, 22-18.]
5. **JUDGMENT In Personam, Against Mortgagor, Not Liable as Maker of Note, Error.** Where an action is commenced to obtain a personal judgment on a note executed by one person only, and to foreclose a mortgage on real estate, given to secure the note, and executed by such person and his wife, it is error to render a personal judgment against the wife to satisfy any part of the judgment after sale of the mortgaged premises.

Error from Cloud District Court.

FORECLOSURE of mortgage, brought by *Hunter* against *F. W. Neitzel* and *Maria* his wife, as mortgagors, and *Crans* and *Dinwoodie* as incumbrancers. Judgment in favor of plaintiff, and against all the defendants, at April Term 1875, and defendants bring the case here on error. The proceedings, and errors complained of, are fully stated in the opinion.

L. J. Crans, for plaintiffs in error.

E. J. Jenkins, and *M. V. Jones*, for defendants in error.

The opinion of the court was delivered by

HORTON, C. J.: Hunter held a note signed by *F. W. Neitzel*, which was secured by a mortgage executed by said Neitzel and wife. Other mortgages on the same real estate, executed by Neitzel and wife, were held by *L. J. Crans* and *William Dinwoodie*. Hunter commenced his action in the court below to obtain judgment on his note and to foreclose his mortgage, and he joined Crans and Dinwoodie as parties defendant, alleging as to them that they claimed an interest in the mortgaged premises to the amount of \$500 each, and that said claim consisted of mortgage-liens on said premises to secure the payment of said money. The summons was issued March 20th 1875, made returnable on the 23d, served on the 20th, and returned and filed on the 22d. The answer-day was set for the 12th of April following. Crans and the Neitzels appeared specially and objected to the summons on the ground that the

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answer-day was fixed less than twenty days after the day on which the summons was returnable. Their motion being overruled, and leave to answer having been refused, the court rendered judgment against both the Neitzels, foreclosed the mortgage, and barred the said Crans from setting up or claiming any right or title, legal or equitable, in the said described premises.

The motion to set aside the summons was properly overruled, as the answer-day was within the provision of the statute. Sec. 722 of the civil code, Gen. Stat. 1868, p. 771, provides that the time within which an act is to be done shall be computed by excluding the first day, and including the last. Under this rule, the return-day of the summons is to be excluded, and the 12th day of April included; and there being eight days in March, after the 23d, and including April 12th, twelve days in April, twenty days time were allowed for answering after the day on which the summons was returnable. The argument of counsel that the 24th of March should be construed as the first day, and therefore excluded, and that of necessity the answer-day could not have been earlier than the 13th of April, is not sustained by any decision, nor in accordance with the rules of construction of statutes in such cases. *Dougherty v. Porter*, 18 Kas. 206.

The application for leave to answer was denied by the court; and in the absence of any showing of a defense in the case, it cannot be reasonably argued that the court erred in its action. Such applications are greatly in the discretion of the court, to refuse, or allow; but without making any claim to a defense, a party is not entitled to the right of filing an answer in an action, when in default upon personal service.

The objection that the case was not properly on the docket, or triable at the April term for 1875, is also unavailing. The answer-day was on the 12th of the month. Court convened on the 4th Monday of the same month, to-wit, on April 26th, and under the statute the case was then properly for hearing, no answer having been filed.

1. Answer-day;
time; rule of
construction.

2. Default;
refusing leave
to answer.

 Neitzel v. Hunter.

Within the decision of the case of *Short v. Nooner*, 16 Kas. 220, so much of the judgment as debars and forecloses the rights of Crans in the mortgaged premises is erroneous, and cannot be sustained. The same may be said of the personal judgment against the wife of Neitzel. She only signed the mortgage, and was not liable personally on the note; therefore it was error for the court, as to her, to do more than decree a foreclosure of the mortgage, and order a sale thereof to satisfy the judgment, costs and expenses and bar her from setting up any title or claim thereafter in the same. If the premises failed to satisfy the judgment, the separate property of the wife could not be taken to pay it. The mortgage was only a security for the debt evidenced by the note, and such security could be fully exhausted; but the liability of the wife was limited to the security given by her, viz., all her interest in the mortgaged premises.

The judgment will be reversed as to L. J. Crans, and modified as to Maria Neitzel, so as to relieve her from the payment of any portion of the judgment rendered personally against her after a sale is made of all the mortgaged premises; and otherwise the judgment of the district court is affirmed. No costs will be taxed in this court against L. J. Crans; and as to the other parties, the costs will be divided.

All the Justices concurring.

ST. JOSEPH & DENVER CITY RAILROAD Co. *et al.* v. JAMES SMITH, AS *Treasurer*, *fc.*

1. **RECEIVERS, APPOINTED BY FEDERAL COURTS; Actions Against; Jurisdiction of State Courts.** A county treasurer filed his petition in the district court against a railroad company, and the receiver of said company appointed by the circuit court of the United States to recover the taxes levied upon said company for the year 1874. The petition alleged the appointment of the receiver and his possession and control of the road. Without, so far as the record discloses, the issue or service of any process, the company and receiver filed a joint answer, in which they admit that a portion of the taxes are properly chargeable against the company, and consent that judgment may be rendered against them in the action for that amount, and also allege the appointment of the receiver by the United States circuit court, that he is not amenable to the process of the district court, and pray that as to him the suit may be dismissed. *Held*, That the district court had jurisdiction, and properly rendered judgment against the receiver. [*Kronberg v. Elder*, 18-150.]
2. ——— While it may be conceded that a court appointing a receiver may draw to itself all controversies to which the receiver is a party, or which affect the property under his control, yet it does so only by direct action upon parties by way of injunction, or proceedings as for contempt; and the appointment in no manner affects the ordinary jurisdiction of other tribunals. [*Bank v. Simpson*, 22-414.]
3. ——— An allegation therefore, in an answer, that the defendant is a receiver duly appointed by another court, raises no question as to the jurisdiction of the court in which the answer is filed.
4. **ASSESSING AND TAXING REAL ESTATE; Powers of Board of Equalization.** Under the general tax law, the valuation of real estate is fixed in the first place by the assessor, and not by the owner, and may thereafter be changed by the board of equalization at a regular meeting of which legal and public notice is given; and by the law of 1874 the assessment and valuation of railroad property was to be the same as that of other property. [*Lappin v. Comm'rs*, 6-403; *Auditor v. R. R.*, 6-500; *Comm'rs v. Lang*, 8-284; *Ross v. Comm'rs*, 16-411; *R. R. v. Comm'rs*, 16-587; *Griffith v. Watson*, 19-27; *R. R. v. Comm'rs*, 19-587; *Hall v. Comm'rs*, 22-37; *Comm'rs v. Sergeant*, 24-572; *Gillett v. Treasurer*, 30-167.]

Error from Marshall District Court.

ACTION by the county treasurer, against the *Railroad Company*, and *William Bond* as receiver of said company, to recover certain unpaid taxes levied on certain real property

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belonging to said *Railroad Company* in Marshall county. The property is described in the petition as follows:

"In Guittard township, the road-bed, right-of-way, and railroad track of said company, situate in Guittard township, a strip of land extending on each side of said railroad track, and embracing the same, together with all the stations and improvements thereon, commencing at the point where said railroad track crosses the east boundary-line of said township in entering said township, and extending to the point where the track crosses the west boundary-line of said township in leaving the same."

Like property lying in the townships of Franklin, Center, and Marysville, respectively, was described in the same manner. The taxes claimed amounted to \$8,400.91, with the additional penalties thereon prescribed by law for non-payment. The defense set up in the answer is stated in the opinion, *infra*. An agreed statement of facts, made and signed by the attorneys respectively of the plaintiff and defendants, shows the following:

"1st. The Saint Joseph & Denver City Railroad Company, by its proper agents and officers, made out and duly verified and filed with the proper person or officer of the county the lists and schedules by them required by the laws of 1874, relating thereto.

"2d. By such statement and list the value of the different classes of property of said company was therein placed as follows: Right-of-way, \$2,159.80; rolling stock, \$15,016.14; track and road-bed, \$108,429.54; personal property, \$100: total, \$125,705.48.

"3d. The township assessors of said Marshall county failed and refused to list and value such property as so returned, but arbitrarily, and without any notice to said railroad company, and of their own motion, assessed said property in their respective townships, changing the several values as contained in the sworn returns of said railroad company, so that the aggregates stood as follows: Right-of-way, \$2,158.50; rolling stock, \$14,888.50; track and road-bed, \$172,283; personal property, \$163: total, \$189,443.

"4th. Afterward, the county board of commissioners, sitting as a board of equalization, at a meeting held on the day prescribed by law, of their own motion, and without any special notice to the said railroad company, raised and increased

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the several amounts so returned as follows: Right-of-way, \$3,006.50; rolling stock, \$15,034; track and road-bed, \$145,412: total, \$168,452.50.

"5th. The said statement so changed and increased in value was then duly forwarded to the state auditor, who, as required by law, laid the same before the state board of equalization, who without any notice to the railroad company, and of its own motion, changed and increased the several classes of property as follows: Right-of-way, \$5,100; rolling stock, \$25,250; track and road-bed, \$221,650: total, \$252,000.

"6th. The total valuation of the railroad property denominated 'real property' in the state of Kansas, for the year 1874, was increased by the said state board of equalization ten per cent."

Sections 1 and 2 of chapter 96 of the session laws of 1874, provided, that "on or before the first day of May," "every person, company, or corporation owning, operating, or constructing a railroad in this state, shall return sworn lists or schedules of the taxable property of such railroad," such returns to be made "to the county clerks of the respective counties in which the railroad may be located." The person or company making such return is not required by said chapter to fix the value of the property returned. Section 7 of said chapter is as follows:

"SEC. 7. The county clerk shall return to the assessor of the township or city a copy of the schedule or list of the railroad track and other real estate, and of the rolling-stock and other personal property pertaining to the railroad; and such railroad track and other real estate, and rolling-stock and other personal property, shall be assessed by the city and township assessor. Such property shall be treated in all respects in regard to assessment and equalization the same as other property belonging to individuals, except that it shall be treated as property belonging to railroads," etc.*

This action was prosecuted for taxes assessed and levied upon the real estate belonging to the corporation, and not for taxes assessed and levied upon personal property. Trial at

[* THIS section, (§7.) and §§2, 3, 4, 5, 6, and 11, of said ch. 96, were amended by ch. 123, laws of 1875; and both said acts, (ch. 96, laws of 1874, and ch. 123, laws of 1875,) were repealed, and other rules for assessing railroad property prescribed, by ch. 84, laws of 1876.]

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March Term 1876 of the district court. The court found that the *Railroad Company* was indebted to Marshall county in the sum of \$10,949.15, for unpaid taxes, penalty, costs and interest on said real property described in plaintiff's petition, and that said sum is a first and prior lien on the said real property described in plaintiff's petition, and said real estate is liable for the payment of said sum so found due, with costs of suit; and also, that the moneys in the hands of said *William Bond*, receiver as aforesaid, or that may come into his hands as such receiver at any time hereafter, are subject to the payment of said sum so found due and costs of this action. Judgment accordingly, and defendants bring the case here on error.

Doniphan & Reed, for plaintiffs in error.

Frank W. Love, and *Everest & Waggener*, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This was an action to recover certain taxes levied upon the property of the railroad company for the year 1874. And the first question presented is one of jurisdiction. It is insisted that the district court had no jurisdiction of an action against a receiver duly appointed by the U. S. circuit court. It will be proper to notice first, how the question is presented in the record. There appears a petition filed by the county treasurer, and the joint answer of the railroad company and the receiver. The fact of the appointment of the receiver and his possession of the road, is alleged in the petition. The record discloses no process; and for aught that is shown, the appearance of the receiver was entirely voluntary. No separate plea to the jurisdiction was filed, and the only manner in which the jurisdiction of the court was challenged was by an allegation in the answer that defendant Bond was a receiver appointed by the U. S. circuit court, and as such was an officer of that court, and not subject to suit herein, and a prayer that the suit against him might be dismissed. Immediately prior to this allegation and prayer was this admission:

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“Defendants admit that upon a proper assessment said company would be liable and should properly pay taxes upon the amount of their sworn returns, which is admitted may be adjudged in this case, which would be the sum of \$——.”

Did the district court under these circumstances err in exercising jurisdiction and rendering judgment against the receiver? We think not. The general proposition is unquestioned, that a receiver is an officer of the court by which he is appointed, amenable to its orders, and to be protected by the power of that court from any interference with the discharge of his duties. This protection is accorded in at least two ways—by punishing for contempt any such interference, or by injunction restraining suit in any other court against him.

The authorities may perhaps not be entirely unanimous as to whether the power of restraint by injunction reaches to all suits against a receiver; and it may perhaps be a question whether, when the object of the suit is merely the establishment of a claim, and does not seek to disturb the possession or question the title or right of the receiver, the claimant may not prosecute his action in a court other than the one appointing the receiver, without danger of punishment for contempt or restraint by injunction. But into a discussion of that question we shall not enter. It will be conceded for this case, that the power of the court appointing a receiver is unlimited for purposes of protection to restrain all suits in all courts against the receiver, and to punish as for a contempt any interference with the receiver by force, or action. But it is also beyond question, that a party may by leave of the court appointing the receiver maintain any action in any court against him. In other words, the court appointing the receiver is not thereby compelled to assume jurisdiction of all controversies to which he may become a party, but may leave their determination to any court of appropriate jurisdiction. The appointment does not *ipso facto* oust all other courts of their ordinary jurisdiction as to matters in which the receiver may be interested, or which affect the property placed in his hands; it simply secures to that court the power to control at its discretion all such con-

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troversies. It may assert its right to take to itself all such controversies, or it may leave them for determination wherever the parties may bring them. The jurisdiction of other courts remains unchanged; but it may reach parties, and compel them to proceed nowhere else than in its own forum. This we think the authorities uniformly concede. Thus, in *Hill v. Parker*, 111 Mass. 508, it is said, that "when the action is brought without applying for such leave, the possession of the receiver is not necessarily a valid defense at law, and the court of chancery, if applied to for an injunction, may in its discretion allow the action to proceed to judgment and to be defended by the receiver." Again, in *Kinney v. Crocker*, 18 Wis. 74: "In such cases it (the court appointing the receiver) will sometimes punish as for a contempt any attempt to disturb the possession of its officer; it will sometimes restrain suits at law and draw to itself all disputed claims in respect to the subject-matter; and sometimes it will allow the suit at law to proceed. But in all these cases it is not a question of jurisdiction in the courts of law, but only a question whether equity will exercise its own acknowledged jurisdiction of restraining suits at law under some circumstances, and itself dispose of the matter involved." In *Blumenthal v. Brainard*, 38 Vt. 407: "A court of chancery will protect a person acting under its process, or authority, in the execution of a decree or decretal order against suits at law, and will compel parties to apply to that court for relief. This protection is accorded by that court to its officers only on their own application, and is granted by the chancellor in the exercise of his discretion, and it is to be presumed that it would be granted in any necessary or proper case for such relief. * * * But we think that the mere fact that the defendants were acting as receivers under the appointment of the court of chancery, cannot be recognized as a defense to a suit at law for a breach of any obligation or duty which was fairly and voluntarily assumed by them in matters of business conducted or carried on by them while acting as such receivers." In the case of *The Bank v. Risley*, 19 N. Y.

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369, it was decided that "a person having a superior legal title or lien ought, it seems, to obtain the leave of a court of equity before attempting to disturb the possession of a receiver. But the question is one of contempt purely, and does not affect the legal right." And in *Aston v. Heron*, 2 Mylne & Keen, 390: "If the misconduct of an officer of the court in executing its orders becomes the subject of civil proceedings before another tribunal, the court may in its discretion either itself take cognizance of the complaint, or may leave the matter to be dealt with upon such proceedings." See also, *Paige v. Smith*, 99 Mass. 395; *Allen v. Railroad Co.*, 42 Iowa, 683; 2 Southern Law Review, New Series, p. 576.

It is evident from these authorities that the question always is, not one of jurisdiction, but of contempt; that the ordinary jurisdiction of other courts is in no manner taken away or affected by the appointment of a receiver; that while the court making the appointment may draw to itself all controversies to which the receiver is a party, it does so by acting directly upon the parties, and not by challenging the jurisdiction of the other tribunals; that while it may so draw to itself all such controversies, it is not compelled to do so, and that not doing so in any particular case, the mere fact of the appointment constitutes no plea to the jurisdiction. Applying these principles to the case at bar, and can there be any doubt of the jurisdiction of the district court? The county treasurer brings his action in that court against the receiver. Whether he first obtained leave of the circuit court whose officer the receiver was, to bring this action in the circuit court, is not shown. It is nowhere alleged, or denied, that such leave was asked and obtained. It is conceded that the circuit court, if no such leave was granted, could have restrained the treasurer from prosecuting the action, or punished him for contempt. Nothing of this kind was, so far as is shown by the record, ever applied for by the receiver, or if applied for was refused by the circuit court. "It is to be presumed," says the supreme court of Vermont, "that it (the protection) would

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be granted in any necessary or proper case for such relief." So it is to be presumed here, that if the circuit court in its discretion deemed it best to draw to itself this controversy, it would have done so. Not having done so, it must be presumed that it deemed it wise to leave the matter for determination to the tribunal in which it was pending. And in this ruling we think the learned justice of the circuit court exhibited that clear sense of justice and propriety which has made his administration of the law in that court an honor to himself, and a credit to the bench; for it seems to us eminently wise, that questions of taxation should be so far as possible left to the determination of the tribunals of the state which imposes the tax. Power in the state to tax the property or securities of the United States, is denied, because the power to tax involves, it is said, the power to destroy. From the same proposition flows the propriety of leaving to the state tribunals questions of the validity and extent of state taxes. And we can but think that considerations of this nature prevented the drawing to itself by the circuit court of the question of taxation involved in this action.

Further, the appearance of the receiver seems to have been voluntary. Can a person come voluntarily into court, and then question its jurisdiction of his person? And again, he admits the validity of the tax up to a certain amount, and consents that judgment may be rendered in this action against him for such amount. Can a party against whom an action is pending come voluntarily into court, admit that part of the claim is due, consent that judgment may be rendered against him for that amount, and at the same time restrict the jurisdiction of the court to inquire and determine as to the validity of the entire claim? It seems to us most clearly not. The district court had jurisdiction, and it did not err in rendering judgment by reason of any lack of jurisdiction.

The other question, that of the validity of the tax, seems to be settled by the decision in the case of the *K. P. Rly. Co. v. Wyandotte Co.*, 16 Kas. 587; or at any rate, controlled by the views

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expressed in the opinion in that case. The objections to the validity of this tax are, that the assessors did not accept the valuation returned by the company, and that the board of equalization raised such valuation without any personal notice to the company. Neither of these objections is well taken. The property in this case was real property; in that, personal. The distinction between the manner of assessing the two kinds of property was pointed out in that opinion. The valuation of personal property, as returned by the owner, is conclusive until corrected by proceedings before the county clerk or commissioners, of which the owner must receive notice; while the valuation of real estate is fixed in the first place by the assessors, and may be changed by the board of equalization at a regular meeting, of which public notice has been duly given. It is conceded that such notice was given. The act of 1874 provides that railroad property "shall be treated in all respects in regard to assessment and equalization the same as other property belonging to individuals." Laws 1874, p. 149, § 7. This provision seemed to us decisive of the question in that case, and it must be held as equally controlling here. The tax appears to be valid, and the judgment must be affirmed.

All the Justices concurring.

COMM'RS OF OTTAWA Co. *et al.* v. CHRISTIAN NELSON *et al.*

1. **BONDED INDEBTEDNESS, on Division of Counties, and Townships; Constitutional Law.** Sections 3 and 4 of "an act to regulate taxation on the change of boundary lines," approved March 3, 1873, are constitutional and valid. (*Comm'rs of Sedgwick Co. v. Bunker*, 16 Kas. 498, cited, and followed.) [*Chandler v. Reynolds*, 19-249; *Hunt v. Hamilton*, 25-82; *Comm'rs Marion Co. v. Comm'rs Harvey Co.*, 28-181, 200; *Craft v. Lofthack*, 34-388.]
2. ——— That clause of section 1 of article 11 of the constitution, which provides that "the legislature shall provide for a uniform and equal rate of assessment and taxation," discussed, and construed. [*Hines v. Leavenworth*, 3-186; *Leavenworth Co. v. Miller*, 7-537; *R. R. v. Morris*, 7-210, 221; *Francis v. R. R.*, 19-307; *Leavenworth v. Booth*, 15-628.]

Error from Ottawa District Court.

INJUNCTION, brought by *Nelson* and fourteen others, "citizens and taxpayers in and of Bennington township, in Ottawa county," plaintiffs, against the *Board of County Commissioners*, *T. E. Scott* as county treasurer, and the *Township of Concord*, as defendants. The plaintiffs state that they are severally the owners of certain real property situate in said township of Bennington, (describing the property of each;) that the territory now constituting the township of Bennington was formerly included within and formed a part of the township of Concord; that on the ——— of ——— 1872, said territory was duly detached and set off from Concord township, and organized into a separate township, and called Bennington; that on or about the 1st of October 1871, the proper authorities duly issued the bonds of said township of Concord, in the sum of \$10,500, running five years from date, and bearing interest, etc.; that said bonds were issued in payment of two certain bridges built in Concord township, but "neither of said bridges are now or ever have been since its organization in 1872 within the limits of Bennington township." The plaintiffs further stated, that there was levied on said real estate of the plaintiffs certain taxes in and for the years 1873 and 1874, respectively, to pay interest on said bonds and to provide a sinking-fund for their payment and redemption, and that the

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county treasurer of said Ottawa county (said pretended taxes remaining unpaid and standing charged against said lands) had sold all of said lands of plaintiffs for said pretended taxes for the year 1873, at tax sale, etc.; "that said taxes were levied on real estate only in said Bennington township, although at the time said taxes were so levied there was a large amount of personal property in said township subject to taxation; and that by reason of the premises said taxes or pretended taxes on the plaintiffs' lands for 1873 and 1874, so levied for the purposes aforesaid, are illegal and void." Plaintiffs demanded judgment, "that said pretended taxes be declared void, and that the same as standing against the plaintiffs' said lands be canceled, and that the defendants be forever enjoined from levying any taxes or pretended taxes against the plaintiffs' said lands for the payment of interest or principal of said bonds," etc. To this petition defendants demurred, "for that the said petition of the said plaintiffs does not state facts sufficient to constitute a cause of action." The case was heard on said demurrer at October Term 1875. The district court overruled the demurrer, and defendants not desiring to answer further, the court gave judgment in favor of the plaintiffs, decreeing said taxes so levied on plaintiffs' lands for said years 1873 and 1874 to be null and void, and that such taxes be canceled and set aside, etc., and that defendants be forever enjoined and restrained from hereafter levying taxes on said lands of plaintiffs for the payment of the interest or principal of the bonds mentioned and described in plaintiffs' petition. The defendants excepted, and now bring the case here on error.

Thompson & Johnston, for plaintiffs in error.

McClure & Humphrey, for defendants in error.

The opinion of the court was delivered by.

VALENTINE, J.: In 1872 the township of Concord, Ottawa county, was duly divided, and from the detached territory the new township of Bennington was constituted. At the time of said division the township of Concord was liable on an in-

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debtedness for certain bonds previously issued by the township to build certain bridges. The question now presented is, whether Bennington township is liable to pay any portion of said indebtedness. Or rather, it is, whether the real estate situated in said township is thus liable. Or, to state the legal question involved in the case with more exactness, it is, whether sections 8 and 4 of "an act to regulate taxation on the change of boundary lines," approved March 3d 1873, (Laws of 1873, page 267,) are constitutional and valid, or not. For if said sections are constitutional and valid, then the real estate in said township of Bennington is liable for a portion of said indebtedness; but if they are not constitutional and valid, then no portion of the property in Bennington township is thus liable. This same question, with some others, has already been decided by this court. *Comm'rs of Sedgwick County v. Bunker*, 16 Kas. 498. In the Sedgwick county case we held that said sections were constitutional and valid, and we still think that such decision is correct. We were not however at that time entirely satisfied with that decision, and we are not now entirely satisfied with the same; but it corresponded then with our best judgment, and it corresponds now with our best judgment. Counsel for defendant in error in this case ask us to reconsider that decision, and they present to us a very able and elaborate argument to convince us that we were wrong. But they have presented nothing new—nothing that we had not already carefully considered and held to be insufficient to invalidate the law. But it is not strange that counsel should wish to have the question reëxamined and reconsidered. The question is a difficult one. The arguments on both sides are nearly equally balanced, and different minds might honestly come to different conclusions thereon. Even unprejudiced minds might reach different conclusions, while every prejudiced mind will undoubtedly reach a conclusion corresponding with its own prejudices, or its own interests. Every person whose interest is against the law, will undoubtedly believe that the law is unconstitutional. But this is not all. The arguments against the constitutionality of the law lie principally

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upon the surface, and can easily be seen and comprehended, while the arguments in its favor lie further back and can only be seen or comprehended by greater labor and by severer mental effort. To say that all assessments and all taxes must be equal and uniform, in order to be valid; that the tax in this case is not equal and uniform, and therefore that the tax in this case is void, is an argument so short, so simple, so logical, and so easy of comprehension, that all persons who cannot or will not push their inquiries into a broader field of investigation will gladly accept it as true, and think it conclusive. But this argument is not sound. The fault is in the major premise of the syllogism. All assessments and all taxes are not required to be equal and uniform. It is true, that a certain degree of equality and uniformity must prevail in all assessments, and in all taxes, or they will be void. But the broad proposition, that all assessments and all taxes must in all respects be equal and uniform, is not true, and in the nature of things it could scarcely in any case be made to be true. Counsel for defendant in error, all through their argument, seem to have mistaken the language of our constitution. Our constitution provides that "the legislature shall provide for a uniform and equal *rate* of assessment and taxation." (Const. of Kas., art. 11, §1.) It does not provide for a uniform or equal *rule* of assessment or taxation. And yet counsel all through their argument continually speak of the "uniformity of the *rule* of assessment and taxation," instead of speaking in the language of the constitution of "a uniform and equal *rate* of assessment and taxation." They use the language of the constitutions of Ohio, and Wisconsin, and California, and several other states, instead of using the language of our own constitution. Now why should they do this, if they really believe that the language of our own constitution is sufficient for their purpose? Neither does our constitution in terms require that *all property* except such as it itself exempts, shall be assessed or taxed; nor does it provide in terms that no exemption shall be allowed except such as it allows. On the contrary, it provides in terms that "*personal* property to the amount of *at least*

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two hundred dollars for each family, shall be exempt from taxation," and by this language unavoidably implies that more than two hundred dollars worth of personal property may be exempted by statute. In this particular, as well as in the said "rate of taxation," our constitution differs from those of many of the other states. These differences will be noted in the opinion soon to be delivered in the case of *Francis, State Treas'r, v. A. T. & S. F. Railroad Co.* The full provision of our constitution upon these subjects reads as follows:

"The legislature shall provide for a uniform and equal rate of assessment and taxation; but all property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and personal property to the amount of at least two hundred dollars for each family, shall be exempted from taxation." (Const., art. 11, § 1.)

Counsel for defendant in error refer us to the *rule* of taxation as enunciated in the case in 9th Wisconsin Rep., page 440. Now on that page is found the brief of counsel for the plaintiff, in the case of *Milwaukee, &c., Rld. Co. v. The County of Waukesha*. Said counsel in that case was opposed to the law, and of course said it was invalid. The court however held it to be valid and constitutional. In the opinion the court say: "The imposition upon railroad property by the act of 1854, does not violate that provision of the constitution of Wisconsin which provides a uniform rule of taxation, provided like property pertaining to railroads, or all property of that class, is alike taxed, or *alike exempt*, as it appears to be." (9 Wis. 449.) This case is reported in a note to the case of *Knowlton v. Supervisors of Rock Co.*, 9 Wis. 410. The court does not, in either of these cases, decide that property other than that exempted by the constitution may not also be exempted from taxation by statute. In the first case mentioned, the court decides as above stated; and in the other case, the court decides that a part of the property in any given district cannot be taxed "by a different rule from that by which other property [in the same district] is taxed," but that "all kinds of property must be taxed uniformly, or be absolutely exempt." (Syllabus, page

411; see also in this connection, *Ill. Cent. Rld. Co. v. McLean Co.*, 17 Ill. 291.)

Now in the present case, the real estate of said Bennington township is all "taxed uniformly" to pay said indebtedness, and the personal property is all "absolutely exempt" from such taxation. Is not this in accordance with the said Wisconsin decisions? We are also referred to a decision in California. But in California the constitution requires that "*all property in the state shall be taxed in proportion to its value,*" and "*taxation shall be equal and uniform.*" We are also referred to decisions in Indiana. Now if we understand the following decisions in Indiana, property may be exempted from taxation by statute which is not so exempted by the constitution: *Bank v. City of New Albany*, 11 Ind. 139, 142; *Connersville v. Bank*, 16 Ind. 105; *King v. Madison*, 17 Ind. 48. We do not take issue with any decision in any state referred to by counsel for plaintiffs below; and so far as the present case is concerned we might well admit that each of such decisions would be held to be good law in Kansas, even under our constitution. The case before us is outside of all ordinary cases, and is simply analagous to the said Sedgwick county case reported in 16 Kas. 498.

As we have before stated, it is not necessary that all assessments and all taxes in Kansas should be equal and uniform in order to be valid. (See *Glasgow v. Rowse*, 43 Mo. 480, and *Ill. Cent. R. Co. v. McLean Co.*, 17 Ill. 291, et seq.) And we suppose that no person who has been able to give the subject any careful consideration will so contend. *First*: The aggregate amount and rate of assessment and the aggregate amount and rate of taxation vary in almost every county, city, town, township and school district in this state. The aggregate rate in some places is as high as five per cent. on the valuation of the property, and in other places it is as low as one or two per cent. And yet the constitution says that "the legislature shall provide for a uniform and equal rate of assessment and taxation." Now does this mean, "a uniform and equal rate of assessment and taxation" *throughout the state*, and for every

part and portion of the state? And if not, why not? Can any one give any sufficient reason why not? Of course, every one knows that the constitution does not mean, (although it may seem to say so,) that the "rate of assessment and taxation" shall be so "uniform and equal" throughout the state that if the aggregate rate of taxation in any one school district or township in the state should be just two per cent. on the valuation, that the aggregate rate of assessment and taxation in every other part and portion of the state should also be just two per cent. And yet, who can give an intelligent and logical reason why the constitution does not mean this? There are reasons, and sufficient reasons, but they do not float upon the surface. And hence we would expect that strict constructionists and superficial reasoners would refuse to receive them, and would deny their validity, even when shown to them, unless they assent through fear of ridicule for adopting such an impracticable view of the constitution. Upon this question, see *Bright v. McCullough*, 27 Ind. 228, 229, et seq., and cases there cited. We have shown one exception to the rule that all assessments and all taxes must be equal and uniform; and this one exception alone destroys the universality of the rule contended for by the defendants in error, and to this extent it weakens their argument based upon the universality of such rule. But there are several other exceptions, some of which we will mention.

It seems to be almost universally admitted that said constitutional provision, requiring that assessments and taxes should be at an equal and uniform rate, does not apply to such special assessments or special taxes (usually called "special taxes" in this state,) as are imposed upon abutting lot-owners in cities, towns, or villages, for street improvements. It has always been so held in this state, (*Hines v. Leavenworth City*, 8 Kas. 186, 197, and subsequent cases,) and has generally been so held in other states under similar constitutional provisions. Now these special and local impositions are clearly assessments, and clearly taxes; but still it is almost universally admitted that they are not such assessments and such taxes as

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are contemplated by said constitutional provision. Now why are they not? Can any one tell? We do not propose in this opinion to give any answer.

Neither does said constitutional provision apply strictly to license-taxes. (*Leav. City v. Booth*, 15 Kas. 628, 635; *Fretwell v. City of Troy*, 18 Kas. 271.) In the case of *Leav. City v. Booth*, first referred to, it is said that—

“A proper license-tax is not a tax at all, within the meaning of the constitution, or even in the ordinary signification of the word ‘tax.’ (*City of East St. Louis v. Wehrung*, 46 Ill. 395; *Addison v. Saulnier*, 19 Cal. 83; *Carter v. Dow*, 16 Wis. 318; *State v. Herod*, 29 Iowa, 123, 125; *Mitchell v. Williams*, 27 Ind. 62.) This is so even where the license-tax is much greater than the mere cost of issuing the license, and even where the surplus fund incidentally arising from the issuing of the license goes into the treasury to swell the general revenue fund. (*Charity Hospital v. Stickney*, 2 La. An. 550; *Tenny v. Lewy*, 16 Wis. 566, 567; *Chilvers v. The People*, 11 Mich. 43; *Ash v. The People*, 11 Mich. 347; *Baker v. City of Cincinnati*, 11 Ohio St. 534, 543, 544; *Johnson v. Philadelphia*, 60 Penn. St. 445, 450; *Henry v. The State*, 26 Ark. 523, 525; *Orton v. Brown*, 35 Miss. 426.) And there are still other decisions, holding that the constitutional provisions with reference to taxation have no reference to the collection of license-taxes, among which are the following: *Anderson v. Kerns Draining Co.*, 14 Ind. 201; *Thomasson v. The State*, 15 Ind. 449, 451; *Bright v. McCullough*, 27 Ind. 223, 232; *The People v. Coleman*, 4 Cal. 46.”

Neither do we suppose that capitation taxes, or poll-taxes, or requirements to work on the roads, or to train in the militia, come within said constitutional provision, although evidently they are all taxes in one sense. *Sawyer v. City of Alton*, 4 Ill. (3 Scam.) 127, 130; *Town of Pleasant v. Kast*, 29 Ill. 490, 494.

But even those assessments and those taxes which do come within said constitutional provision are not required to be, and are not always in practice, made and levied by a “uniform rule.” Railroad property is assessed in one manner, while other property is assessed in quite a different manner; and still all these assessments are held to be valid. (*Gulf Rld. Co. v. Morris*, 7 Kas. 210, 220, et seq.) Different officers may, and sometimes do, assess different pieces of property belonging to

even the same individual. (*Id.* page 227, and Gen. Stat. page 266, § 53, page 1038, § 88, and page 1041, § 65.) Personal property is assessed and taxed by various rules. Some of it is assessed and taxed where the owner resides, without regard to where the property is situated. Some of it is assessed and taxed where the property is situated, without regard to where the owner resides. And some of it, to-wit, bank stock, is assessed and taxed where the business of the bank is done, without regard to where the owner of the stock resides, or where the bulk of the property of the bank is situated, or where the certificates of stock are held. (Laws of 1876, page 57, § 7.) And it has been held in this state that in certain cases the *entire* partnership property of a firm may be taxed in one county, while some of the partners may reside in other counties. (*Swallow v. Thomas*, 15 Kas. 66.) All this we think is generally considered legal under our constitution. Taxes are levied by various officers. State taxes are usually levied by special act of the legislature, and other taxes are usually levied by local officers under general laws. But the same local officers for any taxing district do not always levy all the taxes for such taxing district. Take cities of the second class, for instance; and in such cities some of the taxes are levied by the mayor and council; (Laws of 1873, page 128, § 32;) some of them are levied by the board of education; (Laws of 1876, page 272, § 18;) and still another portion of such taxes may be levied by the county clerk of the county in which such city is situated; (Laws of 1875, page 45, § 6.) The most of the school-district taxes are levied by the school districts themselves, but some such taxes may be levied by the county commissioners. (Laws of 1876, page 278, § 11.) These are only examples. Other taxes are levied by still other persons. Now with all these examples and illustrations before us, how can it be said that all assessments and all taxation are governed by a "uniform rule?"

We need not multiply illustrations. The fact is, that the constitution only requires that all ordinary and usual assessments and taxation shall be imposed at "a uniform and equal

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rate;" and all extraordinary and uncommon kinds of assessment and taxation are left to be regulated by law in the same manner as the same would be regulated if said constitutional provision did not exist. Now to tax the property of one township to pay the debt of another township, is an extraordinary and uncommon kind of taxation. It can only happen by the change of the boundary lines of one or more townships. It can perhaps never happen more than once to the same locality. And it can seldom happen even once to any one locality. Constitutions are not generally framed to meet extraordinary and exceptional cases, but only to prescribe general rules for ordinary cases. Our constitution provides that "all county officers shall hold their offices for the term of two years, and until their successors shall be qualified;" (Const., art. 9, §8;) and yet this court held that when a new county is organized that the first county officers may be elected for a less term than two years; that the constitution "applies only to the regular term of the office, and not to vacancies, or exceptional cases." (*Hagerty v. Arnold*, 13 Kas. 367.) In the organization of new counties and new townships some things must be done which in the very nature of things cannot come under any of the general rules established for older counties and older townships. And in such cases it is hardly fair to say that the framers of the constitution intended that all of the particular provisions of the constitution for older counties, or older townships, should apply with all their force and rigor to the new counties and new townships, as first organized, and thereby prevent the legislature from doing justice in the particular case. It is more reasonable to suppose that in such cases such provisions were intended to apply to such extraordinary and exceptional cases only so far as in the nature of things they could reasonably be made to apply.

In the case of *Comm'rs of Sedgwick Co. v. Bunker*, (16 Kas. 504,) the following language is used: "When a debt is created against a county, all the taxable property therein, real and personal, becomes liable to pay the same. The real estate becomes permanently liable, (except for subsequent legislation,)

because the owner thereof cannot remove it out of the county; but the personal property does not become so liable, for personal property may be removed out of the county at any time at the pleasure of the owner. If the legislature should change the boundary lines of any county, and in doing so should set off a strip of the territory thereof to some other county, then the legislature might at the same time enact that such strip should continue to be liable for the payment of its share of the debts of the county to which it formerly belonged, or the legislature might entirely relieve such strip from all such liability. And it would seem that the legislature ought to have the power to relieve such strip from a portion of such liability, and to continue its responsibility for the other portion. At least, it would seem that the legislature should have the power to say that the real estate shall continue liable, and the personal property not. It would hardly seem that the detached territory should complain because of such an arrangement, for the taxpayers of the strip would have no more taxes to pay on their real estate in proportion to its value than the taxpayers of the county from which the strip was taken would have to pay on their real estate, and they would have nothing to pay on their personal property. They would have the advantage of the taxpayers of the county in not having any personal-property tax to pay. Not taxing the personal property of the strip, however, makes the tax on all the other property both of the county from which the strip is taken, and the strip itself, higher than it otherwise would be. But as such a thing would not make the tax void as to the taxpayers of the county, would it make it void as to the taxpayers of the strip?" (16 Kas., pp. 504, 505.) The legislature in such a case treats the real estate of the strip, for the purpose of paying the existing bonded indebtedness of the county, as though the strip still remained a part of the county. But it treats the personal property as though it were removed from such county. That is, for the purpose of paying said bonded indebtedness the real estate of the strip is treated as remaining with the county, and is treated as though it and the county together still formed

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one taxing district; and by so treating the same, the *rate* of assessment and taxation for such indebtedness is equal and uniform within such taxing district. But the personal property of the strip is treated as having been removed from the county, and as having been placed in another county, and another taxing district; and by so treating the same, the *rate* of assessment and taxation in this other taxing district is also equal and uniform. Now the legislature has the power in other cases, to change the *situs* of personal property for the purposes of taxation, although no change is made in its actual *situs*. In the case of *Swallow v. Thomas*, 15 Kas. 68, it was said by this court that as to "the power of the legislature to separate, for the purposes of taxation, the *situs* of personal property from the domicile of its owner, there can be no doubt; (*Tappan v. National Bank*, 19 Wallace, 490;) nor any of the fact that, unless it has so separated it, it is taxable at his domicile." (See also, *First National Bank v. Smith*, 65 Ill. 44.) In the case of *Griffith v. Carter*, 8 Kas. 565, it was held that a stock of goods kept for sale in Coffey county, and which perhaps had never been in Douglas county, was nevertheless taxable in Douglas county where the owner of the property resided, and was *exempt* from taxation in Coffey county." That is, the *situs* of the property for the purposes of taxation was in Douglas county, although the actual *situs* of the property may never have been there, and was exclusively in Coffey county. That same kind of property would now under the same circumstances be taxed in Coffey county. The legislature has changed the law in this respect. (Laws of 1876, page 57, § 7.) And the legislature in making such change has not only changed the taxable *situs* of such property from Douglas to Coffey county, and the *rule* of taxation in this respect, but it has also to some extent changed the *rate* of taxation; for a little higher rate of taxation must now be imposed in Douglas county, and a little lower rate in Coffey county, to raise the same amount of tax in each of the said counties than would have been necessary to impose if the taxable *situs* of said property had not been changed. And yet,

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such a change, and such a state of things, are legal, according to the decision made in the case of *Swallow v. Thomas*, supra. That is, according to the decisions made in said cases of *Griffith v. Carter*, and *Swallow v. Thomas*, the legislature may tax or exempt certain property in Douglas county, as it chooses, and may exempt or tax the same property in Coffey county, as it chooses, provided the property is taxed only in one county, and exempted only in one county. And according to said cases, the rate of taxation would be equally equal and uniform under said constitutional provision, whether the property was taxed or exempted in either of said counties, provided of course that it was taxed in one and exempted in the other. It is further said in the case of *Comm'rs of Sedgwick County v. Bunker*, supra: "But suppose the personal property of the strip should also be taxed: then must the personal property brought onto the strip after its separation from the county be also taxed? It was not liable for any debt of the county before the separation. Perhaps if the strip had remained attached to the county it never would have been brought onto the strip, and therefore never would have been liable for any tax or debt of the county. Perhaps the detaching of the strip had a controlling influence in bringing such property onto the strip. Then should such property be taxed to pay such debt? The debt may not be due for thirty years after the detaching; and should property brought onto the strip twenty or thirty years after its separation from the county be taxed to pay an old debt of the county? These are probably questions for the legislature, and not for the courts. But even if any portion of the personal property situated on said strip should not be taxed to pay said debt, then the uniformity of taxation contended for by the defendant would be destroyed."—(16 Kas. 505.) Suppose that within ten or fifteen years from this time two men should emigrate from some other state to Kansas. Neither has ever before been in Kansas, or owned property therein, but each brings with him from his former home a considerable amount of personal property. One settles with his property in said county, the other goes onto said strip.

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One surrenders himself with all his property to the jurisdiction of said county, receives the benefits of all the property and institutions belonging to the county, and both he and his property become liable to taxation therein. The other never enters within the limits of said county, and never owns or has any property therein. Now is there no stronger reason for taxing the one to help pay the said debt of said county, than for taxing the other? Counsel for defendants in error in this case say not; but it would seem to us otherwise. (See opinion in the case of *Chandler v. Reynolds*, soon to be delivered.)

But we must conclude. We have already extended this opinion to a greater length than was probably necessary; and yet we have not exhausted the subject. To enunciate a few superficial abstract propositions, and then follow them to their logical sequences, is comparatively an easy task. But to enter upon a real investigation of a difficult and complicated subject, and examine it in all its multifarious relations and countless details, requires more time, labor, and research than we have time to give to it. We have extended this opinion, however, thus far in order to show that the general abstract propositions relied upon by the defendants in error do not state correctly either the letter or the spirit of the constitution. They are too general. They cover too much ground. They embrace within their comprehensive terms too many particulars. No provision of the constitution can be found so comprehensive or so sweeping in its general terms. Hence, although said general propositions of the defendants in error may seem to be generally true in their application to cases, still they cannot always be true, and must in many cases be subject to exceptions and limitations. General propositions of law however are generally subject to exceptions and limitations, and much of the labor of courts is devoted to ascertaining and designating these exceptions and limitations. And here comes the conflict. Technical and superficial reasoners, persons whose prejudices or interests are with the general proposition, and those who cannot or will not investigate a subject in all its manifold details, will refuse to recognize the

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exceptions or the limitations, and will cling to the general proposition.

We do not wish in this case to fix the boundaries of the operation of said constitutional provision. The task would be too difficult, and we could not do it if we would. Nor do we wish to decide where said provision will apply, or where it will not apply, any further than is necessary for the decision of this particular case. Indeed, all that we wish to decide is, that said constitutional provision does not apply in this case to such an extent as to render said sections 3 and 4 of said act of 1878 unconstitutional and void. No other questions are in fact determined, whatever may be said in the opinion. Whether it is within the power of the legislature to authorize the imposition of a greater rate of taxation upon any part of the property of a detached portion of any county or township to pay indebtedness contracted by such county or township prior to its division, than upon the property of the county or township itself, is not decided in this case. The only effect of this decision is, that it announces the principle that the legislature may when dividing a county or township relieve the personal property of the detached territory from all liability for previous debts of the county or township while continuing the liability of all the other property. Nothing else is decided. The judgment of the court below will be reversed, and cause remanded for further proceedings in accordance with this opinion.

All the Justices concurring.

CHAS. E. CHANDLER, *as Treas., &c.*, v. JASPER REYNOLDS.

MUNICIPAL BONDS, *In Aid of Bridges; Division of Township, or County.*

Where a territory is detached from a county or township, the act of the legislature of 1873 relating to "taxation on the change of boundary lines," authorizes the taxation of said detached territory to pay prior bonded indebtedness of such county or township only in cases where the bonds were both "authorized and issued" "previous to the detachment of said territory." [*Comm'rs v. Wilson*, 19-234; *Comm'rs v. Bunker*, 16-498, annotated edition; *Comm'rs v. Hinchman*, 81-788.]

Error from Pottawatomie District Court.

INJUNCTION brought by *Reynolds* against *Chandler* as county treasurer. All the facts appear in the opinion. A perpetual injunction was decreed by the district court, and the county treasurer brings the case here on error.

John Martin, for plaintiff in error.

Hick & Reed, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action to perpetually enjoin the collection of a certain tax. The facts of the case are substantially as follows: On the 1st of August 1871, at an election held for that purpose the electors of St. Marys township voted to issue \$42,000 of the bonds of said township to build a bridge across the Kansas river. According to the election proclamation, and the order of the township officers submitting the question to a vote, the bonds were to be issued to the person or company building the bridge, in sums of \$100 each, bearing ten per cent. interest, the interest payable annually at the township treasurer's office; they were to run twenty years, and were not to be issued until the bridge was completed. On the 25th of said August, the King Wrought-Iron Bridge Manufactory and Iron Works, a corporation, (which for convenience we will call the Bridge Company,) entered into a contract with the township officers to furnish all the materials and build the bridge for \$39,100 in the bonds of St. Marys

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township at par; the bridge to be completed by the 25th of December 1871, which time was afterward extended by agreement to the 1st of February 1872; and it was completed and accepted by the township officers on the 16th of said February. On the 11th of September 1871, thirty-six square miles of the territory of St. Marys township, including the land of the defendant in error, were duly detached therefrom by the board of county commissioners, and formed into Emmett township, leaving about thirty-six square miles in St. Marys township.

On the 4th of January 1872, the treasurer and clerk of St. Marys township made out, signed and delivered to the Bridge Company \$40,000 of the bonds of said township. In exchange for \$900 of said bonds they took the Bridge Company's note for that amount. Each of said bonds was for \$100, payable in ten years, bearing ten per cent. interest, payable in New York, and dated August 1st, 1871. On the 8th of January 1872, and while the said \$40,000 of bonds were outstanding, the said township officers, at Topeka, Kansas, made out, executed and delivered to the said Bridge Company \$40,000 more of the bonds of St. Marys township, each bond in the sum of \$1,000, payable in twenty years, bearing ten per cent. interest from date, and dated back to the first day of August 1871, with interest coupons attached, the interest payable semi-annually in New York; and the Bridge Company agreed to return within fifteen days, and did return to the said township officers fifteen days thereafter, the first-mentioned bonds, delivered on the 4th of January, and the same were destroyed. A tax of 11½ mills on the dollar for the year 1873 was levied on the land of the defendant in error and other lands situated in Emmett township, to pay interest on the last-mentioned \$40,000 of the bonds of St. Marys township, issued on the 8th of January 1872. Said tax was levied exclusively on real estate in Emmett township, notwithstanding there was and is personal property in said township liable to taxation, and taxed therein for other purposes, amounting to over \$80,000 in value. This action was commenced on the 9th of January 1874, in the district court of Pottawatomie county,

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by defendant in error, to enjoin the collection of this tax. It was tried at the August term 1874, of said court, upon an agreed statement of facts, substantially as above, and judgment was rendered for the defendant in error (plaintiff below,) declaring the tax illegal, and perpetually enjoining its collection; and the defendant below as plaintiff in error now brings the case to this court.

We shall assume that said bonds are valid, and that they are binding obligations upon St. Marys township; and with this assumption, is said tax legal and valid? According to the decision rendered in the case of *Comm'rs of Sedgwick County v. Bunker*, 16 Kas. 498, 503, it is not. As will be perceived from the foregoing facts, said bridge was not completed, nor were said bonds due or issued, until some time after said Emmett township was separated from St. Marys township and duly organized; and therefore, according to said decision, no taxes can be imposed on any property situated in Emmett township, by virtue merely of the act of the legislature of 1873, "relating to taxation on the change of boundary lines," (laws of 1873, page 267,) to pay anything that may be due on said bonds. But counsel for plaintiffs in error desires us to reconsider that decision. He claims that the legislature not only had the power to pass the act which they did pass, which we admit, (*Comm'rs of Ottawa County v. Nelson*, just decided, *ante*, 234,) but that the act actually applies to this case so as to make said tax legal and valid. A portion of his argument reads as follows:

"In order to illustrate the operations of this act under a theory of construction different from the one now insisted upon by me, take this case: On the first of August 1871, an election was duly held in St. Marys township for the purpose of determining whether the officers of that township should be authorized to contract for the construction of a bridge across the Kansas river at some point in the township, and issue the bonds of the township in payment therefor. The election resulted in favor of building the bridge and issuing the bonds; and in pursuance of the authority thus granted, the township officers did, on the 25th of August 1871, duly

enter into a contract for the construction of the bridge and for issuing the bonds. Now this proceeding created a liability to pay these bonds. It made a debt against all the territory that then constituted the territory of St. Marys township; and on the 25th of August, when this liability was incurred, a very large proportion of the territory now included in the townships of Belvue and Emmett constituted a part of the township of St. Marys. So we find that this debt was created by the action of all the people then included in St. Marys township. It was created for the benefit of all the people and property in that township, as then constituted; not only this, but the debt was so contracted upon the faith of the value of all the property in the township as then constituted. It is unquestionably true, that the people and the property now included in that portion of the township of Belvue and Emmett were equally benefited by the building of the bridge as the remainder of the old township. This being so, it is clear that this detached territory ought to bear its share of the burden imposed in obtaining that benefit, and especially so when that burden was imposed by the action of those who were then residents and property-owners on such detached territory. Good conscience and equity require such a construction of this statute as will fairly apportion this burden so voluntarily assumed; and the legislature undoubtedly intended that the law should be understood and enforced. It would be a gross wrong to the old township, and a glaring outrage upon public creditors, to establish by statute or judicial decision the theory that the inhabitants of a part of a township may voluntarily assist in contracting debts or incur obligations of this kind for their own benefit, and so soon as the burden becomes onerous to discharge their property from their self-imposed liability by being cut off from the old township, thus imposing the whole of the burden upon the old territory and property, and without the assumption of any corresponding obligations of the new township to which it may be attached. This would be grossly inequitable and unjust, and the legislature cannot be presumed to have intended the establishment of such a harsh and unfair rule."

The foregoing would be a good argument to present to the legislature; and, if the terms of the statute were really doubtful or ambiguous, it would be a good argument to present to us. The inequity of the law as it is, and the equity of such a law as the counsel would have this statute to be, are ably set

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forth in the foregoing argument. But we do not consider the terms of said statute as doubtful or ambiguous. They clearly do not apply to the present case so as to make said tax valid. Where territory is detached from a county, or township, said statute would authorize the taxing of said detached territory to pay prior bonded indebtedness of such county or township only in cases "wherein any bonds shall have been *previous* to such change of boundary lines legally authorized *and issued*." That is, the detached territory is not liable for any portion of such bonded indebtedness unless the bonds were both "authorized and issued" "previous to" the change of boundary lines.

Precisely the same legal questions are involved in the case of Charles E. Chandler, plaintiff in error, v. Alfred E. Travis, defendant in error, (now submitted to us,) as are involved in this case; and therefore this opinion will be sufficient for both cases.

The judgments of the court below in both cases will be affirmed.

All the Justices concurring.

PETER MANVILLE V. LUCAS FELTER.

TRESPASSES TO PROPERTY; Remedies, Civil and Criminal. Under section 2 of chapter 113, general statutes of 1868, a civil action to recover damages cannot be joined and tried with a criminal prosecution instituted for a violation of said section; nor can the complainant in the criminal prosecution provided for in said statute recover in such proceeding any judgment for wrongs done to his property. The civil and criminal actions therein provided are not in anywise dependent upon each other. Either or both methods may be resorted to, as may be deemed best. [*State v. Armell*, 8-288; *State v. Grevell*, 19-193; *Reisner v. R. R.*, 27-390; *State v. Crawford*, 28-744; *Sullivan v. Davis*, 29-30.]

Error from Doniphan District Court.

A FULL statement of the proceedings in this case will be found in the subjoined opinion. The district court, at Sep-

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tember Term 1876, gave judgment against *Manville*, and he brings the case here for review.

Albert Perry, for *Manville*.

Price & Heatley, for *Felter*.

Willard Davis, Attorney General, for the State.

The opinion of the court was delivered by

HORTON, C. J.: We frequently read in the law books of a confusion of goods, and of a misjoinder of actions; but we have presented to us in the record in this case such a confusion of suits, and such a misjoinder of actions, as to be truly *sui generis*. On June 15th 1876, Lucas Felter filed a complaint against Peter Manville under § 2, ch. 113, Gen. Stat. 1096, be-

fore a justice, and attempted to join a public prosecution and a civil action to recover in his own behalf the statutory damages prescribed by the act. He denominated the paper, or written complaint which he filed, "a bill of particulars" and an "affidavit." The case, as tried before the justice, was entitled "The State of Kansas vs. Peter Manville." The jury returned that Manville was guilty as charged, and assessed the complainant's damages at five dollars. Thereupon the justice rendered judgment, that Manville pay Lucas Felter ten dollars, double the amount of damages found, and the further sum of five dollars, and also adjudged Manville guilty of a misdemeanor and assessed his fine at the sum of one dollar, together with the costs of prosecution, and ordered that he be committed to the jail of Doniphan county until the judgment should be complied with, unless sooner discharged according to law. Manville then appealed the case to the district court, and there the case was entered on the docket alternately as the case of "The State of Kansas vs. Peter Manville," and as "Lucas Felter vs. Peter Manville." When tried in the district court, it was styled the case of "Lucas Felter v. Peter Manville." The court rendered judgment on the verdict of the jury, that said Felter recover of said Manville the sum of two dollars, the further sum of five dollars,

1. "Confusion confounded."

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(making in all seven dollars,) all the costs, (taxed at \$88.40,) and that Manville pay the additional sum of one dollar as a fine. In this court the case is docketed as "The State of Kansas vs. Manville," and the attorney general, by virtue of his office, appears for the state; but the cause is brought here by a petition in error, and the counsel of Lucas Felter enter his appearance, and waive the issuance of a summons.

The statute "to prevent certain trespasses" provides redress in two ways for certain wrongs done to the property of individuals; one by a public prosecution, the other by a civil action brought by the party injured. *The State v. Armell*, 8 Kas. 288. If a public prosecution is had, of course the cause must be tried by the procedure applicable to criminal cases, and the county attorney would have the direction of the suit in the inferior courts. If a civil action is brought by the party injured, the case must be disposed of within the rules controlling trials of civil actions, and officially the county attorney would have no connection therewith. Under the section of law alleged to have been violated, the civil and criminal actions cannot be prosecuted together. The law does not tolerate such a course of procedure as was attempted in the proceedings before us, and we think the court below was manifestly guilty of the widest departure from all the recognized rules of practice. Some question might be raised whether the action ought not to be treated solely as a civil case, and so much of the judgment affirmed as gives to the complainant damages. But this view is not presented in either brief filed, and considering all the proceedings, the confusion of the suits in the courts below, and the joinder of a civil and criminal action on the trial, we do not deem it wise to favor in the slightest degree such practice, and therefore conclude to reverse all the judgment, and to remand the case for further proceedings in accordance with this opinion.

All the Justices concurring.

PACIFIC RAILROAD Co. v. DANIEL W. THOMAS *et al.*

1. **RATIFICATION OF CONTRACT; Notice to Principal, of Agent's Contract.** A master mechanic of a railroad company for a particular division of the company's road employs a physician and surgeon to attend an employé of the company who was injured while in the performance of his duties as such employé, and while under the immediate order of said master mechanic, and said master mechanic states that he would see that the company paid for said physician's services. The physician performs said services, looking to the railroad company for his pay and giving to it the credit, (although at the same time he charges upon his books said services to said employé, and makes no charges upon his books against said railroad company.) While he was so performing his said services he makes out a bill for the same against the railroad company and incloses it in a letter which states his said employment by said master mechanic, and asks that the company pay the bill, and he sends said letter and bill to the assistant superintendent of the railroad company for said division, but neither said division superintendent nor the company ever pay any attention to said bill or to said letter. *Held*, That these facts are sufficient to uphold a finding by the jury that said division superintendent ratified said employment of said physician and surgeon by said master mechanic.
2. **SUPERINTENDENTS of Railway Corporations; Their Powers, and Authority.** It will be presumed in the absence of anything to the contrary, that the general superintendent of a railroad company has the authority from the company to employ a physician and surgeon to attend an employé of the company who has been injured while in the company's employ. And it will also be presumed in the absence of anything to the contrary, that the division superintendent of such company has the sole power within his division as the general superintendent has. And it will also be presumed in the absence of anything to the contrary, that where an officer or agent of a railroad company has the power in the first instance to employ a physician and surgeon and make the company responsible for his services, such officer or agent would also have the power to ratify a previous unauthorized employment of such physician and surgeon, and thereby make the company responsible for his services. [*Hentig v. Kernke*, 25-560; *R. R. v. Ingram*, 20-70, 71; *R. R. v. Reimer*, 18-458; *R. R. v. Reeher*, 24-228.]

Error from Leavenworth District Court.

ACTION by Thomas and another, to recover for certain professional services as physicians and surgeons. All necessary facts are set forth in the subjoined opinion. Trial at May Term 1873 of the district court. Verdict and judgment in

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favor of plaintiffs for \$235, and the *Railroad Company* brings the case here.

T. A. Hurd, for plaintiff in error.

Clough & Wheat, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action for services as physicians and surgeons. Daniel W. Thomas and Moses S. Thomas were the plaintiffs in the court below, and the Pacific Railroad was the defendant. The facts of the case stated briefly are substantially as follows: In November 1869, Frank Gates was assistant master mechanic of the western division of plaintiff-in-error's railroad, the terminus of which was in Leavenworth. Robert Kane was section boss, and had charge of the repairs of track and road-bed, and had in his employ one John Kennedy. On November 4th, Gates and Kane, with the men under Gates' charge, undertook to load the smoke-stack of a locomotive upon a tender at the turn-table in Leavenworth, and from some defect of the appliances used the stack fell, and Kennedy was caught by it, and his leg was broken. Dr. D. W. Thomas attended Kennedy as a physician and surgeon until Kennedy recovered, which was about the last of December 1869. There was sufficient evidence for the jury to find, as we suppose they did find, that Dr. Thomas was employed by both Gates and Kane, and that Gates said that he would see that the railroad company paid for his services. The plaintiffs (Drs. D. W. and M. S. Thomas, partners,) looked to the railroad company for their pay, and gave the credit to the railroad company, although upon their books they charged Kennedy for their services, and did not charge the railroad company. About the last of December 1869, Dr. D. W. Thomas made out a bill for his services against the railroad company, and sent this bill by mail inclosed in a letter properly addressed to H. Hale, superintendent of the western division of the defendant's railroad, at Kansas City, Missouri. This

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letter stated the employment of Dr. Thomas by Gates, and asked that the bill be paid. Hale never answered.

In July 1871 the plaintiffs commenced this action. Two trials were had—the first in February 1872, and the last in May 1873—at the first of which trials, as well as the last, Dr. Thomas testified concerning said letter and said bill. In March 1872 the plaintiffs gave notice to the defendant and its attorneys to produce said letter and said bill on the trial, as the plaintiffs wished to use them as evidence. The defendant however did not produce either of them; and although Dr. Thomas testified on both trials concerning their contents, yet the railroad company did not show whether they had ever been received by Mr. Hale, or not. Of course they were received. The mere putting them into the post-office, properly directed and addressed, was *prima facie* evidence of that fact, and there was no evidence to the contrary. The court below instructed the jury that the employment of Dr. Thomas by Gates and Kane would not alone make the railroad company responsible for Dr. Thomas' services; and that unless such employment was afterward ratified by some agent of the company having power to ratify the same, the plaintiffs could not recover. Now the only evidence tending to show a ratification of said employment was the neglect or refusal of Hale, and of the railroad company, after receiving said letter and bill, to pay any attention to them. And upon this evidence the jury evidently found that there was a ratification; and taking this evidence, together with the circumstances of this case, we think the evidence was sufficient to sustain such finding. (*Toledo Rld. Co. v. Rodrigues*, 47 Ill. 188; *Toledo Rld. Co. v. Prince*, 50 Ill. 26; *Marquette Rld. Co. v. Taft*, 28 Mich. 289, 294, et seq.; *A. & P. Rld. Co. v. Reisner*, 18 Kas. 458.) Kennedy was in the employ of the railroad company; Gates was the master-mechanic of that division; Kennedy was injured while performing services for the company, under the orders of Gates, and in the immediate presence of Gates; Gates employed Dr. Thomas, and said that he would see that the company

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paid him; Dr. Thomas performed the services, looking to the company for his pay, and while he was so performing such services, and before he had finally completed them, sent said letter and said bill to Hale, itemizing his said services, explaining the same, and informing Hale of his said employment by Gates, etc.; and although Hale was at that time the superintendent of that division, yet he never paid any attention to said letter or to said bill. We cannot upon such a state of facts say that the finding of the jury was erroneous.

But it is claimed by plaintiff in error, defendant below, that the court below erred in giving the following instruction to the jury, to-wit:

“It is claimed that Mr. Hale, the party to whom Dr. Thomas says he addressed the letter at Kansas City, was the deputy, or division superintendent of the road or company, or of that part of the road this side of Holden, Missouri. It is claimed he had such authority by virtue of his position, as empowered him originally to have employed the plaintiffs; and that if he had such power, in case the original employment was by some servant of the company who had not authority to employ, he had the authority to ratify the unauthorized act. I say that the law would presume, in the absence of testimony to the contrary, that the general superintendent of a railroad company would have authority to employ a surgeon to attend on an employé of the company who had been injured while in the employ of the company. That would be the presumption of the law, in absence of testimony. Now the division superintendent, Hale, *had, in respect to matters happening within his jurisdiction, the same authority as the general superintendent had.* But I say this is the presumption of the law, when the testimony does not show what the precise nature of his authority was. If the testimony should show, as a matter of fact, that he did not have such authority, then I say to you the plaintiffs could not recover in this case; that is, if the testimony shows that Mr. Hale, as division or deputy superintendent, had not authority to have originally employed the plaintiff; then he had not the power to ratify the act of either Kane or Gates, or other subordinate servants of the company.”

We think the foregoing instruction is correct. We think that presumptively “the general superintendent of a railroad company would have authority to employ a surgeon to attend

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on an employé of the company who had been injured while in the employ of the company," and presumptively that the division superintendent would have "in respect to matters happening within his jurisdiction the same authority as the general superintendent," although in both cases these presumptions might be rebutted by evidence, and it might be shown that neither the general superintendent nor the division superintendent had any such power or authority. And we would also think that presumptively, and in the absence of anything to the contrary, where an officer or agent of the company has the power in the first instance to employ a physician and surgeon, and make the company responsible for his services, such officer or agent would also have the power to ratify a previous unauthorized employment of such physician and surgeon, and thereby make the company responsible for his services. We also think that there was sufficient evidence for the jury to find that "the division superintendent, Hale, had, in respect to matters happening within his jurisdiction, the same authority as the general superintendent had."

The judgment of the court below will be affirmed.

All the Justices concurring.

THE STATE OF KANSAS V. GEORGE LEWIS.

1. **CRIMINAL LAW; Waiver of Preliminary Examination; Duress.** The mere fact that a person arrested upon a criminal charge, is hand-cuffed when taken before the examining magistrate, and so remains during the reading of the warrant, and subsequent proceedings, the sheriff and a policeman being present all the time, does not in anywise affect a waiver then and there made by the accused of a preliminary examination upon such criminal charge; and a plea in abatement to an information filed in the district court charging the accused with the same offense, grounded upon such fact, claiming that the waiver was made under duress, is not good, and a demurrer thereto is rightfully sustained.
2. **BREAKING JAIL, Before Conviction; Statute Construed.** Where a person charged with having committed a criminal offense is imprisoned in the county jail, awaiting his trial on such charge, breaks such jail and es-

Statement, and Brief of Appellant.

capas, and being rearrested is thereafter tried upon such charge and acquitted, he cannot set up and maintain such acquittal as a bar to an information duly filed against him charging him with the offense of breaking jail and escaping from lawful custody.

[As to endorsing names of witnesses, see page 265; also, *State v. Medlicott*, 9-232; *State v. McKinney*, 31-576; *State v. Cook*, 30-82.]

Appeal from Atchison District Court.

INFORMATION against *Lewis*, charging that said *Lewis*, on the 23d of February 1877, while imprisoned in the common jail of Atchison county, in the custody of the sheriff of said county, duly charged with having committed the crime of burglary, before conviction upon such charge, and awaiting his trial therefor, unlawfully and feloniously broke such jail and escaped therefrom and from the custody of said sheriff, etc. Trial at the March Term 1877. Verdict, guilty, and *Lewis* was sentenced to confinement in the penitentiary for two years. He now appeals to this court. The facts, and proceedings before trial, are fully stated in the opinion, *infra*.

Smith & Solomon, and *W. D. Gilbert*, for appellant:

1. At the outset of this case we find a travesty on justice enacted by the sheriff of Atchison county, a policeman of the city of Atchison, an examining magistrate, and the county attorney. All these functionaries surround a man charged with crime; he is dragged into the presence of a justice of the peace, shackled and hand-cuffed, to answer the charges preferred against him, and to have a hearing thereon. Under this pressure he naturally waives examination. It may possibly be claimed that because this was a preliminary hearing, and inasmuch as the appellant waived an examination, he is in no position to complain. Since the grand-jury system is practically abolished in this state, we conceive that the preliminary examination is a limitation on the power of the county attorney, who in the absence of the wholesome provision of law providing for such examination might act *ex parte*, and with an oppressive power, only to be redressed at the hands of a constitutional jury. A preliminary hearing is

certainly a "prosecution" within the meaning of § 10 of our bill of rights: and what opportunity was afforded to the appellant to *defend in person*, or by counsel, before the justice? None—and his waiver of a preliminary examination was not his free and untrammelled act. Hence his plea in abatement of the information. The court will notice that no issue is joined on this plea in abatement. A demurrer is filed to the plea, admitting the truth of its allegations. The showing of oppression and judicial outrage recited in the plea in abatement is offensive to the sense of every lawyer. They infringe upon the constitutional protection with which every citizen of this republic is hedged about. They smell of the age of the inquisition, and are repugnant to the spirit of free institutions. The ancient common law, as well as the late American decisions, condemn such proceedings. 4 Black. Com., 332, and note; Hale's Pl. Cr. 219; *Waite's Case*, Leach, 34; 6 State Trials, 230; 42 Cal. 165; *The State v. Kring*, Sup. Ct. of Mo., June 1877.

2. The court below erred in sustaining the demurrer to the appellant's plea in bar. At the time the appellant is alleged to have escaped, he was in custody awaiting trial on the charge of burglary. On being rearrested he was brought to trial in the district court on said charge of burglary, and was duly acquitted. The information for breaking jail, was filed under § 183 of the crimes act. This section provides only for the punishment of any person who shall break jail "*before conviction* for the violation of any penal statute." Now the trial court in construing this section resolved itself into a legislature, and amended this section by inserting the words "or acquittal," after the words "before conviction," in order to bring the defendant within the purview of the law. If this section means anything, it means what it says. It is not ambiguous, and it applies to only one class of cases, to-wit, where the defendant escapes "before conviction." This may be a fault in the law, but the section admits of no other interpretation without judicial interpolation and amendment changing the manifest and plain language of the section. Courts will not

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by construction extend the operation of penal statutes to cases not clearly within their terms; 2 Dillon Ct. Ct. 219; 14 Peters, 464; 5 Wheaton, 76; 2 id. 119.

3. The court erred in permitting the name of Amos T. Johnson to be indorsed on the information. The supposed authority for indorsing the name of Johnson as a witness is found in § 67 of ch. 82, Gen. Statutes; but this section provides that the court can only permit the indorsement of the names of witnesses *before trial*; and yet the county attorney, after five witnesses had been examined, was allowed to add the name of Johnson to the information, over the defendant's objection, and that, too, after the county attorney had stated that he knew of the presence of the witness in the county ever since the commission of the alleged offense. Sec. 67 of the criminal code contemplates that the defendant shall be apprised of the names of the witnesses before the trial.

The opinion of the court was delivered by

VALENTINE, J.: This was a criminal prosecution for an alleged violation of section 188 of the act relating to crimes and punishments. (Gen. Stat. 357.) Said section reads as follows:

"SEC. 188. If any person, lawfully imprisoned or detained in any county jail or other place of imprisonment, or in the custody of any officer, upon any criminal charge, before conviction, for the violation of any penal statute, shall break such prison or custody and escape therefrom, he shall upon conviction be punished by confinement and hard labor for a term not exceeding two years, or in a county jail not less than six months."

The facts of the case, so far as it is necessary to state them, are as follows: The defendant was imprisoned in the county jail of Atchison county, in the custody of the jailor of said county, upon the criminal charge of burglary in the second degree, as defined by section 68 of the act relating to crimes and punishments, (Gen. Stat. 330,) awaiting a trial upon such charge; and while so imprisoned as aforesaid he broke said jail and said custody, and escaped therefrom. Afterward a warrant was duly issued by a justice of the peace of said county for his arrest upon the charge of

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facts.

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breaking said jail and custody as aforesaid. Upon such warrant he was duly arrested by the sheriff of said county and a policeman of the city of Atchison, and was hand-cuffed and taken before said justice for a preliminary examination, whereupon, without said hand-cuffs being removed, and in the presence of said sheriff and said policeman, and said justice and the county attorney of said county, he waived a preliminary examination, and was returned to said jail. Afterward he was tried upon the charge of burglary, and was acquitted. The county attorney thereupon filed an information in the district court of said county against the defendant duly charging him with the offense of breaking said jail and custody, and escaping, as aforesaid; upon which information the defendant was duly arraigned and pleaded successively as follows: 1st, A plea in abatement, that he was hand-cuffed, and in the custody of said sheriff and said policeman, when he waived said preliminary examination, and therefore that said waiver was a nullity, and that therefore the county attorney had no power to file said information. 2d, A plea in bar, that he had been tried and acquitted on the charge of burglary, and that therefore he could not be tried or convicted upon the charge of breaking said jail. 3d, The general plea of "not guilty."

The county attorney demurred to the first two pleas, and the court below sustained both of the demurrers, and we think correctly. There was no pretense that any means were used

1. Waiver of preliminary examination; duress.

with the intent that such means would cause the defendant to waive said preliminary examination; no pretense that defendant had any cause to fear that justice would not be done him, except the mere presence of said officers, and that he was hand-cuffed; no pretense that any wrong was done him, except merely the receiving of said waiver while the defendant was hand-cuffed; and no pretense that any of these things worked any prejudice to the defendant's substantial rights on the final trial of the case in the district court upon its merits. We cannot therefore reverse the judgment of the district court rendered upon the verdict of an impartial jury, after a fair trial has been had on the merits of the case in that court, merely because the defendant waived

a preliminary examination before an examining magistrate while he was hand-cuffed.

The defendant also claims that as he was acquitted on the charge of burglary, therefore that he did not commit the offense of escaping from said jail "before conviction" upon said charge of burglary. We think otherwise. His offense, of escaping from said jail, comes, as we think, within the letter and spirit of the statutes prohibiting escapes. He escaped from imprisonment for an alleged burglary, and had never been convicted of such burglary. His offense therefore comes within the exact letter of the statute, and of that section of the statute under which he was prosecuted. He escaped "before conviction." His offense also comes within the spirit of the statute. The spirit of the statute, as gathered from sections 167 to 187 of the crimes act, (Gen. Stat. 354 to 358,) is to punish for all escapes from lawful custody. Some of said sections provide for punishing for escapes made from custody in criminal cases; some for escapes made in civil cases; some, where convictions have already been had in criminal cases; and some "before conviction" in criminal cases. And taking said sections altogether, and construing said section 183 as we construe it, they provide for punishing for escapes from lawful custody in all cases. If said section 183 is to be construed as the defendant claims that it should be construed, then it would be improper in any case to try a defendant for an escape until after a trial and conviction upon the original charge; for if he should *by any means* procure an acquittal upon the original charge, or a dismissal of the case, or a *nolle pros.* to be entered therein, then he would not have been guilty of committing any offense by making such escape. When a party is in legal custody, and commits an escape, we do not think that it depends upon some future contingency as to whether such escape is an offense or not.

As to permitting a witness's name to be indorsed on a criminal information at the time of the trial, and permitting such witness to testify in the case, see *The State v. Dickson*, 6 Kas. 209, 219.

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We do not think the court below committed any substantial error in this case, and therefore its judgment will be affirmed.*

All the Justices concurring.

*REPORTER'S NOTE.—The peculiar features of the foregoing case of *The State v. Lewis*, seem to justify the inserting here of the "poetical report" thereof written by EUGENE F. WARR, Esq., attorney-at-law, of Fort Scott, and which he published in the "Fort Scott Daily Monitor," of 10th March 1878. Mr. Warr's "report" is as follows:

IN THE SUPREME COURT, STATE OF KANSAS.
GEORGE LEWIS, Appellant, *ads.* THE STATE OF KANSAS, Appellee.

[Appeal from Atchison county.]

SYLLABUS:

Lew—Paw; Quill—Will. When upon thy frame the law—places its majestic paw—theo' in innocence, or guilt—thou art then required to wilt.

Statement of Case, by Reporter.

This defendant, while at large,
Was arrested on a charge
Of burglarious intent,
And direct to jail he went.
But he somehow felt misused,
And through prison walls he cooed,
And in some unheard-of shape
He effected his escape.

Mark you, now: Again the law
On defendant placed its paw,
Like a hand of iron mail,
And relocked him into jail—
Which said jail, while so corraled,
He by sookage-tenure held.

Then the court met, and they tried
LEWIS up and down each side,
On the good old-fashioned plan;
But the jury cleared the man.

Now, you think that this strange case
Ends at just about this place.
Nay, not so. Again the law
On defendant placed its paw—
This time takes him round the cape
For effecting an escape;
He, unable to give bail,
Goes reluctantly to jail.

LEWIS, tried for this last act,
Makes a special plea of fact:
"Wrongly did they me arrest,
"As my trial did attest,
"And while rightfully at large,
"Taken on a wrongful charge.
"I took back from them what they
"From me wrongly took away."

When this special plea was heard,
Thereupon THE STATE demurred.

The defendant then was pained
When the court was heard to say
In a cold impassive way—
"The demurrer is sustained."

Back to jail did LEWIS go,
But as liberty was dear,

He appeals, and now is here
To reverse the judge below.
The opinion will contain
All the statements that remain.

Argument, and brief of Appellant:

As a matter, sir, of fact,
Who was injured by our act,
Any property, or man?—
Point it out, sir, if you can.

Can you seize us when at large
On a baseless, trumped-up charge;
And if we escape, then say
It is crime to get away—
When we rightfully regained
What was wrongfully obtained?

Please-the-court-sir, what is crime?
What is right, and what is wrong?
Is our freedom but a song—
Or the subject of a rhyme?

Argument, and brief of Attorney for The State:

When THE STATE, that is to say,
We take liberty away—
When the padlock and the hamp
Leaves one helpless in our grasp,
It's unlawful then that he
Even dreams of liberty—
Wicked dreams that may in time
Grow and ripen into crime—
Crime of dark and damning shape;
Then, if he perchance escape,
Evermore remorse will roll
O'er his shattered, sin-sick soul.

Please-the-court-sir, how can we
Manage people who get free?

Reply of Appellant:

Please-the-court-sir, if it's sin,
Where does turpitude begin?

Opinion of the Court. PER CURIAM:

We—don't—make—law. We are
bound
To interpret it as found.

The defendant broke away;
When arrested, he should stay.

This appeal can't be maintained,
For the record does not show
Error in the court below,
And we nothing can infer.
Let the judgment be sustained—
All the justices concur.

[Note by the Reporter:]

"Of the sheriff—rise and sing,
"Glory to our earthly king!"

[E. F. W.]

KANSAS PACIFIC RAILWAY CO. v. JOSEPH D. LITTLE.

1. **IMMATERIAL ERROR—Insufficient for Reversal.** Where the court below commits errors, but under the facts of the case the errors are immaterial, the judgment will not be reversed therefor. [*Case v. Hannaha*, 2-490; *Hall v. Jenness*, 6-357; *R. R. v. Pointer*, 9-620; *R. R. v. Durkee*, 10-128; *Norton v. Foster*, 12-45; *State v. Winner*, 17-298; *Germond v. Littleton*, 22-730; *Woodman v. Davis*, 32-348; *Shepard v. Allen*, 16-182; *Briggs v. Tye*, 16-285; *Comm'rs v. Roberts*, 22-762.]
2. **INSTRUCTIONS—Not Reviewed Unless Excepted to.** Where the court below commits errors, as in charging the jury, but the errors are not saved by any exceptions, the judgment will not be reversed therefor. [*Pratt v. Miller*, 2-192; *Major v. Major*, 2-337; *Lalonde v. Collins*, 5-361; *Norton v. Foster*, 12-45; *Cohen v. Hamill*, 8-621; *Woolledge v. Converse*, 8-473; *Ritchie v. Schenck*, 7-170; *Bartlett v. Feeney*, 11-594; *State v. Jennerson*, 14-133; *Powers v. Kindt*, 13-74; *Comm'rs v. Roberts*, 22-762; *Crouther v. Elliott*, 7-235; *Jenks v. Sch. Dist.*, 18-356.]
3. **PARTY, AS WITNESS; Relatives of Party; Bias and Prejudice.** Courts cannot say that, as a matter of law, the evidence of a party must be viewed with "suspicion," nor that, as a matter of law, relatives of a party litigant must be "held to be more or less biased against the adverse party." While it is the duty of the trial court, if asked to do so, to instruct the jury that they may take into consideration the interest or relationship of any witness in weighing his testimony, yet the court may very properly leave it to the jury to say whether such witness is biased or prejudiced or not, and whether his testimony must be viewed with suspicion or not.
4. **SERVANTS OF COMMON EMPLOYER—When Not Fellow-Servants; Respondent Superior.** The plaintiff was injured by the fall of a derrick while in the employ of a railroad company as a laborer in building a culvert. It was shown on the trial that O. superintended the work in building said culvert for said railroad company, that he hired the plaintiff and all the other laborers on the work, and had the power to hire and discharge such laborers whenever he thought proper to do so; and although the materials and machinery for the work were furnished to O. by other and superior agents of the railroad company, yet that it was the duty of O. to inspect such machinery, to see that it continued in good order, and to report to his superiors so that they might furnish him other machinery if it became defective; that while O. was using said derrick it became defective and he knew it, but he nevertheless continued the work and continued to use it, and in consequence of such defect it fell and injured the plaintiff while he was at work for the company, and under the orders of O. Held, That the plaintiff and O. were not mere fellow-servants of the railroad company, but that O., with reference to the plaintiff, was a superior servant or agent, and the representative of the railroad company, and that the company is responsible to the plaintiff for his said injuries caused by the negligence of O. [*R. R. v. Rice*, 10-

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426; *R. R. v. Kessler*, 18-525; *Hefley v. Baker*, 19-12; *R. R. v. Young*, 19-492, 493; *R. R. v. Phillips*, 20-12; *Wyandotte v. Gibson*, 25-243; *R. R. v. Richardson*, 25-407; *Parsons v. Lindsay*, 26-434; *Speer v. R. R.*, 23-578; *Moulton v. Aldrich*, 28-811; *R. R. v. Wilson*, 28-641; *R. R. v. Morgan*, 31-79; *R. R. v. Pierce*, 33-64; *R. R. v. Adams*, 33-429.]

5. EVIDENCE; *Declarations and Knowledge of Superior Servant*. The court below did not err in admitting evidence as to what O. said, or what was said to him, prior to said accident, concerning the insufficiency of said derrick. Such evidence was proper for the purpose of showing that O. knew that the derrick was unsafe.

Error from Wyandotte District Court.

ALL necessary facts are stated in the subjoined opinion. At the April Term 1876 of the district court, *Little* recovered judgment for \$1,050, and costs of suit, and the *Railway Company* brings the case here.

J. P. Usher, and *C. E. Bretherton*, for plaintiff in error.

D. B. Hadley, for defendant in error.

| The opinion of the court was delivered by

VALENTINE, J.: This was an action to recover damages for personal injuries sustained by the plaintiff below through the fall of a derrick upon him, while in the employ of plaintiff in error, as a laborer, in building a culvert. The jury found in substance, that there was no negligence in originally providing the derrick, but that it became defective while used in building the culvert, and that Owens, foreman of the job, continued to use it after he knew of its defective character.

We agree with the learned counsel for plaintiff in error, that the court below committed errors, but under the facts of the case and the record brought to this court, we think that none of them are available. Some of them were wholly immaterial, and some of them were not properly saved by proper exceptions. We agree with counsel that the testimony of William Little, sen., as to what Owens and Ridgway said at the Clifton House in Lawrence on the next day after the accident occurred, was erroneously admitted; that the court below erred in refusing to strike it out, and also erred in refusing to charge the jury to disregard it. But under

1. Immaterial error, not prejudicial.

Opinion of the Court.

the undoubted facts of this case we think these errors were immaterial. The court also, by giving instruction No. 1 as asked for the plaintiff, and by refusing to give instructions Nos. 10 and 16 as asked for by the defendant, seemingly at least instructed the jury that the railroad company warranted the sufficiency of its machinery. This was erroneous. A railroad company does not warrant the sufficiency of its machinery; but is required only to use due care in supplying and in keeping in order good and proper machinery, and is responsible only for negligence in not doing so. But these errors we think were also immaterial under the facts of this case. The court also erred in defining "gross negligence," making it entirely too mild, and then again erred in instructing the jury that if the defendant was guilty of gross negligence the plaintiff might recover exemplary damages. In effect the court instructed the jury, that the plaintiff might recover exemplary damages for mere ordinary negligence. This is not the law. The plaintiff had no right to recover such damages for any negligence less than gross negligence amounting to wantonness. (*L. L. & G.*

2. Instructions not reviewed if not excepted to.

Rld. Co. v. Rice, 10 Kas. 426.) These instructions

however were not excepted to, and therefore the errors committed in giving them are not available in this court. Probably however no harm was done by giving said instructions, as we do not think that the jury allowed anything as exemplary damages.

The plaintiff in error also complains of the refusal of the court below to give the 20th and 24th instructions asked for by it. Said instructions read as follows:

"20.—In weighing the testimony offered on behalf of the parties, the jury will consider that the plaintiff is deeply interested in the result of the suit, and will view his testimony with proportionate suspicion."

"24.—Parties to suits, and their immediate relatives, are by the law held to be more or less biased against the adverse party; and in this case the credibility of the plaintiff, his father, brother, and sister, are directly in issue—the plaintiff as interested, and the others as biased witnesses against the defendant."

Now we cannot say that the court below erred in refusing to

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give these instructions. Their language is a little too strong. We cannot say that, *as a matter of law* the evidence of a party must be viewed with "suspicion." Nor can we say that, *as a matter of law* relatives must be "held to be more or less biased against the adverse party."

a. Bias of parties, and their relatives, as witnesses.

The reverse of this is sometimes true. And while it is the duty of the trial court, if asked to do so, to instruct the jury that they may take into consideration the interest or relationship of any witness in weighing his testimony, yet the court may very properly leave it to the jury to say whether such witness is biased or prejudiced, or not, and whether his testimony must be viewed with suspicion or not. There was no conflict in the testimony of the witnesses in this case, and there was nothing that transpired during the trial that should have caused the jury to look with suspicion upon the testimony of any witness. There was no ground at all upon which to base these instructions except the mere fact of interest of the plaintiff, and the mere fact of relationship to him of some of the other witnesses. We cannot therefore say that the court below erred in refusing to give these instructions.

We now come to the main question in the case: Was the railroad company, with respect to the plaintiff, responsible for the negligence of Owens? Was Owens, with respect to the plaintiff, a superior servant, representing the railroad company, or was he a mere fellow-servant with the plaintiff? The work to be accomplished in which Owens and the plaintiff and others were engaged, was the building of a culvert for the railroad company. Owens was the foreman of the work. He employed all the other persons engaged therein, and had the power to discharge them whenever he thought proper to do so. He hired the plaintiff, who was merely a laborer on the work. Owens did not furnish the materials, nor the tools, nor implements, for building said culvert, and he did not have the authority directly to do so. They were furnished by other employes of the company, superior to Owens. Owens however had the power to inspect said materials, tools, and implements, and if not sufficient or if they became insufficient to apply to his superior officers for others.

Statement of facts.

Opinion of the Court.

The jury found specially that "it was the duty of Owens to inspect the derrick, and see that it continued in good order." Said derrick was sufficient and in good order when Owens received it. But afterward by use it became insufficient. One of the ears of the spider into which one of the guy-rods was hooked became cracked and partially broken. The spider was of cast iron. Owens knew of the condition of the spider, and knew that because of said crack the derrick was unsafe; and yet he continued the work on the culvert, and continued to use said derrick. The ear of said spider broke off where it was cracked, and in consequence thereof the derrick fell and injured the plaintiff while he was at work for the company, and under the orders of Owens; and it is for such injury that the plaintiff instituted this action.

The foregoing facts are unquestioned. They were established by proof and by admissions beyond a reasonable doubt. And therefore, if the plaintiff is entitled to recover upon these facts, then all the errors committed by the court below, or at least all that were sufficiently saved by proper exceptions, must now be considered as wholly immaterial, and the plaintiff's judgment must be affirmed. Whether the plaintiff is entitled to recover upon these facts, depends as we think, upon whether the railroad company is responsible for Owens' negligence or not. That Owens was negligent in using said derrick after he knew that it had become insufficient and unsafe, we suppose no one will question; but whether this negligence was the negligence of the railroad company, may be questioned, and is questioned. We think it was. Owens was the only representative that the railroad company had upon that work. He was really the superintendent of the railroad company for that particular work. As to the laborers on the work he was the railroad company itself. If he had been merely a foreman working under a common employer, a common master, a common principal, along with the other employées, then we suppose under the authorities he would have been only a fellow-servant with the others and the company would not have been responsible for his negligence towards the others. But he was not merely a foreman working with the others under a common employer.

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As to the others he was the employer himself. He was their master, their principal. He hired and discharged them. He inspected the machinery used by them to see that it continued in good order—or at least such was his duty; and he superintended the work generally. They scarcely knew of any other principal or master. All their dealings were with him, except that he did not originally furnish the materials and machinery, and did not pay them. But he had charge of everything after it was furnished, and they could draw their pay only through him and upon his statements and orders. In *Shearman & Redfield on Negligence*, section 102, it is said as follows: "One to whom his employer commits the entire charge of the business, with power to choose his own assistants, and to control and discharge them as freely and fully as the principal himself could, is not a *fellow-servant* with those who are employed under him; and the master is answerable to all the under-servants for the negligence of such a managing assistant, either in his personal conduct within the scope of his employment, or in his selection of other servants." We have found no case exactly parallel with this, but we would refer to the following cases as throwing some light upon the questions herein discussed: *K. P. Rly. Co. v. Salmon*, 14 Kas, 512, 522, et seq.; *Lanning v. N. Y. C. Rld. Co.*, 49 N. Y. 521; *Flike v. Boston & C. Rld. Co.*, 53 N. Y. 549; *Corcoran v. Holbrook*, 59 N. Y. 517; *Ford v. Fitchburg Rld. Co.*, 110 Mass. 240; *Brothers v. Carter*, 52 Mo. 372; *Gilson v. Pacific Rld. Co.*, 46 Mo. 163; *Harper v. Indianapolis & C. Rld. Co.*, 47 Mo. 567.

The court below did not err in admitting evidence as to what Owens said, or what was said to him prior to said accident, concerning the insufficiency of said derrick. Such evidence was proper for the purpose of showing that Owens knew that the derrick was unsafe.

The judgment of the court below will be affirmed.

All the Justices concurring.

JOHN H. HANSON V. JOSEPH A. TOWLE, as Adm'r.

1. CLAIMS AGAINST ESTATES OF DECEDENTS; *Exhibition of Claim*. The exhibition of a claim to the administrator of an estate, made under section 84 of the act concerning executors and administrators, does not suspend or affect the running of the statute of limitations. [*Clawson v. McCune*, 20-340; *Scroggs v. Tutt*, 23-182, 188.]
2. LIMITATION OF ACTIONS; *Sec. 106 of Executors-and-Administrators Act, Construed*. Section 106 of said act limits the time in which a suit may be brought to establish a claim either in the probate or district courts.
3. ——— *Contingent Promise to Pay*. A promise to pay a debt upon certain conditions cannot be invoked to avoid the statutes of limitations unless the conditions are complied with.
4. ——— *Acknowledgment, Required to Suspend Statute*. A mere reference to the indebtedness, although consistent with its validity, and implying no disposition to question such validity, or a mere suggestion of some action concerning it, is not such an acknowledgment as is contemplated in section 24 of the code of civil procedure as sufficient to suspend the running of the statute of limitations. There must be an unqualified and direct admission of a present subsisting debt on which the party is liable, and which he is willing to pay. [*Elder v. Dyer*, 28-604, 609; *Grugg v. Barnes*, 32-310.]
5. ——— *Administrator, No Power to Revive Debt Barred by Statute*. An administrator has no power by promise or acknowledgment to revive against an estate a claim once barred by the statute of limitations. [*Ina Co. v. Swayze*, 30-122; *Clawson v. McCune*, 20-337.]

Error from Franklin District Court.

ACTION by *Hanson*, against *Towle* as administrator, upon two promissory notes, commenced originally in the probate court. That court having disallowed the claim, *Hanson* appealed the case to the district court, where a trial was had at the November Term 1876. Judgment in favor of defendant *Towle*, and *Hanson* brings the case here. The facts are sufficiently stated in the opinion.

W. Littlefield, and *C. R. Meigs*, for plaintiff in error:

1. The claim of *Hanson* was not barred by statute. It was legally exhibited to *Towle*, the administrator, in substantial compliance with § 84, p. 449 of Gen. Stat., in November 1871, which was before any question of limitation could arise. A

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substantial compliance with the law we believe to be sufficient; (6 Hill, 389;) and if the claim has been properly exhibited we insist that we have until the estate is entirely closed and settled up to establish the same as provided in §91, p. 450 of Gen. Stat., the section under which we are proceeding. (23 Mo. 256; 29 Ark. 288; 29 Wis. 60.) As this question involves a consideration and construction of the provisions of the law governing the allowance and payment of debts of deceased persons, let us look at it for a moment. Our executors-and-administrators act, (ch. 37, Gen. Stat.,) is generally taken from Ohio; but the provisions in relation to "allowance and payment of debts," (art. 5, §§80 to 102,) are taken from the statutes of Missouri, substantially; (see 1 Wagner's Statutes, pp. 101, 102.) It will be perceived that §84 is a copy of the Missouri statutes; but in the Missouri act there immediately follows a section which is omitted from our statute, which requires the claim thus exhibited to be presented to the court for allowance within three years from the granting of the first letters on the estate. Our statute has no provision corresponding to this, and it seems to have been purposely omitted. Section 106 of our statute provides that an administrator shall not be liable to a suit of a creditor unless commenced within three years from the time of his giving bond. But that section applies to a different matter. There are two ways to establish claims against an estate provided for by our statute: 1st, a claim may be exhibited to the administrator according to §84, and then afterward established in the probate court according to the provisions of §91; or 2d, a suit may be commenced under §86, and is to be considered legally exhibited from the time of the service of summons, (§83,) and in this case the limitation in §106 applies. This §106 is taken from Ohio. 1 Swan & Critchfield, 583; 2 Ohio St. 156. Consequently §106 has no application to this proceeding, which is not a suit brought under §86, but an attempt to establish a claim against an estate after the same has been exhibited, and based upon §91 of our statute. There is nothing in our statutes which prevents the allowance of our claim, as the exhibition of the same to the administrator

Brief of Defendant in Error.

stopped the running of the statute of limitations. 23 Mo. 256; 36 Mo. 96.

2. The administrator has promised in writing to pay this claim; and in the case of the last note at least before the five-years limitation had run; and he has by that means bound the estate he represents to pay the claim; (see Towle's letters and evidence, and deposition of Hanson.) 13 Ohio, 271; 16 Mass. 429; 36 N. J. L. 44; 35 Maine, 364; 17 Georgia, 96; 9 Allen, 502; 4 T. B. Monroe, 36; 12 T. B. Monroe, 408; 5 Binn. 573; 15 Johns. 3. That there was a sufficient promise to pay, seems to us to be established beyond question. The promise to pay, if made, was made at least on the last note before the bar; and the authorities referred to show no question as to the right or power of the administrator by promise to stop the running of the statute before it has become a bar, distinguishing this from a case where the bar is already completed and a promise made afterward.

John W. Deford, for defendant in error:

1. Hanson claims that the testimony of himself and Towle shows a "substantial compliance" with § 84, Gen. Stat. 449. Suppose that the facts stated by these two witnesses did constitute a "substantial" (nay, even a literal) compliance with § 84, yet I maintain it had no operation whatever upon the running of either the three-year, or five-year, statute of limitations. The only effect of a "legal exhibition" of a demand under § 84, is to settle its classification under § 80. (23 Mo. 256; 3 Kas. 392.) A claimant may *exhibit* his claim under § 84, at any time within the three years allowed by § 81; but if during the same time, he fails to institute adversary proceedings against the administrator under §§ 91-94, or § 86, his claim will be barred by § 106. Counsel for Hanson suggest that § 6 on p. 102 of 1 Wag. Mo. Stat. is omitted from the Kansas act; but § 106 (copied from the Ohio laws) of our act certainly covers the whole ground occupied by said § 6 in the Missouri statute. *McKinzie's Adm'r v. Hill*, Adm'r, 51 Mo. 304, is much like this case, where the court says: "Notice was given to the ad-

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ministrator on the 14th of July 1868, that the note would be presented for allowance at the next October term of the probate court. But at that term the plaintiff did not appear, no presentation was made, and no steps were taken in the matter. A new notice was given, that the demand would be presented for allowance at the April term 1869, which was served on the 2d of April in the same year, at which term the cause was submitted to the court, and judgment was rendered for the defendant. Here the offer was to prove that *the claim was exhibited* within two years after the granting of letters. That is the time allowed by statute for proving up claims against an estate, but if the demand is barred by the general provisions of the statute, *before it was presented*, it was never intended to graft this on the statute as an extension of time. The first notice must be wholly disregarded, *as no attempt was made to proceed under it*, and the second notice was not given till after ten years had gone by, and the statute, therefore, is a complete protection." So in the case at bar, assuming § 84 to have been "substantially complied with" in 1871, or 1872, yet the claim *was not presented* to the probate court until 1875, and in the meantime both the general and the special statutes had run against it.

2. In the second place, plaintiff in error insists, "that the administrator has promised in writing to pay this claim; and in the case of the last note, at least, before the five-years limitation had run; and has by that means bound the estate he represents to pay the claim." But a cursory perusal of the record will convince the court that no such promise was ever made. The counsel for Hanson say, it seems to them "beyond any question," there was one; but as I read the testimony there is nothing approaching to a compliance with the requirements of § 24 of the civil code. An acknowledgment or promise, to take a case out of the statute of limitations, must be direct and unconditional; or if contingent, it must appear that the contingency has happened. 7 Kas. 297; 41 Mo. 264; 47 Mo. 99; 16 Ohio St. 498. As to the letters, see 8 Metc. (Mass.) 432; 1 Dillon. 418; 47 Mo. 99, *supra*; 41 Penn. St.

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482. When an administrator says he has not funds to pay a claim, he does not thereby acknowledge it; 12 Wheat. 565; nor by admitting its original justice; 8 Cranch, 72. .

3. But even if the administrator had made such a promise or acknowledgment, as would have satisfied § 24 of the code, still it would have been void for want of power in him to make it. An administrator, under our statute, has no authority to make any such acknowledgment or promise. This court held, in *Brown v. Evans*, 15 Kas. 88, that an "estate may be held liable for promises made by the administrator where in law he has a right to make such promises, or where in law it is his duty without a promise to do just what he has promised to do." But our statute confers no power on an administrator to take a claim out of the statute of limitations by a new promise or acknowledgment under § 24 of the code; and it is not, in this state, the duty of an administrator to pay such a debt until it has first been duly established by the probate court. 58 Mo. 90, 95; Angell on Lim., §§ 266-273; 1 Hen. & M. (Va.) 563; 7 Conn. 172; 15 Me. 360; Redfield on Wills, 269, 288, 291.

The opinion of the court was delivered by

BREWER, J.: This was an action begun on the 5th of April 1875, in the probate court, under sections 91 to 94 of the executors-and-administrators act, (Gen. Stat. 450,) to "establish a demand," based on two notes of this tenor:

\$367. CHARLESTON, N. H., Dec. 20th, 1866.

For value received, we promise to pay to John J. Hanson, or his order, Three Hundred and Sixty-seven Dollars, on demand, with interest.

HANSON & TOWLE.

\$500. WILLIAMSBURG, KANSAS, May 20th, 1869.

For value received, I promise to pay to John J. Hanson, or order, Five Hundred Dollars, on demand, with interest.

SERGEANT HANSON.

To both notes the defendant Towle pleaded, first, the general statute of limitations, (Gen. Stat. 638, code, § 18, subdv. 1,) and second, the special statute (*id.*, 452, § 106.) Sergeant

Hanson came to Kansas on the 1st of November 1868, and resided here thenceforth continuously

Statement of
facts.

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until his death, which occurred August 27th 1871. Towle was appointed his administrator, and gave bond as such, September 7th 1871, and on the 18th of said month published the notice of his appointment as required by law. As already stated, this demand was not presented to the probate court for allowance until April 5th 1875. That tribunal held it barred, and the district court, on appeal, decided the same way.

As both the notes are payable *on demand*, (Angell on Lim., § 95,) the general statute began to run against the first one the day Sergeant Hanson came to Kansas, Nov. 1st,

1. Statutes of
Limitation.

1868, and (allowing seventeen days for the interval between his death and the appointment of Towle as administrator,) it was barred Nov. 18th 1873; and the second note was extinguished by the same statute on the 8th of June 1874, five years and seventeen days after its date. And in the absence of the *general statute*, both notes would have been barred by section 106 of the executors-and-administrators act, on Sept. 14th, 1874, three years after Towle's appointment. But

Secs. 106 and 84,
ch. 37, con-
strued.

to evade these statutes, the plaintiff in error contends, "That the claim was exhibited in *substantial compliance* with section 84 of the executors-and-administrators act in November 1871, and consequently before any question of limitation could arise." Conceding that the evidence discloses full compliance with this section—though of this there is grave doubt—and still the bar of the statute is not removed. The section provides for exhibiting a claim against an estate, and says that certain things being done the claim shall be considered as "legally exhibited." But what is implied by this expression? and what is the purpose of the section? Nothing more than that the representative of the estate has been legally informed of the existence of the claim, and that the claims may be classified for payment in accordance with the provisions of section 80. By that section priority of payment is (within certain limits) given according to priority of exhibition, with the design doubtless of inducing a speedy presentation of claims, and an early settlement of the estate. By section 85, the administrator is required to keep a

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list of claims thus exhibited, and return it to the court with each annual settlement. But a mere notice from a creditor to a debtor, or the representative of a debtor, of the existence of a claim, ought not to stop the running of the statute. At least it should not be given that force without express direction of the legislature. Ordinarily it requires some act or conduct of the debtor to stop the statute. Nor is the exhibition of a claim under section 84 in any sense the commencement of an action. Sections 91 and 92 provide for the mode of commencing actions in the probate court to establish claims; and the ordinary procedure of petition and summons obtains in commencing such actions in the district court. The claim, though exhibited, may never be placed in suit. If under fifty dollars, the administrator is expressly authorized to pay it without suit or allowance; (Sec. 90; *McKinzie's Adm'r v. Hill, Adm'r*, 51 Mo. 804.)

Exhibiting a claim, is not commencing a suit.

Again, this exhibition is only claimed to have been made in 1871, and this action was not commenced in the probate court until April 1875, more than three years after the alleged exhibition as well as the appointment and qualification of Towle. But section 106 reads: "No executor or administrator after having given notice of his appointment as provided in this act shall be held to answer to the suit of any creditor of the deceased unless it be commenced within three years from the time of his giving bond." Counsel would limit the application of this section to suits in the district court; but the section expresses no such limitation. The word "suit" is general, and includes proceedings to establish claims in the probate, as well as the district court. 2 Bouv. Law Dict. p. 558. Nor does there seem to be any good reason for a limitation solely upon actions in the district court. If commenced in the probate, the action can be taken on appeal to the district court, so that unless this section applies to both courts, it practically affects neither. But the language of the section is general, and we may not interpolate any restriction. *Gilbert, Adm'r, v. Little, Adm'r*, 2 Ohio St. 156:

2. Sec. 106 of ch. 37, applies to suits in both courts.

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ministrator to revive by acknowledgment or promise a claim once barred. Without entering into any discussion of these authorities, we express our concurrence with those that hold that he has no such power. He has no personal interest in the estate. He is not the "party to be charged thereby." His powers and duties are very fully prescribed by statute, and nowhere is there anything which would seem to imply a power to cast upon the estate the burden of a debt from which it had once been legally discharged. See as authorities, *Thompson v. Peters, Adm'r*, 12 Wheat. (U. S.) 565; *Peck v. Botsford*, 7 Conn. 176; *Fritz v. Thomas*, 1 Whart. (Penn.) 66; *County v. Harbison, Adm'r*, 58 Mo. 90; *Sevier v. Gordon*, 21 La. An. 373; *Huntington v. Babbitt*, 46 Miss. 528; *Seig v. Acord*, 21 Grat. 865.

The judgment will be affirmed.

All the Justices concurring.

WILLIAM S. TOWNSDIN V. NANCY O. NUTT.

1. **MARRIED WOMAN; Action in Her Own Name to Recover for Personal Injuries; Pleading.** In an action to recover damages for an assault and battery brought by a married woman in her own name, where the petition does not disclose the fact that she is married, but states among other things that she was hindered and prevented from performing her necessary work from the result of the injuries, that she was compelled to pay for medical treatment to cure the hurts and bruises, and the defendant files an answer to the petition, that at and before the filing of the petition the plaintiff was a married woman and is still a married woman, held, that it was not error for the district court on the motion of the plaintiff to strike out the said defense as irrelevant and immaterial.
2. **PERSONAL INJURIES; Injured Party a Competent Witness.** In an action to recover damages resulting from an assault and battery, the plaintiff although not an expert, is permitted to testify concerning her bodily health before and after the assault. [*State v. Folwell*, 14-105, 110; *State v. Stackhouse*, 24-453.]

Opinion of the Court.

3. **EVIDENCE, INCOMPETENT**—*Once Admitted, then Struck Out.* Where evidence is erroneously received, and the court thereafter charges the jury to disregard such objectionable testimony, the admission of the testimony in the first instance is not necessarily a sufficient cause for the reversal of the judgment.
4. **ASSAULT AND BATTERY; Riding Horse Against a Person; Instructions.** In an action to recover damages for an assault and battery, where the evidence tended to prove that the defendant while on horse-back attempted to ride down a woman standing in a field, and was only prevented from so doing by the woman catching the bridle of the horse as the animal was coming against her, *held*, not error to instruct the jury that if the defendant rode or drove a horse toward the plaintiff in a threatening manner with the intent to injure the plaintiff, and within such a distance as that harm might have ensued to the plaintiff if the defendant had not been stopped, they must find a verdict in her favor. [*Taylor v. Clendening*, 4-453; *State v. Taylor*, 20-643; *State v. Newland*, 27-764.]

Error from Cloud District Court.

ACTION by Mrs. *Nutt* to recover damages for an assault and battery alleged to have been committed on her by *Townsdin*. Trial at April Term 1876 of the district court. Verdict and judgment in favor of plaintiff for \$500, and defendant *Townsdin* brings the case here.

L. J. Crans, for plaintiff in error.

Strain & Sturges, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: This was an action to recover damages for an assault and battery. The cause was tried by a jury, who found in favor of the plaintiff. The defendant in the court below complains of the action of the district court, and seeks to reverse the judgment. The petition filed in the case was in the usual form, and did not disclose the fact that the plaintiff was a married woman. Among other things it stated that she was hindered and prevented from performing her necessary work from the injuries which she received, and that she was compelled to pay and did pay \$25 to be cured of the hurts and bruises which

1. Married woman may maintain action in her own name for personal injuries.

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she received. Defendant Townsdin, in answer to the petition, stated and set forth as a separate defense, that at and before the filing of the plaintiff's petition the said plaintiff was a married woman, intermarried with William Nutt, and that she is still a married woman. Upon the motion of the plaintiff in the court below, the court struck out this defense as irrelevant and immaterial matter. No error was committed thereby. Even if the husband be liable in some cases for medical aid furnished the wife, and under some conditions is the party to recover for the loss of the services of the wife, in this case the pleading struck out was not sufficiently specific and full to tender a defense. The injuries were alleged to have occurred about the 1st of February 1876. The petition was not filed till March afterward; and as to the coverture of the plaintiff at the time of the assault and battery, nothing is asserted. Neither does the attempted answer set forth any circumstances showing that within the decisions of this court the husband was responsible for the medical treatment of the wife, or entitled to her earnings. Not only should the marriage have been stated as of the time prior to the payment of the money for medical treatment and loss of service, but the pleadings should at least have shown that the plaintiff and her husband lived and cohabited together, and possibly it should have also appeared that the wife was not engaged in performing labor and services on her separate account. Exactly how much should have been contained in the answer to make it a sufficient plea, if such a defense could be made, it is not necessary for us to decide. It is certainly true, that under our statutes which confer so many rights upon married women unknown to their condition under the common law, the defense was not sufficient. The plaintiff in error seems to have contented himself with the old plea of *feme covert*, and to have disregarded the provisions of the laws which authorize a married woman to sue and be sued in the same manner as if she was unmarried, and to perform labor and services on her sole and separate account, and make the earnings therefrom her sole and separate property.

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On the trial the court permitted the said Nancy O. Nutt to be interrogated as follows: "What was the difference in your health before, and after, the assault?" "Was the assault an injury to you?" and allowed her to answer, over the objections of the plaintiff in error, who claimed the questions incompetent as involving answers which could only be given by an expert. In reply to the first interrogatory the witness stated, "I was in middling good health before, and have not been so well since. I have suffered with my back, and have not been able to do all my work, or my own washing. I have since been in delicate health; have had symptoms of miscarriage. I was with child. Had misery and distress and pains in my back, and doctored for it, and had bearing-down pains, and pain in the back." To the last interrogatory, she answered, "It was." The questions were not ones of science, and did not require the knowledge of an expert to answer. After giving the facts as to her condition, in her first reply, it is true she answered rather to a conclusion than to a statement that the assault injured her; but her inference being founded upon facts previously stated could not have prejudiced the rights of the plaintiff in error. *The State v. Folwell*, 14 Kas. 110; 1 Whart. on Ev. 512.

It is urged that the court erred in permitting the plaintiff to prove the pecuniary condition and financial ability of defendant Townsden, against his objection. Some controversy exists in reference to the right to show the pecuniary condition of the parties in mitigation or aggravation of damage.

2. Withdrawing evidence from jury.

On the one side, it is held that if the defendant not show his poverty in mitigation of damages, th.

is no reason why the plaintiff should aggravate them by proof of his wealth; and on the other, that where the law permits exemplary or punitive damages, verdicts ought to be graduated according to the ability of the defendant to pay, on the theory that a judgment of a few dollars, which would operate as a punishment if assessed against a poor man, would utterly fail to have that effect upon a man of wealth. In Iowa, it is held that the weight of authority is against the reception of

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such evidence; and in Illinois and some other states the opposite doctrine is believed to be sustained by authority. In this case, however, it is not necessary for us to investigate the cases to an extent sufficient to enable us to express an opinion as to the preponderance of the decisions, as the court in its charge to the jury expressly withdrew all this testimony from the jury by instructing them that the pecuniary ability of the defendant and the plaintiff had nothing to do with the case. In some cases the admission of improper testimony, although subsequently withdrawn in the charge, might be cause for reversal of a judgment, if it appeared that the rights of the objecting parties were in any way prejudiced; but in this action, we see no ground for reversal for this reason.

It is contended that the district court erred in instructing the jury, that if they found from the evidence that the defendant Townsdin rode or drove a horse toward the plaintiff in a threatening manner *with the intent* to injure the plaintiff, within such a distance as that harm might have ensued to the plaintiff if the defendant had not been stopped, they must find a verdict in her favor. This instruction was given on the testimony that the plaintiff in error while on his horse attempted to ride over and ride down the defendant in error, and that he was only prevented from succeeding in his object by the act of the defendant in error, in catching the bridle of the horse. The point is made, that the instruction should have gone further, and stated that harm ensued to the defendant in error—or in other words, that an action could not be maintained for an assault. We think otherwise. Where one person is guilty of an act of inchoate violence to the person of another, having the intention to do harm, and with the present means of carrying his intent into effect, and is only defeated in his purpose by the conduct of the other party acting solely in his own defense and exclusively for his own protection, the party offending is not relieved of all liability; and in such a case, at least nominal damages would be reasonable from the person making the assault. In this case, injuries are testified to as resulting from the assault. Under such cir-

4. Assault and battery: instructions.

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circumstances, an actual wrong is committed, and the party is not only liable criminally, but may be compelled to answer in a civil proceeding for all injuries directly resulting from the wrongful action.

Upon an examination of the record and briefs we find that the above alleged errors are the only ones which it is necessary to pass upon, and that the other matters submitted for our review are either unimportant and immaterial, or have not been sufficiently excepted to for examination here.

The judgment will be affirmed.

All the Justices concurring.

SCHOOL DISTRICT No. 82 v. CHARLES TAYLOR.

1. *TITLE; Adverse Possession; Constructive Notice.* Where the owner of a certain quarter-section of land sells and conveys by deed one acre thereof to a school district, and the school district takes immediate possession thereof, builds a school-house thereon, and occupies such school-house for school purposes, but never has its deed recorded; and while the school district is so occupying said property, said grantor mortgages the whole of said quarter-section of land, including said acre, to secure a negotiable promissory note, and said mortgage is immediately recorded, and T. purchases said note and mortgage before due, but before purchasing the same examines the county records and makes inquiries of the mortgagor concerning adverse claims and incumbrances, but receives no knowledge or notice concerning any adverse claims or incumbrances, and had no actual notice of said deed at the time he so purchased said note and mortgage, or of any of the rights or claims of the school district, *held*, that as the school district, at the time when said note and mortgage were executed, and at the time when T. purchased the same, was in the actual, open, visible, notorious and exclusive possession of said acre of land, T. was bound to inquire of the school district or its agents concerning its interests in said property, and failing to do so he takes his mortgage interest in the property subject to all the equities of the school district.

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2. ——— *Equities, When Superior to Legal Title; Unrecorded Deed.* Upon the facts recited, although said unrecorded deed may, as a conveyance of the legal title, and as against T., be considered as void under section 21 of the "act relating to conveyances of real estate," yet such deed, as evidence of the contract (parol or otherwise) between the parties, together with the possession of the school district, and the making of said lasting and valuable improvements on the land, constitute such a strong and paramount equitable title to the property that no mere legal title can overthrow it.

——— Although the deed to the school district was not recorded, still, under the circumstances of this case, the equitable title of the school district to the property is paramount and prior to the mortgage lien of T. to said acre of land. [*Tucker v. Vandermark*, 21-268; *Greer v. Higgins*, 20-421, 427; *McNeil v. Jordan*, 23-16; *Holden v. Garrett*, 23-109; *Bruce v. McBee*, 23-382; *Moore v. Reeves*, 15-150; *Johnson v. Clark*, 18-157; *Wickersham v. Zinc Co.*, 18-481; *Deetjen v. Richter*, 33-414; *Uiley v. Fee*, 33-690.]

[Decisions upon laws relating to recording deeds, see *Young v. Thompson*, 2-83; *Swarts v. Stees*, 2-236; *Simpson v. Munde*, 3-172; *Cockrill v. Downey*, 4-426; *Coon v. Browning*, 10-85; *Hutchinson v. Hartman*, 15-133; *Setler v. Alvey*, 15-158.]

Error from Montgomery District Court.

FORECLOSURE of mortgage, brought by *Taylor* against S. F. Griswold and *School District No. 82*. In April 1873, Griswold executed his note, and a mortgage to secure the same, to and in favor of one Lewis Taylor, for \$335.50, payable one year after the date thereof. The mortgage covered a full quarter-section of land. In May next following the plaintiff, *Charles Taylor*, became the owner and holder of said note and mortgage. After maturity of the note, this action was commenced. Griswold made default. The *School District* answered, claiming title to a portion of said mortgaged premises, to-wit, a tract about seventeen rods square, lying in the northwest corner of said quarter-section, and containing one acre, more or less—and alleging that it acquired title thereto in fee simple by warranty deed executed by said Griswold to said *School District* on the 16th of October 1872. All other necessary facts are stated in the opinion, *infra*. Trial at December Term 1874 of the district court. Decree of foreclosure and

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sale as to the whole of the mortgaged premises, and the *School District* appeals, and brings the case here on error.

J. D. McCue, for plaintiff in error.

York & Humphrey, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: The only question involved in this case is one concerning conflicting interests in a certain piece of land. Both parties claim under the same grantor. The plaintiff claims under a mortgage, and the defendant claims under a deed of conveyance. The deed was executed first in time, but the mortgage was recorded first. In fact the deed has never been recorded. It would seem from the agreed statement of facts, that the common grantor once owned a certain quarter-section of land; that he sold and conveyed one acre thereof to the defendant, School District No. 82 of Montgomery county; that the defendant immediately took possession thereof, built a school-house thereon, and occupied the same for school purposes, and is still so occupying said premises, but that it has never had its said deed of conveyance recorded. After said deed of conveyance was executed, and while the defendant was occupying the premises under it as aforesaid, the common grantor executed said mortgage for the whole of said quarter-section, and the plaintiff Taylor purchased such mortgage without having any actual knowledge concerning said deed, or concerning the rights or claims of the defendant, and we suppose without having any actual knowledge of any fact that would put him upon inquiry concerning such rights and claims of the defendant. He purchased said mortgage, and a negotiable promissory note which the mortgage secured, before the same became due. But before he purchased the same he searched the county records and made inquiries of the mortgagor concerning adverse claims and incumbrances upon said land, but received no knowledge or notice of any such claims or incumbrances.

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The agreed statement of facts concerning the defendant's possession of said land reads as follows:

"Prior to the execution of said mortgage, said defendant had erected on said acre of land a school-house, and had occupied and used said house for school purposes openly and notoriously, and so had possession of said house to present time."

The court below rendered judgment in favor of the plaintiff and decreed that the mortgage was prior in right to the deed; and the defendant now (as plaintiff in error) seeks a reversal of such judgment.

The decision of the court below seems to have been founded upon section 21 of the "act relating to conveyances of real estate." (Gen Stat. 187.) Said section reads as follows:

"No such instrument in writing, [including deeds of conveyance,] shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the register of deeds for record."

The case of *Kirkwood v. Koester*, 11 Kas. 471, is also cited in support of the decision of the court below. Now we do

Section 21, of act
relating to
conveyances,
construed.

not think that either said section 21 or said case of *Kirkwood v. Koester*, authorizes the decision made in this case. Said section applies only where the party claiming under the unrecorded deed founds his claim solely upon such unrecorded deed as a conveyance, and as creating a legal title to the property in contradistinction to an equitable title. And it does not apply where the party claiming under it simply uses it as one of the facts of his case along with other facts to make out a strong and paramount equitable title. Suppose that the defendant's deed in this case is void

Equities superior
to legal title.

as a conveyance; suppose that it is no better than a mere parol agreement; suppose indeed that instead of being a conveyance in writing, as it is, the contract of sale was all merely in parol, and still, it, or rather the parol contract of sale when proven by sufficient evidence, together with the possession of said property by the defendant, and the valuable improvements made thereon by it, would constitute such a strong and paramount equitable title that no mere legal

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title could overthrow it. The defendant in this case (considering its deed void as a conveyance of the legal title,) holds the paramount equitable title to said acre of land, and the plaintiff holds nothing but a mere lien upon the bare naked legal title. The defendant's rights are therefore paramount to those of the plaintiff.

But the plaintiff claims that he is an innocent and *bona fide* purchaser of his interest in said land. He claims that he had no notice of the defendant's purchase of the land, or of the deed thereto, or of the defendant's possession or improvements. Now if said section 21 is to govern in this case, and if such section is to be taken literally, then it makes no difference whether the plaintiff had any notice of said purchase, or said possession, or said improvements, or not. He might have been a resident of the school district, and might have sent his children to school in said school-house for years, and might have known all about said purchase, and said possession, and said improvements, and still if he did not "have actual notice" of said deed, the deed would be void as to him. Under said section the deed would be void as to all persons "except between the parties thereto, and such as have *actual* notice thereof," without regard to how much said persons might know concerning the defendant's purchase of the property, or its possession thereof, or its improvements made thereon, or concerning any other facts or matters connected therewith which would not amount to "actual notice" of the deed itself. Hence it will be seen, that a claim of equities on the part of the plaintiff founded upon ignorance of the defendant's purchase, or possession, or improvements, or of any other fact except that of the existence of the deed itself, is outside of said section, and virtually an abandonment of said section. But when it comes to comparing equities between the parties, those of the defendant are much the stronger. Not only are the equities of the defendant enhanced by its possession of the land in controversy, and by its expenditures of money in making lasting and valuable improvements thereon, but its equities are prior in time, and

Adverse possession, constructive notice.

therefore prior in right. The defendant was in the possession of said land when the plaintiff's equities were created. And this possession was actual, open, visible, notorious and exclusive. The plaintiff had to shut his eyes not to see it. If he had looked at the land, he must have known it. If he had inquired of any person in the neighborhood, any man, woman, or even child of school-age, he must have been informed concerning it. But it seems he made no such inquiries. He did not inquire of any person concerning adverse claims or interests except of his own mortgagor. We therefore think he cannot claim to be an innocent and *bona fide* purchaser of his said mortgage interest. The defendant being in the actual, open, visible, notorious and exclusive possession of said property, the plaintiff was bound, before purchasing his said mortgage interest, to inquire of the defendant or its agents concerning its interests in the property, and failing to do so he takes his mortgage-interest in the property subject to all the equities of the defendant. Taking his mortgage-interest under such circumstances, he is bound to know what equities the defendant holds in and to the property. (*Johnson v. Clark*, 18 Kas. 157; *McKinzie v. Perrill*, 15 Ohio St. 162; *Lestrade v. Borth*, 19 Cal. 661, 667; *Talbert v. Singleton*, 42 Cal. 390; *Dickey v. Lyon*, 19 Iowa, 544; *Simmons v. Church*, 31 Iowa, 284; *Wicks v. Lake*, 25 Wis. 71; *Morrison v. Kelly*, 22 Ill. 610; *Helms v. May*, 29 Ga. 121; *Garrett v. Lyle*, 27 Ala. 586; *Woodward v. Clark*, 15 Mich. 104, 112; *Boggs v. Anderson*, 50 Me. 161.)

The case of *Kirkwood v. Koester*, 11 Kas. 471, differs very materially from this case. In that case Koester and Reed held the mortgage; Clutter was their mortgagor; and Kirkwood claimed adversely to them. Clutter the mortgagor in that case (unlike the mortgagor in this case,) held the actual, open, quiet and undisturbed possession of the property in controversy at the time that Koester and Reed purchased their mortgage-interest, and Clutter also at the same time held the absolute unqualified legal title to the property. While Kirkwood, who claimed adversely, (unlike the

Case distin-
guished.

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defendant in this case,) had no possession, or even claim to a right of possession, but only a secret, hidden, invisible and undiscoverable equity founded upon a judgment against a person who had nothing but a secret and invisible equity in the land.

The judgment of the court below will be reversed as against the defendant School District No. 82, and the cause will be remanded with the order that judgment be rendered in favor of such school district on the agreed statement of facts.

All the Justices concurring.

OXFORD FERRY COMPANY V. COMM'RS OF SUMNER CO.

FERRY LICENSE; Power and Jurisdiction of County Board; Mandamus Refused.

Where B. presented his petition under section 2 of the ferry act, to the board of county commissioners then in session, for license to keep a ferry across the Arkansas river at Oxford, and before the final hearing of his petition, and on the next day, M. also presented his petition for a like license at the same place, and both petitions were heard together, and both petitioners presented oral testimony of their abilities and facilities to accommodate the public in keeping and operating a ferry at Oxford, and after all the testimony had been introduced the majority of the county board granted a license to M., and refused one to B.; and it is not shown or claimed that the commissioners acted capriciously, corruptly, arbitrarily or oppressively, this court will not interfere by mandamus to compel said board of county commissioners to order the county clerk to issue a license to B. [*Territory v. Rayburn*, McC.-134; *Walker v. Armstrong*, 2-198, 199; 2 Dill. 832.]

Original Proceedings in Mandamus.

A PETITION was filed in this court on 30th June 1877, by Wm. Baughn and three others, partners under the name and style of "Oxford Ferry Company," as plaintiffs, against the Board of County Commissioners of Sumner Co., as defendant, praying for a peremptory mandamus, etc. An alternative

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writ was issued, to which defendant made due return, showing cause. The facts appearing in the record, and shown on the hearing, fully appear in the opinion, *infra*. Decision made, and peremptory writ refused, on the 21st of December 1877.

McDonald & Minor, for plaintiffs.

Woods & Herrick, and *Thomas George*, for defendant.

The opinion of the court was delivered by

HORTON, C. J.: This is an application for a mandamus to compel the board of county commissioners of the county of Sumner to order the county clerk of said county to issue a license to the plaintiffs, composing the Oxford Ferry Company, to operate and maintain a ferry across the Arkansas river near the town of Oxford. The facts in the case are as follows: On the 25th of May 1877, the plaintiffs presented to the county board of said county a petition signed by forty-three residents of Oxford township, praying that a license be granted to them under their firm-name to establish, operate, and maintain a ferry across the Arkansas river opposite the town of Oxford in said township. The plaintiffs then proved to the satisfaction of the defendant that the signatures to the petition were genuine, and the further hearing was postponed to the next day, May 26th. On the morning of the 26th, the plaintiffs appeared before the county board and asked that their petition be taken up and acted upon. Thereupon one John Murphy filed his petition with the board, signed by twenty-three residents of Oxford township, praying that a license be granted to him to establish, operate, and maintain a ferry across the same river, and at the same point as applied for by the plaintiffs. The county board, against the objection of the plaintiffs, decided to consider the petition of the said Murphy at the same time as the petition of plaintiffs, and that evidence might be introduced by the respective parties. It was shown by the plaintiffs that since the destruction of the bridge across the Arkansas river at the point mentioned in their petition, they

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had been operating for the accomodation of the traveling public a skiff, or small boat, to carry passengers over the river; that they had leased of one C. E. Kimball, the owner of the land along the west bank of the river, land for a distance of three hundred feet for a ferry-landing. They also presented and asked to have considered a written agreement from one H. L. Benedict, claiming to be agent of one R. Wanser, giving to them certain rights and privileges to the lands on the east bank of the Arkansas for ferry purposes, to show that plaintiffs had the exclusive right to the use of the east bank of said river for a ferry-landing; and the plaintiffs proved that the land on the east bank of said river opposite said town of Oxford belonged to the said R. Wanser, who was on that day absent from the county, and had been absent for a long time, and that H. L. Benedict was a tenant of said Wanser, residing on a farm a short distance from the river. The plaintiffs further proved that they had commenced work on the approaches for a ferry-landing on the west bank of the river, on said 26th of May; that one of the firm had started for Wichita on the 25th for the purpose of constructing a ferry-boat to be used at their ferry, with sufficient means to build a good boat, and that they were able to give a good and sufficient bond for the proper fulfillment of their duties as required by law.

Said Murphy proved to the county board, that a corporation called the "Oxford Bridge-and-Ferry Company" had been organized in 1872, under and by virtue of the laws of the state of Kansas, and had built the toll-bridge across the Arkansas river at the town of Oxford, which was carried away by the high waters on the 18th of May 1877; that on the 21st of May, the directors of this corporation held a meeting and contracted with the said Murphy to build and operate a ferry boat at or near said bridge site, which contract was in writing, and presented in evidence; that the said Murphy had ferry privileges on the west bank of the river within fifty feet of the bridge; that in pursuance of said contract the said Murphy, on the 28d of May, left Oxford for Wichita for the purpose of building a ferry boat to be used at said ferry, the boat to be at Ox-

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ford by the 28th of said May thereafter, or as soon as possible. One J. L. Abbott also testified that he was the agent of said R. Wanser for the purpose of looking after his timber along the east bank of the river, and to prevent persons cutting timber on his lands, and that he has given permission to said Murphy to land his boat on the east side of the river on Wanser's land, until Wanser's return.

Thereupon the defendant granted the petition of John Murphy, and refused the petition of the plaintiffs, against the remonstrance and protest of Samuel Bain, one of the members of the county board. Murphy thereupon paid into the county treasury the sum of forty dollars, being the amount of his license for one year, and executed his bond as required by law; and the county clerk issued to him a license to establish, operate, and maintain a ferry at the point contended for during one year, in accordance with the orders of the defendant; and said Murphy has ever since that time been operating a ferry across the Arkansas river opposite the said town of Oxford at a point within fifty feet of the site of the former bridge of the bridge-and-ferry company. Said Murphy has, since the 28th of May, leased from the said Wanser all the ferry rights and privileges on the east bank of the river opposite the town of Oxford for the space of one year from June 18th 1877.

The counsel for the plaintiffs have not seen fit to file any brief in the case, nor have they attempted to enlighten us by oral argument, or otherwise, as to the points upon which they rely; and within our rules we might dismiss the case for want of prosecution. But having given due consideration to the questions presented by the facts recited in the record, and having carefully considered the statute regulating ferries, and finding sufficient reason for refusing a peremptory writ of mandamus, we think it best to dispose of the case on its merits. Sections 2 and 4 of the ferry act, (Gen. Stat. 499,) are as follows:

“SEC. 2. Any person or corporation may petition the board of county commissioners of the county for license to keep a ferry, and if said board believes such ferry necessary for the

accommodation of the public, it shall order the county clerk to issue a license, upon the payment of the tax to be assessed in such order." * * *

"Sec. 4. Upon the production of the receipt of the county treasurer for the tax to the county clerk, he shall issue a license to keep a ferry at the place therein mentioned for one year."

If the license was legally issued to the second petitioner, viz., John Murphy, we suppose it will be conceded that the defendant could not be compelled to grant an additional license to the plaintiffs to operate a ferry at the same point. Hence, the only question really presented in the record is, whether the county board acted within the provisions of the law in ordering the county clerk to issue the license to Murphy. It is not shown nor claimed that the county board acted capriciously, corruptly, arbitrarily, or oppressively. When the first application was presented, and before the hearing thereon was concluded, the board adjourned till the next morning; and prior to the commencement of the hearing on that day, an additional petition for a license to keep a ferry at the same place was filed, and thereupon the board concluded to receive the evidence on each petition before taking final action. At the time of making this order both of the petitions were legally before the board for consideration. Much oral testimony was submitted. The commissioners had the opportunity of seeing and hearing the witnesses, of becoming well acquainted with the applicants, and fully understanding the facilities each had for faithfully carrying out his agreement; and having decided that they believed a ferry necessary at Oxford, it devolved upon them to make a selection from the persons applying for the license. They were the proper parties to judge which of the applicants was most worthy of their confidence and most likely to best accommodate the public in keeping and operating a ferry. Both could not succeed. They could accept one, and reject the other. They were compelled to make a choice. Two ferries were not needed. In the exercise of their powers they granted a license to Murphy. The selection seems to have been judiciously made, and subsequent events

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have fully sustained the action of the majority of the board. We do not think the mere fact that the Oxford Ferry Company presented its application for a license prior to the petition of Murphy, any sufficient reason for compelling the issuance of the license to such company, so long as both petitions were really considered at the same time by the board. If such a ruling was adopted, the granting of a license to keep a ferry, would, in a conflict of applications, depend more upon the priority of the filings of the petitions than upon the ability and capability of the applicants to supply the public with ferry accommodations. In brief, if the claim of the plaintiffs is to be sustained, the statute is to be so construed that the interests of the public would be secondary to the priority of the filing of the various applications with the county commissioners. This construction should not be given to the statute, if it be susceptible of any other; and in our view this construction would be erroneous. The board of county commissioners is a tribunal with mixed powers, administrative and judicial; and it has full jurisdiction conferred upon it by the statute over the granting of licenses to ferries outside of the limits previously disposed of for ferry privileges by legislative enactments. It is a question whether the judgment and determination of the board as to the issuance of a license is not, in cases like this, final and conclusive, as a matter confided to their sound discretion. But whether their action may be subject to review, we need not determine. We find the board did not exceed its powers in granting the license to Murphy, and as no showing is made that an additional ferry is necessary for the public convenience, no wrong was committed in rejecting the application of the plaintiffs.

The application for a peremptory writ of mandamus must therefore be denied, and judgment rendered for the defendant for all costs.

All the Justices concurring.

COMM'RS OF OSBORNE CO. *et al.* v. WINSLOW BLAKE.

INJUNCTION; County Taxes Levied for Current Expenses in Excess of Authorized Amount. In an action to perpetually enjoin the collection of certain taxes, the petition of the plaintiff alleged in substance as follows: In 1876 the county commissioners of Osborne county levied for the current expenses of the county that year all the tax that they had any authority to levy, and more too; and in addition thereto they levied a tax of eighteen mills on the dollar of the valuation of the taxable property of said county for that year for the purpose of paying a certain judgment "which had been rendered on warrants issued by said board of county commissioners to defray the current expenses of said county mainly for previous years;" but for what amount of the current expenses of the year 1876, or of any previous year or years such warrants were issued, the petition does not state or show. Neither does the petition state or show what tax or how much tax had been previously levied for any one of said previous years to pay the current expenses of such previous year. *Held*, That the petition does not state facts sufficient to authorize a perpetual injunction restraining the collection of all of said eighteen-mill tax. [*Comm'rs v. Blake*, 25-356, 357.]

Error from Osborne District Court.

INJUNCTION brought by *Blake*, against *R. R. Hays* as county treasurer, *L. D. Honn* as sheriff, the *Board of County Commissioners of Osborne County*, and *James A. Wilson*, to restrain the collection of certain county taxes assessed and levied upon *Blake's* personal property in the year 1876. The facts, pleading, and proceedings, are sufficiently stated in the subjoined opinion. Judgment was given in favor of *Blake* at the April Term 1877 of the district court, and the *Board of County Commissioners*, sheriff, and treasurer appeal, and bring the case here for review.

A. Sazey, for plaintiffs in error.

C. Reasoner, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by *Blake* to perpetually enjoin the collection of certain taxes. The petition in the court below alleged among other things that the

county commissioners of Osborne county, on the 7th of October 1876, levied certain taxes, all for the current expenses of said county, and all for the current expenses of that year except one of said taxes, which was levied for the payment of a certain judgment "which was rendered" in favor of one Wilson "on warrants issued by the said board of county commissioners to defray the current expenses of said county mainly for previous years." For what amount of the current expenses of the year 1876, or of any previous year or years, these warrants were issued, the petition does not show. The amount for the year 1876 may have been one cent, or one dollar, or any other small amount. The tax levied for the payment of said judgment was 18 mills on the dollar of the valuation of the taxable property of said county for that year, and the total levy of taxes for the current expenses for that year amounted to 36 mills on the dollar of said valuation. The assessed value of all the taxable property of said county amounted to less than five millions of dollars, and hence the county commissioners were authorized to levy a tax, for the current expenses of any one year, of one per cent. on the dollar of such valuation, and no more. "The said board of county commissioners were not authorized by any direct vote of the electors of said county to levy a tax exceeding one per cent. for current county expenses upon the valuation of the taxable property of said county; nor were they authorized by any direct vote of the electors of said county to levy any tax whatever for the payment of said judgment; nor was any portion of said taxes levied for the purchase of land, or for the erection of buildings thereon for the maintenance of the poor of said county, or for the support of the poor therein; nor was said board of county commissioners authorized by a vote of the electors of said county to levy a tax for said purposes." Upon this petition and affidavits a temporary injunction was allowed. All of the defendants demurred to said petition. Those of said defendants who are now plaintiffs in error demurred to said petition on the ground that it did not state facts sufficient to constitute a cause of action. Said demurrer was overruled; and the

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defendants making no application to answer to said petition, a decree was given against them upon the petition, perpetually enjoining them "from collecting all of said taxes levied in excess of one per cent. on the dollar of the valuation of the property of the said Winslow Blake for current county expenses for the year 1876."

Both parties construe this decree as perpetually enjoining the collection of that portion of said 18-mill tax which was levied on Blake's property for the purpose of assisting in paying Wilson's judgment; and, as the decree is open to such a construction, we shall also construe it in the same manner. And giving it such a construction, we think it is erroneous. It is true that the commissioners of Osborne county had no authority to levy a tax for the current expenses of such county for any one year of over one per cent. on the valuation of the property of such county for such year. (Gen. Stat. 294, ch. 25, §181.) But said 18-mill tax to pay Wilson's judgment was not levied "for the current expenses of *any one year*." It was levied for the current expenses of *years*, and mainly for the current expenses of years previous to 1876; but for just how many of such years, and for what particular years, we are not informed. Now it may be that in said previous years only a small amount of tax was levied for the current expenses of those years; and if so, then we can see no good reason why the county commissioners should not be allowed to levy an additional amount of tax for the current expenses of those years, provided that the two levies for any one year should not in the aggregate exceed one per cent. on the valuation. For instance, suppose that in 1875 the county commissioners levied a tax of only five mills on the dollar for the current expenses of that year, and suppose that such tax paid only one-half of the current expenses of that year—then we can see no good reason why the county commissioners should not be allowed in 1876 to levy another tax of five mills on the dollar to pay the other half of said current expenses of the year 1875. And we would not think that this last-mentioned levy would in any manner interfere with the power of the commissioners to levy taxes for

the current expenses of the year 1876. Now while we would think that the plaintiff's petition stated facts sufficient to constitute a cause of action for enjoining the collection of a portion of the taxes mentioned therein, still we do not think that it stated facts sufficient to constitute a cause of action for enjoining the collection of said 18-mill tax. The petition did not state or attempt to state or show what or how much tax had been previously levied on or for any one of said previous years to pay the current expenses of such year. And hence it did not show that the commissioners did not have the power to levy said 18-mill tax, or at least the main portion of it. And if they had the power to levy any portion of it, the plaintiff would have no right to enjoin the collection of the whole of it. The decree of the court below was given upon the petition alone without any evidence being introduced. This was proper enough so far as the petition stated facts sufficient to authorize the judgment; for the defendants were in default for want of answer. But so far as the petition was defective, or did not state facts sufficient to authorize the decree, the decree was erroneous; and this would have been so even if evidence had been introduced, unless introduced by the consent of both parties, for there was no issue in the case requiring or authorizing the introduction of any evidence. All the facts stated in the petition were admitted by the default. But the default did not admit anything not stated in the petition.

The decree of the court will be reversed, and cause remanded for further proceedings in accordance with this opinion.

All the Justices concurring.

JOHN FRANCIS, *State Treas.*, v. A. T. & S. F. RAILROAD COMPANY.

1. **TAXING RAILROAD PROPERTY, in Unorganized Counties; Constitutional Law.** Sec. 37 of the tax law of 1876, which provides for the collection of state taxes on railroad property in the unorganized counties of the state, is constitutional and valid. [*State v. Francis*, 23-496; *Bank v. Barber*, 24-546; *Newton v. Atchison*, 31-156; *Graham v. Comm'rs*, 31-478. As to assessment of taxes generally, see, *R. R. v. Morris*, 7-210; *Smith v. Comm'rs*, 9-300; *R. R. v. Russell*, 8-561; *Ottawa v. Barney*, 10-280; *Lawrence v. Kilham*, 11-508; *R. R. v. Blake*, 9-495; *Comm'rs v. Nelson*, 19-242; *Hagaman v. Comm'rs*, 19-395; *Ryan v. Comm'rs*, 30-191; *Treas. v. Longendyke*, 32-270.]
2. ——— Section 1 of article 11 of the constitution of this state, relating to the subject of assessment and taxation, contrasted with the provisions on that subject found in the constitutions of other states, and explained and construed. [*State v. Comm'rs*, 2-61; *Hines v. Leavenworth*, 3-186; *R. R. v. Morris*, 7-221; *Washburn Coll. v. Comm'rs*, 8-348; *Vail v. Beach*, 10-214; *St. Mary's Coll. v. Crowl*, 10-449; *Hudson v. Comm'rs*, 12-144; *Comm'rs v. Bunker*, 16-504; *Comm'rs v. Nelson*, 19-234, 237; *Bank v. Barber*, 24-544; *Ins. Co. v. Welch*, 29-674; *Durkee v. Comm'rs*, 29-699; *Graham v. Comm'rs*, 31-477; *Newman v. Emporia*, 32-460; *R. R. v. Howe*, 32-764.]

Error from Shawnee District Court.

INJUNCTION, brought by the *A. T. & S. F. Railroad Company*, plaintiff, against *John Francis*, as treasurer of state, defendant. The plaintiff's petition shows that plaintiff has been and is the owner of certain railroad property located outside the limits of any of the organized counties, and situate and located within the limits of the unorganized counties of Foote, Sequoyah, Hamilton and Kearney, within the state of Kansas; that said railroad property consists of 106 miles and 1,870 feet of right-of-way, railroad track, and the stations, water tanks and telegraph lines connected therewith, and that said property so located therein is of the actual value of \$400,000; that said property is part of a continuous line of railroad which has been for more than one year last past and is now owned by said plaintiff, extending from and running through the organized counties of Atchison, Jefferson, Shawnee, Osage, Lyon, Chase, Marion, Harvey, Reno, Rice, Barton, Pawnee, Edwards, and Ford, and through the said unorganized counties of Foote, Sequoyah, Hamilton, and Kearney, to the west

Francis, *Treas.*, v. A. T. & S. F. Rld. Co.

line of the said state; that the board of railroad assessors valued and assessed for the purposes of taxation for the year 1876, said railroad property of plaintiff in the state of Kansas, at the following sum per mile for each and every mile of said railway operated by it in the state of Kansas, to-wit: Right-of-way, track, etc., \$7,350; rolling-stock, \$651.30; other property, \$47.22; total, \$8,048.52 per mile; that the valuations set by said board of railroad assessors were returned by the auditor of state to the county clerk of each and every county in which any portion of its said railroad property was then located; that the plaintiff, in proper and apt time, paid the full amount of one-half of all the taxes assessed and levied against its said railroad property, in each and every organized county of the state wherein the same was located and taxable for the year 1876; that none of the railroad property of the plaintiff was ever equalized by any county board of equalization, or by the state board of equalization, for the year of 1876, the said boards and each of them refusing to do so; that there is now, and has been for more than two years last past, a large amount of other personal property belonging to other persons than said plaintiff, situated and located in the said unorganized counties of Foote, Sequoyah, Hamilton and Kearney, and amounting in the aggregate to the sum of \$750,000; that the auditor of state, under the provisions of sec. 37 of an act entitled "an act to provide for the assessment and collection of taxes," approved March 4th 1876, has made a levy of tax for state purposes for the year of 1876 in said unorganized counties of Foote, Sequoyah, Hamilton and Kearney, on the said railroad property of plaintiff, amounting in the aggregate to the sum of \$4,750.40; that said auditor of state has placed said levy of said tax in the hands of the said defendant, *John Francis*, as state treasurer, for collection, and said defendant threatens to and will issue a warrant under his hand directed to the sheriff of the county of Shawnee, and commanding said sheriff to levy the whole amount of said taxes and collect the same, with the additional per cent. thereon, together with his fees for collecting the same, of the personal property of said plaintiff, unless the

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said defendant be restrained by the order of this honorable court from so doing. The petition further stated and charged, that no amount of state taxes for the year 1876 was apportioned by the state board of equalization to the said unorganized counties of Foote, Sequoyah, Hamilton and Kearney, or to any of them, for payment; that no equalization whatever of the total taxable property in said unorganized counties, or in any of them, was made by said state board of equalization for the said year; that no property whatever was returned to said state board of equalization for said year from said unorganized counties, or any of them, to be equalized; that the amount of state taxes levied in said unorganized counties was not apportioned according to the valuation of the taxable property therein for the year 1876; that the total amount of state taxes levied in said unorganized counties is the said sum of \$4,750.40, levied upon the property of the plaintiff as aforesaid, and that plaintiff and its said property is made to bear the whole burden of taxation in said unorganized counties, and that all the other property situate and located therein, and amounting to the said sum of \$750,000, has been permitted to and does entirely escape taxation, and that the said tax levied on its said property in said unorganized counties is greater and a larger rate per cent. than is levied on the property of other person or persons situated in said unorganized counties. Judgment was demanded, that the defendant be enjoined from collecting or attempting to collect said tax or any part thereof levied on the said property of plaintiff in the unorganized counties of Foote, Sequoyah, Hamilton and Kearney, or from issuing a tax warrant for the collection of the same, etc. The defendant demurred, "for that it appears upon the face of said petition that such petition does not state facts sufficient to constitute a cause of action." The district court, at December Term 1877, overruled the demurrer; and *Francis*, state treasurer, appeals, and brings the case here.

Willard Davis, Attorney-General, for plaintiff in error.

Ross Burns, and *J. G. Waters*, for defendant in error.

20—19 Kas.

The opinion of the court was delivered by

BREWER, J.: This case turns upon the constitutionality of section 37 of the tax law of 1876, (Laws of 1876, p. 67.) That section reads as follows:

"SEC. 37. If any of the railroad property in this state is located outside the limits of organized counties, it shall be the duty of the auditor of state to make a levy of tax upon such property for state purposes, the same as is made upon the other taxable property, and place the same in the hands of the treasurer of state for collection; and if such taxes be not paid into the state treasury on or before the first day of January after such taxes have been levied, then the state treasurer shall issue a warrant under his hand, directed to any sheriff in the state, commanding him to levy the amount of such unpaid taxes, with the additional per cent. thereon, together with his fees for collecting the same, of the personal property of said railroad corporation or company against which such taxes are assessed, and pay the same to the state treasurer; and to return such warrant within sixty days [from the date] thereof."

Its constitutionality is challenged under section 17 of art. 2, and section 1 of art. 11. These provisions of the constitution are as follows:

"SEC. 17. All laws of a general nature shall have a uniform operation throughout the state; and in all cases where a general law can be made applicable, no special law shall be enacted."

"SEC. 1. The legislature shall provide for a uniform and equal rate of assessment and taxation; but all property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent, and charitable purposes, and personal property to the amount of at least two hundred dollars for each family, shall be exempt from taxation."

Under decisions already made by this court it does not seem to us that any serious question arises upon the first section quoted. *The State v. Hitchcock*, 1 Kas. 178; *Beach v. Leahy*, 11 Kas. 22, 26. Under the other section it is insisted that a tax to be valid must be upon all the property in the taxing district, and that in these unorganized counties no property is taxed but that of railroads; that the section is unfair and partial legislation, and upon its face an intended discrimination against

railroads; that there is an intentional omission of property from taxation, and that this vitiates the tax upon railroads; and that no equalization is provided for as to this property; and that therefore the rate becomes unequal. Upon this question elaborate arguments have been made by the several counsel, and many authorities cited from the decisions of other states. The inapplicability of many of these authorities will be apparent further along, when we come to compare the provisions of our own and other constitutions. By existing statutes, and indeed by all legislation since the admission of the state, the machinery for all ordinary assessments and taxation has been in the county organization. Of course then, in *unorganized counties* the machinery is wanting, and all property therein escapes taxation. At least that is true of all real property, and all personal property whose *situs* is not changed by the domicile of the owner. Since 1869, however, the assessment and taxation of railroad property has been accomplished, not through county organization, but by independent state machinery. This difference between the two methods of assessment and taxation has been before this court, and its constitutionality affirmed. *Gulf Railroad Co. v. Morris*, 7 Kas. 210. In other words, the constitutional requirement of an equal and uniform *rate* of assessment, does not compel the use of but a single mode or method of assessment. Different kinds of property may be assessed in different modes, and by different officers, provided only that the *rate* at which these different officers are required to make their assessments is uniform, and the same for all.

The freedom from taxation of property other than railroad property in the unorganized counties under the act of 1876, arises in the same manner as the freedom of all property in such counties under prior statutes, and that is, through the failure to provide machinery for reaching it. The question therefore is, whether the failure to provide machinery for collecting taxes on all the property in the unorganized counties renders unconstitutional the means employed to collect taxes on a portion of said property, and invalidates the tax attempted to be collected by such means. The question is a difficult one.

A negative answer seems to conflict with the general idea of uniformity, which common justice as well as the general understanding of both legislatures and courts places as the foundation of all valid taxation. But an affirmative answer if carried to its logical results produces an effect so startling, and so fatal to all taxation from the commencement of our state history, as to compel the clearest conviction of its truth before it can be given. It is a general proposition to which all will yield a ready assent, that taxation must be equal and uniform; but that this general proposition has some limitations. See the opinion in the case of *Comm'rs of Ottawa Co. v. Nelson*, recently filed; (*ante*, 234.) Notice a moment to what results an arbitrary, strict, and technical enforcement of this rule will lead. There never has been a time since the admission of the state when there were not within its limits unorganized counties; never a time when there was not property, real and personal, in such counties; and never a time, prior to this act of 1876, when such property (at least the real property) was made, through the taxing machinery, to contribute to the support of the state government. In other words, the state has never provided the machinery for taxing all the property subject to taxation within the limits of the taxing district, that is, the district to be protected by and to receive the benefit of the tax. Has this failure invalidated the state tax all these years, all the proceedings for the collection of taxes, and all the titles founded upon such tax proceedings? But it may be said that this result can be obviated by holding that for state taxes the taxing district is only the organized counties. But by what authority can the legislature divide the state into two districts and say that one of such districts shall assume the entire burden of the state government? Could it enact that for the county of Shawnee the taxing district should be the city of Topeka, and the entire burden of supporting the county government cast upon this small territorial portion of the county? Is the extent of the taxing district a matter of mere arbitrary enactment? Clearly not; for if so, all restriction would be lost, and the idea of uniformity in taxation would be but the baseless fabric

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of a dream. It is said by Cooley in his work on Const. Lim., p. 504, "that the legislature have no power to arrange the taxing districts arbitrarily, and without reference to the great fundamental principle of taxation; that the burden must be borne by those upon whom it justly rests." But conceding for the argument, that the legislature has power arbitrarily to limit the extent of the taxing district, and that by implication it has limited the state taxing district to the organized counties—that this in nowise conflicts with the constitutional restrictions, and that upon this the state taxes hitherto levied can be sustained, and what then? Does it not follow, that there is a large portion of territory outside the state taxing district, and yet within the jurisdiction of the state, and under the control of the legislature? May not the legislature prescribe the conditions upon which state protection will be afforded to property in that territory? And what section of the constitution limits the extent and character of such conditions? Briefly, it may be stated, that the unorganized counties are necessarily a part of the state taxing district, or they may be excluded by legislative action; if the former, then, if the claim of the counsel is correct, that a failure to provide for taxing all the property in the taxing district is fatal to the tax, there has been hitherto no valid state tax; if the latter, then the property in those counties is outside the taxing district, yet subject to taxation; and where is the constitutional restriction on the power of the legislature?

It is doubtless true, that results do not change rules, and that consequences may not be invoked to overthrow established principles, and that courts may not disregard plain constitutional requirements to save from the injurious effects of illegal legislative action; but surely, the fact that during these sixteen years of state taxation, the validity of no state tax has ever been challenged on the ground that the machinery for assessment and taxation plainly leaves unreached for taxation a portion of the property within the state, the taxing district, is evidence of no little value, that, by the common judgment of all, the constitutional provision above quoted does not re-

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quire such construction. But if it be not unconstitutional to relieve all property in the unorganized counties from state taxation, is it any more unconstitutional to relieve only a part of such property? Does the law become more unconstitutional the nearer it approaches to a full compliance with the strict letter of the constitution? Again, it must be noticed that the maintenance of a county organization is attended with expense; that the non-organization is due to the lack of population; and, by implication, of property sufficient to justify, in the judgment of the legislature, the carrying of such a burden. It may well be presumed, that in these outlying portions of the state the expense of the machinery for collection would exceed the amount of taxes collected. Now in order to secure valid state taxation in the inhabited portions, must the state, at an expense exceeding the proceeds, extend its tax machinery out among the few settlers scattered over the plains in our western frontier? That would simply add to the burden of the settled portion of the state, and be but a sacrifice of the substance for the shadow. It must be borne in mind, that the constitution was designed as a permanent instrument; that it contemplated a state, all whose territory was inhabited; and without descending into minute details, or covering every possible contingency, sought to prescribe general and enduring rules. It is no sliding-scale with varying provisions for vacant plains and inhabited localities. A constitution is for citizens, not for prairies; for a community, and not for a desert. In the very nature of things large discretion must be left to the legislature as to what provisions should be made for, and what obligation cast upon, those who push out beyond the limits of organized counties and commence the work of reclaiming the desert. Not that the constitution is without force, and the legislature supreme in unorganized counties, but that a constitutional provision which evidently rests upon the assumption of a full, civil, and political organization of community is not to be extended into a region destitute of such organization.

And again: It is settled here as elsewhere, that taxation

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by license does not conflict with the constitutional requirement of uniformity, although in the nature of things it is a burden upon but a portion of the community. (*Fretwell v. City of Troy*, 18 Kas. 271.) The tax before us is not in form a license-tax, but in substance and practical effect is very like it. It is a tax upon property in one employment, and a tax graduated to the amount of such property belonging respectively to the various parties engaged in such employment. The result would be the same, both to the state and the railroad, if the legislature had enacted that railroads should in lieu of all state taxes pay a license-tax of so much per mile. We would not be understood however as asserting that a mere similarity of results changes an ordinary tax on property into a license-tax, or that there is no essential distinction between the two, or that the tax before us is not a property-tax. We have noticed the similarity between this and a license-tax, and the settled validity of the latter, to indicate the limitations on a strict and technical construction of the constitutional provision, and how those limitations in principle touch the case before us. It bears upon the objection that this is partial and oppressive legislation and therefore void. Every license-tax upon any calling or profession is in one sense partial and oppressive; it is not a burden cast upon the whole community alike, but only upon one class; yet the power of the legislature in this respect is conceded, and when this burden is cast upon corporations who receive from the state special privileges, the justice of the tax is often as clear as the legality is undoubted.

Still again: It seems to be assumed by counsel, that the legislature cannot legally exempt any property from taxation other than that expressly named in the constitution. Is this true? There is in terms no prohibition on such exemption; and as to personal property, the language of the constitution seems to imply the existence of a power to exempt. It says, "all property used, * * * and personal property to the amount of *at least* two hundred dollars for each family, shall be exempted from taxation." In other words, the amount of personal property to be exempted is not fixed. It must be at

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least two hundred dollars for each family, and it may be as much more as the legislature shall determine. It may be well at this time to notice the language of the constitutions of some of the other states from whose decisions counsel have made quotations. In Ohio the language is:

"Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also all real and personal property, according to its true value in money; but burying grounds, * * * and personal property to an amount not exceeding in value two hundred dollars for each individual, *may* by general laws be exempted from taxation."—(Const. 1850, art. 12, § 2.)

In this will be seen express direction to tax all property, and exemptions are permissive only, and limited. So also in Indiana, where the language is—

"The general assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal."—(Const. 1851, art. 10, § 1.)

The first clause of this section, it will be seen, is like the first clause of the section quoted from our own constitution, but is followed by language requiring a valuation of *all* property. The constitution of Florida is similar, (Const. 1868, art. 12, § 1,) as well as that of Nevada, (Const. 1864, art. 10, § 1,) as well as Oregon, (Const. 1857, art. 9, § 1,) and that of South Carolina, (Const. 1868, art. 9, § 1.) In Arkansas the constitution provides, that—

"Laws shall be passed taxing by a uniform rule all money, credits, investments in bonds, joint-stock companies, or otherwise, and also all real and personal property according to its true value in money."—(Const. 1868, art. 10, § 2.)

The constitution of California provides, art. 11 § 13:

"Taxation shall be equal and uniform throughout the state. All property in this state shall be taxed in proportion to its value, to be ascertained as directed by law."

In Illinois:

"The general assembly shall provide such revenue as may be needful, levying a tax by valuation so that every person and

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corporation shall pay a tax in proportion to the value of his, her, or its property.”—(Const. 1870, art. 9, § 7.)

In Louisiana:

“Taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law.”—(Const. 1868, art. 118.)

In Minnesota:

“Laws shall be passed taxing all moneys, * * * and also all real and personal property according to its true value in money; but public burying grounds, * * * and personal property to an amount not exceeding in value two hundred dollars for each individual, shall by general laws be exempt from taxation.”—(Const. 1857, art. 9, § 3.)

In Mississippi:

“Taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law.”—(Const. 1868, art. 12, § 20.)

In Missouri:

“No property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States and to this state, to counties, or to municipal corporations in this state.”—(Const. 1865, art. 11, § 16.)

The constitution of North Carolina is similar to that of Arkansas. (Const. 1868, art. 5, § 3.) In Tennessee it is this:

“All property, real, personal, and mixed, shall be taxed; but the legislature may except such as may be held by the state, by counties, * * * and shall except one thousand dollars worth of personal property in the hands of each taxpayer. * * * All property shall be taxed according to its value, * * * so that taxes shall be equal and uniform throughout the state.”—(Const. 1870, art. 2, § 28.)

In Virginia:

“Taxation, except as hereinafter provided, * * * shall be equal and uniform; and all property, both real and personal, shall be taxed in proportion to its value.”—(Const. 1870, art. 10, § 1.)

The constitution of West Virginia is similar to that of Virginia in this respect. (Const. 1861, art. 8, § 1.)

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In all these provisions will be noticed either an express direction to tax *all* property, or an express prohibition on exempting any other than certain specified property. Our constitution contains neither. Does it mean the same, without, as those do, with? The positive language of these several sections, sustains if it does not compel the positive assertions of the various decisions cited by counsel. Those decisions rest upon the clear commands and prohibitions of the constitution upon which they were based, and are therefore only of limited and qualified application here. We do not wish to be understood as intimating that there is no restriction on legislative action in the matter of taxation. Underlying all valid taxation rests the principle of uniformity, a principle whose existence is implied if not in positive and express terms enjoined by the provisions of our constitution. But in practical operation, a general rule or principle is often limited by some other general rule or principle, or by the facts and conditions under which its application is invoked. And sometimes it happens that a general rule is given its truest and most thorough enforcement by an apparent disregard in minor and temporary matters of its mandates. Thus it may be that uniformity in the burden of taxation, will be secured in the truest and best sense by not attempting to extend the machinery of taxation into the unorganized counties where the expense of the machinery may exceed the proceeds of the tax; and this being so, the principle of uniformity is in no just sense overthrown or disregarded by leaving the property in those counties untaxed. In a limited sense it may be said, that there is a disregard of the obligations of uniformity because there is no attempt to reach all property; but in a higher and better sense, it is clear that there is secured an equality and uniformity in the burden of taxation. The spirit is present, though the letter may be wanting.

Again: If two methods of assessment may be pursued, one for ordinary property, cumbersome and expensive, the other for a particular class of property, simple and inexpensive, must the two modes be extended equally throughout the state in order to secure a true uniformity? May not that uniformity

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require that all property throughout the state that can be reached for taxation at a cost less than the proceeds of the tax should be so reached? and in the settlement of the unorganized counties, may not the time come when the one kind of property may be so reached by the special method of assessment, while general property could not be so reached by the ordinary method? Would not the obligations of uniformity then not only justify but even virtually compel the taxation of that particular class of property?

A final objection is, that the assessment never comes for review before any board of equalization. There being no county organization, no county or other local taxes, the lack of a county board of equalization is wholly immaterial. So far as the other board of equalization is concerned, its function is to equalize the assessments returned from the several counties. Such a tribunal doubtless subserves a wise purpose in that it prevents any county from shirking its just proportion of the burdens of the state government by grossly inadequate assessments. But such a tribunal is not inherently essential to valid taxation. Its existence is not enjoined by any section of the constitution. It is the mere creature of legislative action; and if wholly abolished its decess would work no hindrance to legal taxation. It would mean simply, that the legislature was content to accept the assessment by the local officers as final for purposes of state as well as local taxation. (*McMullan v. Anderson*, U. S. Sup. Ct., 16 Albany Law J., p. 835.) But as to railroad property, there is no original assessment by local officers. It is made primarily by a state board. The inequalities of local assessments as to ordinary property, sought to be corrected by a state board of equalization, are avoided by the single assessment for the state of all railroad property by a state board of assessors. We forbear any inquiry as to those questions, about which counsel for defendant in error seem to disagree, as to the power of the county board of equalization over the assessments of railroad property, and the effect of a change of the valuation of any county by the state board upon such assessment. Such inquiry does

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not seem essential to a determination of questions involved herein. We hold, and that is all that is necessary for this case, that where the rate of taxation is fixed by legislative enactment, where the assessment of all of a particular kind of property throughout the state, such as railroad property, is made by a single state board of assessors, and where a part of such property is in the unorganized counties in which is no machinery for or attempt to collect local taxes, and therefore no county board of equalization, that a failure to provide for a re-examination of assessments of such property in such unorganized counties, or an equalization thereof by a state board of equalization, does not render the tax void.

We shall not prolong this opinion further. The case has been before us for several months, and the subject of repeated consultations, and frequent examinations. The conclusions which we have reached are by no means entirely satisfactory to us. We hold the section to be constitutional and valid, not because it is clear to us that it is so, but because it is not clear to us that it is not. And the benefit of the doubt must be given to the law. The question would be different if discrimination was attempted between property in unorganized counties, or if the constitution did not contain but a single provision which seems to imply and rest upon the assumption of organized communities.

The judgment of the district court must be reversed, and the case remanded for further proceedings in accordance with the views herein expressed.

All the Justices concurring.

LEAVENWORTH, LAWRENCE & GALVESTON RLD. CO. V. JOHN
VAN RIPER.

1. **AMENDMENT OF PLEADING.** *Without Notice to Adverse Party.* It is error for a court to allow a pleading to be amended in a material respect, and then to render judgment thereon in the absence of the adverse party, and without any notice to him. [*Haight v. Schuck*, 6-192; *Alvey v. Wilson*, 9-401; *R. R. v. McReynolds*, 24-368; *R. R. v. Nicholson*, 31-28.]
2. ——— And such amendment is erroneous, even where the action originated in a justice's court, and the amendment relates only to the amount claimed by plaintiff as attorney-fees recoverable in the action. [*R. R. v. Mower*, 16-573, and cases cited; *R. R. v. Yans*, 16-583]

Error from Allen District Court.

ALL necessary facts and proceedings are stated in the subjoined opinion. The district court at July Term 1876, gave judgment in favor of *Van Riper*, plaintiff, and the *Railroad Company* brings the case here.

S. O. Thacher, for plaintiff in error.

John Martin, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This action was originally commenced in a justice's court. The plaintiff filed a bill of particulars therein, claiming \$25 as damages for a cow alleged to have been killed by the defendant railroad company, and \$25 as attorney-fees for the prosecution of the action. A summons was issued with the following indorsement thereon, to-wit:

"If defendant fails to appear, plaintiff claims judgment the sum of \$25, and costs of suit, and an attorney-fee of \$25."

This indorsement was made in pursuance of that provision in the justice's act which reads as follows:

"There shall be indorsed on the writ the amount for which the plaintiff will take judgment if the defendant fail to appear. If the defendant fail to appear, judgment shall not be rendered for a larger amount and the costs."—Gen. Stat. 777, § 11; (*id.*, page 641, § 59.)

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At the time set for trial both parties appeared. The defendant then procured a continuance of the case to a subsequent time. At this subsequent time the plaintiff appeared, but the defendant failed to make any appearance. Evidence was then introduced, and the justice rendered judgment in favor of the plaintiff and against the defendant for \$25 damages, and \$25 attorney-fees, and costs. Afterward the defendant appealed to the district court. In the district court the case came regularly on for trial. The plaintiff again appeared, but the defendant again made no appearance. A jury was impaneled, and evidence was introduced. The plaintiff then, with leave of the court, amended his bill of particulars so as to make the same conform to the facts proved. This amendment consisted merely in changing the claim of \$25 for attorney-fees to \$40 for attorney-fees. The jury then upon said evidence, and said amended bill of particulars, rendered their verdict in favor of the plaintiff and against the defendant for \$58.75 in the aggregate, but did not state how much of the same was for killing said cow, or how much thereof was for attorney-fees. But as the record shows that the plaintiff amended his bill of particulars so as to make the same conform to the facts proved, and so also as to make the amount of his claim for attorney-fees \$40, instead of \$25, therefore \$40 of the amount for which the jury rendered their verdict must have been for attorney-fees, and the balance of said amount, to-wit, \$18.75, must have been for damages for killing said cow. The court below rendered judgment in favor of the plaintiff and against the defendant for said amount of \$58.75, and the defendant now brings the case to this court for review.

We think the court below committed error in permitting the plaintiff to amend his said bill of particulars in the absence of the defendant and its counsel, and without any notice to either. (*Alvey v. Wilson*, 9 Kas. 401.) The amendment in this case operated as a violation of the spirit if not the letter of said section 59 of the civil code, and said section 11 of the justices code. The defendant made no appearance at the time of the trial; and yet the plaintiff by virtue of this amend-

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ment took judgment for a greater amount than was indorsed on his summons.

Aside from the foregoing sections such an amendment would hardly be proper. It would be a very dangerous practice that would allow parties to amend their pleadings in material respects in the absence of the adverse party, and without any notice to such adverse party. If the adverse party is present at the time the amendment is made, of course he receives notice; but if he is absent, then before the amendment should be made, or at least before it should be acted upon, notice thereof should be specially served upon the adverse party. It is clear, under the code, that a plaintiff could not amend his petition at any time before the answer is filed, whether the time for filing the answer has yet expired, or not, without serving a copy of the amendment upon the defendant. (Gen. Stat. 654, § 186.) And the plaintiff certainly has no greater right to amend his petition or pleading after the answer is filed, than before. In the present case, no answer or pleading of any kind was filed by the defendant. Indeed, no pleading of any kind was filed by either party except said bill of particulars and amended bill of particulars. It was not necessary however for the defendant to file any pleading; for, as we have before stated, the action was commenced in a justice's court. In a justice's court a bill of particulars can be amended only "when, by such amendment, substantial justice will be promoted." (Gen. Stat. 791, § 74.) And in the district court, pleadings can be amended only as follows: "The court may before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding," etc. (Gen. Stat. 655, § 189.) Within the limitations above mentioned the district court may allow a party to amend his pleading, and may allow him to amend so as to "conform the pleading * * * to the facts proved." This the district court may do under said section 189 of the civil code. But we do not think that the district court has authority to allow any pleading to be amended except within the foregoing rules. Before an amendment of any pleading should be

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allowed it should tend to promote justice; it should be in furtherance of justice, and should be made only on proper terms. Now it can hardly be claimed in any case that a material amendment of a pleading, made in the absence of the adverse party, and without any notice to him, would be in furtherance of justice, or would tend to promote justice. It would hardly tend to promote justice for a party who has set forth one statement of facts, or made one claim in his pleading, to be allowed, after he finds that the other party is absent, and without notice to such other party, to set forth another statement of facts, or make another and different claim in his pleading. It would hardly be fair for a party who has notified the other party by his pleading that he claimed \$25 as attorney-fees, afterward, in the absence of the other party, and without giving such other party any notice, to so amend his pleading as to claim \$40 as attorney-fees, and take judgment for that amount. Every person should have his day in court. Every person should have an opportunity of litigating the exact matter or claim upon which the judgment affecting his rights is finally rendered. But if one party may, in the absence of and without notice to the other party, amend his pleading in a material respect, and take judgment thereon, then he may set up a new claim in his pleading and obtain judgment thereon without the other party ever having any opportunity to dispute or to litigate such claim. This would certainly not be the way that justice should be administered, and it is not the way that justice is usually administered.

The judgment of the court below will be reversed, and cause remanded for further proceedings.

All the Justices concurring.

ST. JOSEPH & KANSAS LOAN & BUILDING ASSOCIATION V.
WILLIAM THOMPSON *et al.*

1. **LOAN-AND-BUILDING ASSOCIATIONS; Usury; Interest Recoverable.** Where a loan-and-building association, organized under the laws of this state, loans its funds on a note and mortgage executed by persons not members of the association, such loan is not exempt from the provisions of the statute regulating interest on money, and the association cannot recover in any court more than twelve per cent. interest thereon per annum.
2. ——— **Tender; Cancellation of Note and Mortgage.** Where T. and wife obtain from a loan-and-building association incorporated under the laws of the state, the sum of \$765 on a note given for \$1,500 secured by a mortgage on real estate, and such parties are not members of the association, and there are no recitals in the note or mortgage of any membership, the makers thereof are entitled to a return of the note and mortgage on payment of the amount due on the note; and such association may be compelled to surrender up the note and mortgage to the makers thereof on a tender being made to it of the money actually obtained with interest thereon at the rate of twelve per cent. per annum.
3. ——— **Findings, Supported by Sufficient Evidence.** In a suit where the main question of fact at issue is, whether the makers of the note and mortgage are members of the corporation, and where it appears they have signed no writings estopping them from denying such membership, the controversy is to be settled like any other issue of fact; and where the court finds upon the evidence that such persons are not members of said association, and there is evidence to sustain the finding, although the preponderance of evidence is otherwise, this court will not disturb a judgment based upon such finding of fact. [*Hobson v. Ogden*, 16-388, and cases cited.]

Error from Marshall District Court.

ACTION by *Thompson* and wife to compel the *Loan-and-Building Association* to surrender and deliver up a certain note and mortgage given by plaintiffs to defendant. All the facts are set forth in the opinion, *infra*. The district court, at December Term 1875, gave judgment in favor of plaintiffs, as prayed for, and the *Loan-and-Building Association* brings the case here.

W. W. Guthrie, for plaintiff in error.

J. D. Brumbaugh, for defendants in error.

21-19 Kas.

The opinion of the court was delivered by

HORTON, C. J.: On the 6th of December 1872, the defendants in error executed and delivered to plaintiff in error the following instrument of writing, to-wit:

"\$1,500.

DECEMBER 6th, 1872.

"We promise to pay the Saint Joseph and Kansas Loan-and-Building Company, or order, fifteen hundred dollars, for value received, with interest at ten per cent. per annum, said interest payable monthly on the first Monday of each month, according to the rules and regulations of the said Saint Joseph and Kansas Loan-and-Building Company. Said interest and principal is payable at the office of said company in the city of Saint Joseph, Mo. Appraisement waived.

"WILLIAM THOMPSON.

"MARY J. THOMPSON."

And at the same time also executed and delivered to the company a mortgage on their homestead, consisting of forty acres of land, situated in Marshall county, to secure the said nota.

Statement of
the case. The office of the company was at St. Joseph, Mo.; and the articles of association of the company, which was an incorporation under the laws of Kansas and Missouri, state that the object of the company was to give to its members, through their savings, an easy way to discharge incumbrances and to build homes. Its manner of business was this: Whenever the funds of the company on hand should amount to the sum of five hundred dollars, or its multiple, (the full-paid value of a single share or shares,) it might be offered in open meeting to the members, and it should be awarded to that member paying the highest premium therefor who would agree to pay ten per cent. per annum interest thereon, payable monthly, until the shares of the stock were sold, and the company ceased to exist. The members receiving a loan, before drawing the money, were required to give to the company security by a deed of trust or mortgage on unincumbered real estate. The shares upon which loans were made were called redeemed shares, their ultimate value having been advanced by the company in the loan thereon. The member receiving

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the loan continued to pay five dollars each month upon the shares so redeemed, until the company was ready to dissolve, in addition to the interest of ten per cent. on the note and mortgage given to secure the loan. So soon as the monthly installments, and the accumulations of interest and profits from all sources, should amount to the sum of \$500 per share, the company was to be at an end, and the assets, after the debts of the company were paid, were to be equally divided among the shareholders in proportion to the unredeemed shares held by them.

The note and mortgage were executed in Marshall county, in this state, and there was sent to the defendants in error from the office of the company at Saint Joseph, by express, the sum of \$765 on such note and mortgage, and the sum of one dollar to pay for the recording of the mortgage. Neither of the defendants in error received any other or further sum of money from the company on the note or mortgage. After the execution of the note and mortgage, the defendants paid to the company prior to April 1875, on account of said note, the sum of \$660, and then becoming dissatisfied with the company, on being informed by an officer of the same that they had no interest in the profits of the corporation and were not entitled to a share, as the loan was their benefits, they tendered to the company \$242 as the balance of the money due on the note from them to the company and demanded a return of their note and mortgage. The company refused to accept the said \$242 as payment of the said note, and claimed that the balance due exceeded the sum of \$600. Thereupon the defendants in error commenced their action in the district court of Marshall county to compel the loan-and-building company to accept the said \$242 in full satisfaction of the note and mortgage. The company in its answer to the petition alleged, that William Thompson, one of the defendants in error, was at the time of the execution of the note and mortgage the owner and holder of three shares of the capital-stock of such company, numbered 859, 860, and 361; that he was a member of such company, and was liable to all its rules and

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regulations as contained in the constitution and by-laws, and that in addition to what had been paid by the defendants in error on the note there was due the further sum of \$158 for monthly dues, interest on loan, and fines for non-payment, and also the sum of \$764 balance on note and mortgage, and asked for judgment for said sums with attorney-fees and costs. On the trial judgment was rendered in favor of defendants in error, and plaintiff in error brings the action here, and asks this court to reverse the judgment of the court below and to remand the case to said court with instructions to enter judgment for plaintiff in error for a foreclosure and sale of the mortgaged premises for the various sums claimed due by the company. The special findings of fact of the district court were as follows:

1st.—On the 6th of December 1872 the plaintiffs executed the note and mortgage alleged in plaintiffs' petition.

2d.—The amount of money loaned by defendant to plaintiffs was seven hundred and sixty-five dollars.

3d.—The land described in plaintiffs' petition upon which the mortgage was given was, at the time of the execution of the note and mortgage, and is now, the homestead of plaintiffs.

4th.—The title to the land described in plaintiffs' petition was at the time of the execution of the note and mortgage in Mary Thompson, one of the plaintiffs, and wife of the other plaintiff, William Thompson.

5th.—The plaintiff William Thompson has paid the defendant since the execution of the note and mortgage described in plaintiff's petition the aggregate sum of six hundred and sixty dollars—said sum being the amount of twenty-four several payments of \$27.50 each—twelve of said payments being made in the year 1873, and at the respective dates, to-wit: January 6th, February 8d, March 3d, April 1st, May 1st, June 1st, July 1st, August 1st, September 1st, October 6th, November 3d, and December 1st; and the remaining twelve of said payments being made in the year 1874, and at the respective dates, to-wit: January 1st, February 1st, March 1st, April 7th, May 4th, June 1st, July 1st, August 11th, September 7th, October 1st, November 2d, and December 9th.

6th.—On the 15th of April 1875, and before the commencement of this suit, plaintiffs tendered to defendant two hundred

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and forty-two dollars, as alleged in plaintiffs' petition, in full satisfaction of said note and mortgage, and have now brought the same into court.

7th.—Plaintiff William Thompson never signed the constitution or by-laws of the defendant.

8th.—Plaintiff William Thompson never was a member of the defendant company.

9th.—Plaintiff Mary J. Thompson never was a member of the defendant company, and never signed the constitution or by-laws of defendant.

10th.—Plaintiff William Thompson never bid for shares, or authorized any person to bid for shares, in the defendant company.

11th.—Plaintiff Mary J. Thompson never bid for shares, or authorized any person to bid for her for shares, in the defendant company.

12th.—The amount due the defendant on the note and mortgage for the amount of money actually loaned is the sum of two hundred and forty-two dollars.

14th.—The pretended sale of shares numbered 359, 360, and 361 of stock in the defendant company, to plaintiff William Thompson, was a device and an artifice by which it was intended to evade the usury laws of this state.

15th.—No shares were ever sold in any manner by defendant to plaintiff Mary J. Thompson.

Among others, the following conclusions of law were also filed:

“That the note and mortgage described in plaintiffs' petition are usurious; that defendant be adjudged to receive the sum of \$242 in full satisfaction of the said note and mortgage; that the note and mortgage be canceled of record; and that defendant be adjudged to pay the costs of this action.”

The contract in this case is treated by all the parties as a Kansas contract, and the rights and powers of the plaintiff in error as subject to the statutes of this state. Contracts for the borrowing of money from building-and-loan associations in Kansas are only exempt from the provisions of the usury or interest laws of the state when members of such associations are parties thereto. It was never intended that these corporations, organized as this one was for the purpose of giving to its members through their savings an easy way to discharge

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incumbrances and to build homes, should loan their funds to others than their own members, or that if they did attempt the exercise of such authority that they could disregard the wise and wholesome provisions of the statute regulating the rate of interest collectible by law. It was never intended that these corporations, seeking and obtaining privileges from the state as useful and beneficial associations for the comparatively poor and needy, should blossom out as loan agencies and banking institutions, without limit as to the rate of interest they could receive and collect. Neither the letter nor the spirit of the laws relating to these corporations would authorize such a construction. (Sec. 5, clause 27, of our corporation act, Gen. Stat. 192; Laws of 1869, ch. 5, p. 87; Laws of 1870, ch. 43, p. 92.)

In our view, the only questions presented to us are, whether the defendants in error were members of the loan-and-building company, or whether they were estopped by their acts from denying such membership. It is conceded that the wife, Mary J. Thompson, was never a member of its corporation. About all she had to do with the transaction was to sign the note and mortgage. Neither the note nor mortgage contains any recitals as to the membership of either defendant in error in the company, and upon a review of all the evidence we find no valid reason to set aside the findings of fact of the court; and as the findings are sustained by some evidence, the judgment based thereon is not erroneous. William Thompson did not comply with the constitution by signing it, nor did he ever subscribe for any shares of stock on the books of the company; and the secretary of the company testified that no shares of stock were ever issued to him. Neither is it claimed that any other member of the corporation transferred to said Thompson under the rules and regulations of the constitution and by-laws, by any written transfer or assignment, any share; nor did said Thompson file with the company, as required of all transferees of stock, or shares of stock, any written acceptance of any share, nor otherwise sign any writing showing that he was a member of the company. It is alleged how-

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ever by the counsel for plaintiff in error, that as said Thompson made a written application to the company to redeem certain shares when he applied for the loan, and afterward received a pass-book with a copy of the constitution and by-laws containing the form of a certificate for three shares of stock, and as he was furnished by the company with certain blank forms of assignment and transfer of shares, and executed the note and mortgage, and paid various sums of money to the company, he is estopped from denying his membership in the same. We think otherwise, and our reasons are as follows: Before the execution of the note and mortgage, the application, which was defective in form, was returned to Thompson to be corrected and properly certified, and then to be sent back to the office of the company. This Thompson retained, and never gave back. Whether the so-called blank transfers and assignments were ever signed or not, is immaterial, because they were never delivered to the company, and were the same as if never executed. The pass-book was not obtained until after the loan, and the so-called certificate of stock therein, had the numbers of the shares of stock (now claimed to have been bought by the company for Thompson,) carefully and thoroughly erased and crossed out. Then again, after a loan was made, the party thus redeeming a share or shares had no longer any control of the same, as they reverted to the company. So all of these matters, instead of proving Thompson a member of the company by ownership of any shares, only proved the opposite. We refer now to the only evidence submitted upon which, in our opinion, any serious question can be made as to the findings of the court below on the membership of Thompson in the company. McLean, the secretary, testified on the part of the company, that the note and mortgage were given for the proceeds of shares, 359, 360 and 361; that these three shares were put up at auction and sold to William Thompson at a meeting of the company in St. Joseph, Mo. on the 2d of December 1872; that these shares were owned by the firm of Nicely & Co., a firm composed of the president and secretary and three directors of the com-

pany; that the company bought the shares for Thompson from Nicely & Co. for \$228.50; that at the sale for the loans to Thompson there was paid \$165 premium on each share, and the note of \$1,500 was made up of \$495 paid as premiums for the loan, \$223.50 paid Nicely & Co. for the shares, \$15 paid for the December dues for 1872, and \$766.50 sent to Thompson. Witness also stated that the company transferred the three shares of stock No. 359, 360 and 361 on the transfer-book from Nicely & Co. to William Thompson on 6th December 1872, and presented the transfer-book to show the transfer, and also the minute-book to show the bid for the loan on December 2d. From the minute-book the only business transacted on said December 2d, was as follows:

"The company met at the office of the company in St. Joseph, Mo., and the following shares of stock were sold:

One share to William Thompson, Blue Rapids,	\$165.00
" " " William Thompson, " "	\$165.00
" " " William Thompson, " "	\$165.00

"On motion adjourned, to meet January 6th, 1873.

"F. L. McLEAN, Sec'y."

It is admitted that William Thompson was never at St. Joseph to see anything about the loan, or any shares in the company; and said secretary stated he did not recollect who bid off the shares for Thompson, but that a letter was received from a Mr. Chandler, who was a stockholder in the company, and a neighbor of Mr. Thompson, and with whom Thompson consulted about getting some money from the company, asking that three shares of stock be purchased for Mr. Thompson, and that the shares be bid off for him at the next meeting. It was not shown that Nicely & Co. ever transferred any shares to Thompson, or had any knowledge of the transfer made on the transfer-book, except the fact that said firm of Nicely & Co. were really the loan-and-building company, or rather the officers of such company. It does not appear that either of the defendants in error ever heard of the firm of Nicely & Co. prior to the taking of evidence in the case for trial, or had any knowledge at the institution of their suit of the said trans-

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fer of stock on the books of the company. Upon all the evidence the court below found that William Thompson never bid for shares or authorized any persons to bid for shares in the said company and that the pretended sale of said shares 359, 360 and 361 was a device and an artifice by which it was intended to evade the usury laws of this state. Even admitting that the preponderance of the evidence is against the conclusion reached by the court, we cannot disturb this finding in the face of the direct evidence of said Thompson that he never purchased any shares in the corporation, never bid off any shares at any meeting, and never authorized any person to bid off any shares for him. The Thompsons seem to have acted in good faith in all the transactions, and the equities of the case are certainly with them. They were ignorant of the operations of the association at the time they obtained the money. The loan was made in violation of the regulations of the constitution and by-laws of the corporation; and so soon as the defendants in error understood the claim of plaintiff in error against them a tender was made to the company of a sufficient sum to repay the loan with interest thereon at the rate of twelve per cent. per annum from the date they received it. We do not see that the corporation has suffered any loss at the hands of the makers of the note and mortgage, as the money loaned has been paid or tendered with the highest rate of interest obtainable under the laws of this state, and the shares of stock claimed to have been purchased from Nicely & Co. have never been delivered to the defendants in error. Neither was it shown that such shares have depreciated in value. Under the circumstances, no court of equity would be justified in giving a construction to the contract of the parties by which in addition to the sums already paid and tendered the excessive fines and demands still claimed as due by the plaintiff in error shall be placed in judgment and made a lien upon the homestead of the defendants, unless the provisions of the writings executed by them, or their conduct in the premises, imperatively demanded such an interpretation.

Upon the trial the court admitted some irrelevant evidence

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as to immaterial matters, which on the objections thereto should have been rejected. But this frequently occurs in the trial of cases to the court without the intervention of a jury; and as the findings of fact in the cause are supported by valid testimony, and as in our examination of the testimony supporting the findings we have omitted all considerations of the improper evidence received, the error complained of as to the admission of certain objectionable testimony is an immaterial one, and no ground for a reversal of the judgment. The note, upon its face, is payable at once, unless otherwise provided by the rules and regulations of the corporation. As neither of the defendants in error, under the findings of the court, was bound by these conditions, not being a member thereof, the plaintiff in error should have surrendered up the note and mortgage when the balance due thereon was tendered to its officers.

The judgment of the district court will be affirmed.

All the Justices concurring.

SIDNEY SMITH & SON V. WILLIAM R. MCNAIR.

1. **SALE OF FORGED INSTRUMENTS; *Warranty of Vendor; Liability.*** The vendor of certain papers, purporting to be school bonds negotiable on their face, by the mere act of sale impliedly warrants the genuineness of the bonds, and is liable to the vendee, or his assignee, for what he has received from him, with interest, if such pretended bonds are false and forged when delivered. [*Parmelee v. Knox*, 24-122.]
2. ——— ***Return of Forged Instruments Not Necessary.*** An action can be maintained for the money paid for such forged bonds by the vendee against the vendor, without a return or an offer to return to the vendor the worthless papers. [*Bank v. Peck*, 8-860; *Mfg. Co. v. Lewis*, 30-544.]
3. ——— ***Resale by First Vendee.*** A resale of such forged bonds to a second vendee for a sum in excess of the price paid the first vendor is

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no bar to the recovery of the money paid by the first vendee to his vendor, although the money on the resale has not been refunded by the first vendee to his vendee. [*Wicks v. Smith*, 21-415.]

Error from Leavenworth District Court.

ACTION by *McNair* against *Sidney Smith* and *Walter S. Smith*, partners as *Smith & Son*, to recover the amount paid defendants by plaintiff's assignor for three certain false and forged school-district bonds. All the facts are stated in the subjoined opinion. The district court, at the December Term 1875, gave judgment in favor of *McNair* for \$929.79 and costs, and defendants bring the case here.

Lucien Baker, for plaintiffs in error. (No brief has come to hands of reporter.)

Clough & Wheat, for defendant in error, contended, that the Smiths by selling and delivering forged bonds and coupons warranted that the same were genuine, and that because of the bonds being forged and fictitious, and not genuine, there was an entire failure of the consideration paid therefor, and that the same could be recovered back. Byles on Bills, 6th Am. ed., 161; 18 Iowa, 202, 207; 38 Iowa, 329, 333; 4 Gray, 156; 20 N. Y. 277. Nor is it at all material that the forged bonds were not returned to plaintiffs in error. They were of no value, and for want of such value it was not necessary to return the same. 38 Iowa, 330, 336; 8 Kas. 660.

The opinion of the court was delivered by

HORTON, C. J.: The material questions in this case are, as to the liability of a vendor of forged school-district bonds to the purchaser thereof, where there is no collateral contract of warranty; and if a liability exists against the vendor, whether a return or an offer to return the counterfeit bonds by the purchaser immediately after discovering that they are worthless, is essential to the right of recovery; and lastly, where such vendee has sold the forged

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bonds for a sum in excess of the price paid by him, and has never taken the bonds back, or returned the money received by him to his vendee, has such second vendee or his assignee any right of action against the original vendor? The facts are as follows: William R. McNair, assignee of Jones & Howell, sued Smith & Son to recover back the consideration, with interest, which Jones & Howell had paid the Smiths for certain supposed (but really forged) school bonds and coupons, which the Smiths had sold and delivered to Jones & Howell. There was no express warranty by Smith & Son, and no indorsement or written guaranty by them. Jones & Howell sold the bonds to McNair for \$87.50 more than they gave for them. There was a mistake by all the parties. The sellers and the buyers supposed the bonds to be genuine, when in truth they were forged. After they were ascertained to be worthless, Jones & Howell assigned in writing their cause of action against the Smiths to McNair. The consideration of the assignment was the liability of Jones & Howell to their vendee, which liability was more than the claim of Jones & Howell against Smith & Son. We have carefully examined the cases relied upon by the counsel for plaintiff in error in support of the proposition that when a negotiable instrument passes by mere delivery, and the instrument is sold the same as any other article, the vendee cannot recover back the purchase-money even if the instrument is forged; but in our view, the cases cited are in conflict with the great current of both English and American authorities, and in some of the cases quoted there are features which widely distinguished them from the case at bar. The rule is, that if one person applies to another to purchase an article for a particular purpose, and the person so applied to sells him the article knowing that the purchaser relies upon his complying with his request, the law implies that the article is delivered with a warranty that it is the article called for. It is too well settled to admit of discussion, that a vendor who sells negotiable bonds or notes, is bound, not by the collateral contract of warranty, but by the principal contract itself, to deliver as a condition precedent that which is genuine, not that

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which is false, or counterfeit; and if the negotiable instrument turns out to be forged, the seller is liable to the vendee for what he has received from him for it, with interest from the time of the receipt. The mere act of sale impliedly warrants the genuineness of the instrument. We need only refer to a few of the many cases supporting this view.

In *Jones v. Ryde*, 5 Taunt. 488, it was held, that the vendor of a forged navy-bill was bound to return the money received for it; and in this case the decision was placed on the ground that where a bill was discounted as genuine, which turned out to be forged, both parties being equally innocent, having equal knowledge and equal means of knowledge, the money was recoverable back as money had and received.

In *Young v. Cole*, 3 Bing. N. C. 724, it was held, that when the plaintiff, a stock broker, was employed by the defendant to sell for him four Guatemala bonds, in April 1836, and it was shown that in 1829 unstamped Guatemala bonds had been repudiated by the government of that state, and had ever since been not a marketable commodity on the stock exchange, and the defendant received the price on the delivery of the bonds, both parties being ignorant that a stamp was necessary, that as the bonds were valueless the defendant was bound to restore the price received. Tindal, C. J., said: "It is not a question of warranty, but whether the defendant had not delivered something which, though resembling the article contracted to be sold, is of no value."

In the case of the *Cabot Bank v. Morton*, 4 Gray, 156, it was decided that a person who procures notes to be discounted by a bank, impliedly warrants the genuineness of the signatures of the makers and indorsers. The court say, that it is "a general rule of law, that in every sale of personal property the vendor impliedly warrants that the article is in fact what it is described and purports to be, and that the vendor has a good title and right to it."

Again, in *Snyder v. Reno*, 38 Iowa, 329, the court held that the transfer of a note by delivery, whether the consideration be money or merchandise, impliedly warrants the genuineness

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of the signature of the maker. See also, *Gurney v. Womersley*, 28 Eng. L. & Eq. 256; *Worthington v. Cowles*, 112 Mass. 30; *Aldrich v. Jackson & Butts*, 5 R. I. 218; *Terry v. Bissell*, 26 Conn. 28; *Ledwich v. McKein*, 53 N. Y. 307.

Reason also supports the authorities. Where a person buys negotiable bonds, he expects to receive genuine instruments, not false and fictitious ones. If one buys bread, he does not expect a stone; if he bargains for fish, he is not satisfied with a serpent. In this case, Jones & Howell contracted for school-district bonds, and paid for such bonds. They received worthless papers, of no value intrinsically to any one. What they bargained for, they have not received. No school-district bonds have ever been delivered to them. Common honesty requires that the money they paid out should be returned with interest.

As to the question made, that no recovery could be had without a return, or an offer to return the forged bonds, we answer, that within the principle applied in the case of the ^{2. Return of forged bonds.} *First Nat. Bank of Sturgis v. Peck*, 8 Kas. 660, no return or offer to return was necessary to maintain the action brought by McNair. The bonds were forged, and entirely worthless to all the parties. "In such a case, the return would be a useless ceremony, which the law never requires."

The objection of plaintiff in error to the judgment, that Jones & Howell resold the bonds in excess of the price paid, is ^{3. Resale by first vendee.} not well sustained. The implied warranty of genuineness by Smith & Son was broken the instant of the delivery of the bonds, and they at once became liable to their vendees for the amount they received. This cause of action then accrued. The plaintiffs in error were in nowise affected by such second sale, and could not plead such sale in bar of the rights of Jones & Howell against them, nor against their assignee, who stands in the shoes of Jones & Howell in this case.

The other exceptions taken on the trial were immaterial, as the answer states the assignment of the cause of action to the defendant in error by Jones & Howell, and the sale of the forged bonds to him by them; hence these matters were not

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in issue in the case, and no instructions or directions to the jury concerning these facts were either necessary or proper, The judgment of the district court is affirmed.

VALENTINE, J., concurring.

BREWER, J., not sitting.

ATCHISON & NEBRASKA RAILROAD CO. v. PETER WAGNER.

1. **BILLS OF EXCEPTIONS—Preparation of; Must be Complete.** A bill of exceptions can be settled and allowed only by the judge, and when it receives his signature it should be complete, and nothing left to be settled by the agreement, recollection, or judgment of counsel, clerk, or other person. [*Waysman v. Updegraff*, McC.-89; *Gallaher v. Southwood*, 1-143; *Brown v. Rhodes*, 1-359; *State v. Montgomery*, 8-356; *Hodgden v. Comm'rs*, 10-637; *Moore v. Wade*, 8-391; *Kshinka v. Cawker*, 16-64, 65; *State v. Schonewald*, 26-238, 289; *State v. Nickerson*, 30-547; *Ins. Co. v. Koons*, 28-218.]
2. ——— **Record—Must Prove Itself.** A bill of exceptions is a record, and like any other record is not to be established by parol testimony, but must carry on its face the evidences of its own integrity and completeness. [*Lounsberry v. Rakestraw*, 14-153; *State v. Bohan*, 19-48; *Whitney v. Harris*, 21-96, 97; *Pfeiffer v. Ex. Ch.*, 20-102; *Parker v. S. M. Co.*, 24-32; *Allen v. Kreuger*, 25-75; *Whitsell v. Forgyler*, 30-528; *Scott v. McKinstry*, 27-163.]
3. ——— **"Skeleton Bills;" Rules for Determining their Sufficiency.** While what is familiarly known as a skeleton bill, that is, a bill which provides for the subsequent copying by the clerk into it and as a part of it some paper or document, is allowed, yet to make such a bill valid and complete these rules must be regarded: 1st, The bill, in referring to such paper or document, must purport to incorporate it into and make it a part of the bill; a mere reference to it, although such as to identify it beyond doubt, or a statement that it was in evidence, is not sufficient. 2d, The document must itself, at the time of the signature of the bill, be in existence, written out and complete. 3d, It must be annexed to the bill, and referred to as annexed, or it must be so marked by letter, number, or other means of identification mentioned in the bill as to leave no doubt when found in the record that it is the one referred to in the bill; and these means of identification must be obvious to all, so that any one examining the record can know what document is to be

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inserted, or after insertion that the clerk has made no mistake. [*Shumaker v. O'Brien*, 19-476; *Jackson v. Stoner*, 17-605; *Minnis v. Jordan*, 24-267.]

4. **ALLEGED MISCONDUCT OF PARTY; *Discovery at the Trial; Investigation.***
Where, after all the testimony has been heard, but before the arguments have commenced, one of the parties ascertains or has good reason to believe that one of his adversary's witnesses has been compelled by such adversary to testify falsely against him, he is not obliged to wait until after the verdict, and then seek a remedy for the wrong by a motion for a new trial, but may immediately call the attention of the court to the matter and have it investigated, and if true, the fact made known to the jury before retiring to consider of their verdict.
5. ——— When the attention of the court is called to such a matter it may investigate it openly in the presence of the jury, or in the first instance privately and out of the hearing of the jury. The latter is the preferable course unless the fact of such charge has in some way reached the ear of the jury, in which case it may be better that the jury should know the entire truth, rather than render a decision with a suspicion in their minds of something wrong.

Error from Atchison District Court.

WAGNER sued the *Railroad Company* for alleged personal injuries as having occurred in March 1875, in the city of Atchison. *Wagner* was a day carpenter working in the employ of the American Bridge Company then constructing a bridge across the Missouri river, and was at work in a small board shop put up by said bridge company within four or five feet of the *Railroad Company's* railroad track, near the depot and immediately upon the river bank. The front of the shop rested on the earth, and the rear was supported upon posts. One of defendant's cars got off the track, and by breaking down the bank or by striking against the shop such shop was thrown down, and plaintiff was injured. The action was tried at the November Term 1875 of the district court. Verdict and judgment for plaintiff for \$11,500 damages. The *Railroad Company* brings the case here. Defendant in error, *Wagner*, moved to strike from the transcript what purported to be copies of certain bills of exceptions.

W. W. Guthrie, and *B. F. Stringfellow*, for plaintiff in error —against the motion to strike out, cited among others the fol-

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lowing: 29 Ala. 464; 32 Ala. 395; 32 Ga. 557; 4 La. An. 575; 35 N. Y. 381; 1 G. Greene, 153; 4 Wallace, 188; 19 Ohio, 426; 15 Iowa, 454. That Wagner could not recover, the railroad being rightfully in the street, and the shop being there wholly without right, and as a trespasser, 10 Kas. 552; 15 Kas. 86; 5 Kas. 167, 191, 433, 445; 9 Kas. 597; 6 Blackf. 326; 4 Ohio St. 424; 13 Ind. 325.

Everest & Waggener, and *Doniphan & Reed*, for defendant in error, in support of their motion to strike out, cited *Morris*, (Iowa,) 483; 1 G. Greene, 153; 3 Iowa, 152; 10 Iowa, 110, 558; 11 Iowa, 9, 11, 214; 15 Iowa, 453; 18 Iowa, 22; 16 Wis. 354; 19 Wis. 377; 24 Wis. 514; 27 Wis. 465; 1 Ohio St. 388, 409; 11 Nev. 314; 32 Mich. 259; 31 Mo. 123. Upon the merits of the case, negligence, etc.: 50 N. Y. 203; 15 Grat. 230; 59 Mo. 495; 20 Ohio St. 205; 9 Kas. 620; 14 Kas. 37, 512; 62 Ill. 314; 65 Barb. 108; 34 N. Y. 628; 79 Penn. St.; 38 Iowa, 120; 14 Minn. 57; 7 Wal. 663; 19 Conn. 507; 37 Cal. 419; 8 Allen, 560. That the verdict will not be set aside for excessive damages, 2 Gill. 482; 3 Dana, 464; 29 Iowa, 216; 64 Barb. 448.

The opinion of the court was delivered by

BREWER, J.: This was an action in the district court of Atchison county to recover damages for personal injuries, in which judgment was rendered in favor of defendant in error. The contest in this court has been conducted with vigor and bitterness. There has been that irritation and suspicion on the part of counsel which is both unfortunate and unpleasant.

Passing by all the personal allusions and complaints in the briefs, we shall consider simply the legal questions involved. And at the threshold we find on the part of the defendant in error a challenge of substantially the whole record. In the transcript filed with the petition in error appear three bills of exceptions; and a motion was made to strike them out, on the ground that they are not copies of the bills as signed and now on file in the district court.

1. Bill of exceptions: preparation of.

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Upon this motion the original bills were produced and offered in evidence, together with much other testimony. The bills when signed were what are sometimes called "skeleton bills" — that is, with blanks containing directions to the clerk, "here insert," etc. Such bills it is claimed are nullities, and the clerk has no power in copying to make the insertions, but must follow the very letter of the bill as signed. It is not disputed that the allowance of a bill of exceptions is the act of the trial judge. A paper purporting to be a bill of exceptions, if unsigned by him, will not be noticed in the supreme court: *Waysman v. Updegraff*, McCahon, 89; *Couse v. Phelps*, 11 Kas. 455; *Kshinka v. Cawker*, 16 Kas. 68. The agreements of counsel are insufficient: *Hodgden v. Comm'rs of Ellsworth Co.*, 10 Kas. 637; *The State v. Bohan*, ante, 28. The certificate of the clerk will not answer: *McArthur v. Mitchell*, 7 Kas. 173; *The State v. Bohan*, supra. The language of the statute is plain: "The party excepting must reduce his exceptions to writing and present it to the judge for his allowance. If true, it shall be the duty of the judge to allow and sign it." Gen. Stat., p. 686, code, § 303.

It would seem to follow from this that when the bill receives the signature of the judge it should be complete, and this we understand to be the substance and spirit of all the decisions.

There is to be no further discussion, no further discretion; the record is made. "The office of a bill of exceptions is to bring upon the record some portion of those proceedings which do not of right and of course go upon the record." (*Stoner v. Jackson*, 17 Kas. 607.) It is itself a part of the record. But a record must speak for itself. It must show upon its face all that it is. It must be its own evidence of all that it contains. No part of its contents may rest upon the discretion of the clerk, the recollection of the judge, or the testimony of counsel. But to insure this certainty, is it essential that everything be written out in full, every document and writing copied into the bill before signature? Such appears to be the import of some of the authori-

2. Bill is a record, and must be complete in itself.

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ties cited; but that seems to us unnecessary stringency, and to impose needless clerical labor. Where a deposition or other writing is to be made a part of a bill it can be referred to with such marks of identification as to exclude all doubt. That surely ought to be sufficient; and so we think the better authorities hold. But these things must exist to exclude all doubt:

1st. The bill in referring to such extrinsic document must purport to incorporate it into and make it a part of the bill. A mere reference to the document, although such as to identify it beyond doubt, or a statement that it was in evidence, is not sufficient, for such reference and statement do not make it certain that judge or counsel intended that it should be copied into and made a part of the bill.

2d. The document itself must be in existence, written out and complete at the time of the signature of the bill; otherwise the door is open for dispute as to its language, and the bill may not in fact be allowed by the judge within the statutory time. A reference to the testimony of some witness to be thereafter written out by him, and as written out to be inserted, is improper; and such testimony, though written out and inserted, must be disregarded; for that in effect places in the bill the witness's statements of the testimony, and not the judge's. So also, if a document has been totally or partially destroyed, it must be restored before the signature, and the paper as restored clearly identified. And again: Suppose a paper in a foreign language is received in evidence and translated to the jury by some witness on the stand; it will not do to refer to that paper in the original, leaving the translation to be thereafter written out by any one, not even the witness who translated it to the jury; but the translation must be written out and properly referred to, so that the judge may approve it as the one given on the trial. The same principle renders it proper that short-hand notes be written out before the signature; for the notes of the stenographer are not a record; they are not conclusive as to what in fact was the testimony; they are not good against the certificate of the judge, and are no

substitute for it. Whatever reliance the judge may place upon such notes, he after all must determine what was and what was not the testimony; and until those notes are written out, neither he nor counsel can determine what they will show as the testimony.

3d. And in this we appropriate the language of the supreme court of the United States in the case of *Leftwich v. Lecann*, 4 Wall. 187, in which the court says: "If a paper which is to constitute a part of a bill of exceptions is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill, as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions." And these means of identification must be obvious to all. No mere memorandum, intelligible it may be to a single person, even the clerk, but indicating nothing to any one else, will be sufficient. They must be such that any one going to the record can determine what document is to be inserted, or, after insertion, that the clerk has made no mistake. The record must prove itself, and not the record *and* the testimony of the clerk. The clerk changes; the record endures. And long after judge and clerk are both gone, the record, if good, must carry on itself the evidence of its own integrity.

It may be well to notice some of the vast number of authorities cited by counsel. In the case of *Reed v. Hubbard*, 1 G. Greene, (Iowa,) 153, the bill of exceptions recited, that "The plaintiff exhibited his bill of particulars—[here insert the same.]" And the court sustained a motion to strike out the bill of particulars as copied by the clerk. See also same volume, the case of *Humphrey v. Burge*, p. 223. In the case of *Harmon v. Chandler*, 3 Iowa, 152, the court says: "In order to bring before this court, as a part of the record, any paper used or proceeding had in the district court, not made a part of the record by statute, it must be embodied in the bill of exceptions, or so plainly identified that there cannot possibly be any mistake as to what is referred to. To refer to a motion, or instruction, as, 'marked, A,' and, '[here

Illustrations, and
authorities.

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insert it,]’ is not sufficiently certain for the ends of justice.” See also, *Jordan v. Quick*, 11 Iowa, 9; *State ex rel. v. Jones*, 11 Iowa, 11; *State v. Larkin*, 11 Nevada, 314; *Harbaugh v. Judge*, 32 Mich. 259; *Walker v. Stoddard*, 81 Mo. 123; *Oliver v. Town*, 24 Wis. 514. In the case of *Sexton v. Willard*, 27 Wis., pages 465, 468, the court says: “The bill of exceptions on file is imperfect and incomplete on its face. Blanks are left in it for various depositions and other documents, which, it states, were read in evidence on the trial, and no reference is made to them, or description of them given, by which they can be identified. The attorneys might differ as to the identity of these, and there would be no means of settling the controversy. They should have been inserted in the bill, or made part of it by certain reference, in order that no such dispute may arise.” In the case of *Hicks v. Person*, 19 Ohio, 446, the court says: “All the evidence before the jury must be embodied in or made a part of a bill of exceptions. It will not do, as is sometimes attempted to be done, to refer to the records of courts, or records of deeds, and attempt to make them parts of bills of exceptions. It will not do to refer to depositions on file by the names of the deponents, or by artificial marks upon the depositions themselves, without something beyond this. They must be attached to or made part of the bill of exceptions, so that when a record of the case shall be made they can be introduced into that record as constituting a part of the case.” And further, *Wells v. Martin*, 1 Ohio St. 388; *Busby v. Finn*, 1 Ohio St. 409; *Young v. State*, 23 Ohio St. 578; *Stewart v. Rankin*, 39 Ind. 161; *Kesler v. Myers*, 41 Ind. 546; *State v. Railroad Company*, 44 Ind. 350; *Vanderkarr v. State*, 51 Ind. 91; *Comm’rs Henry County v. Slatter*, 52 Ind. 171; *Everett v. Gooding*, 53 Ind. 72. In the case of *Garlington v. Jones*, 37 Ala. 240, the court, speaking of papers not copied into the bill of exceptions, but made part thereof by reference, says, that they must “be described by such identifying features as to leave no room for mistakes in the transcribing officer.” *Stranobridge v. The State*, 48 Ala. 308; *Tuska-*

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loosa Co. v. Logan, 50 Ala. 503; *Huff v. Gilbert*, 4 Blackf. 19; *Spears v. Clark*, 6 Blackf. 167; *V. University v. Embree*, 7 Blackf. 461.

Applying the rules above given to the case at bar, and what is the result? Bill of exceptions No. 3 is the one purporting to preserve the testimony taken on the trial. In the original bill of exceptions, as allowed and signed by the trial judge, the only identification of the evidence offered by plaintiff is as follows—quoting from the bill:

“As will appear from a stenographic record thereof as follows: [*Here copy record of testimony as kept by stenographer, down to resting of plaintiff's case.*] The said depositions taken by plaintiff, to-wit: [*Here copy names of witnesses, and depositions, as read.*]”

And the only identification of evidence offered by the defendant to be inserted in said bill of exceptions is as follows:

“Defendant, to maintain the issue upon its part, offered evidence which was received by the court of the kind and in order as follows, as also kept by such stenographer: [*Here copy defendant's evidence.*]”

And the evidence of plaintiff in rebuttal is not even identified by the stenographic record, but it is stated that, “The plaintiff offered evidence in rebuttal which was received by the court as follows: [*Here copy evidence in rebuttal.*]” Among the papers brought from the office of the clerk of the district court, and offered in evidence on the motion, is a large roll which upon examination reads as the testimony of witnesses given upon this trial, and which appears to have been copied into the transcript filed in this court as the testimony referred to in the original bill. But upon this roll we find no file-marks, or other marks of identification. From an examination of this roll no one could tell when it was placed among the papers of the clerk's office, or even when it was written out; and if the clerk had produced any other roll or paper reading as testimony given upon that trial, no one could from inspection have told which was correct, or which was intended to be inserted, or which (if either) was written out by a stenog-

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rapher. Indeed, the only means of identification which appear are, the facts that it reads as testimony given upon the trial, and that it is found among the papers of the case. To hold such means sufficient, would open the door to the loosest practice. Again, as a part of plaintiff's evidence the original bill directs—“*[Here copy names of witnesses and depositions as read.]*” Who is to decide what depositions were read? The court certainly by signing such a bill does not determine. It is a matter to be thereafter settled, and by whom? Still again: The only identification of rebutting testimony is—“*[Here copy evidence in rebuttal.]*” Whence is the clerk to get it? Who is to decide what was then given in evidence? Such a direction settles nothing. It does not even purport to settle anything. We have refrained thus far from noting anything outside of that which appears upon the face of the papers, for we think as indicated heretofore, that the identification should be apparent from the record itself, and obvious to all. In reference to the extrinsic testimony of which we received quite an amount on the hearing of the motion subject to further consideration as to its competency, we simply say this—that its contradictions only enforce the conviction that the record must be tried by itself, that the marks of identification must be on the papers, and in the record; and that such contradictions make it painfully certain that it would be in the highest degree dangerous to trust to the recollections of clerk, or counsel, or court. So far then as the motion refers to that portion of the bill of exceptions No. 3 which purports to give the testimony on the trial, it must be sustained.

Notwithstanding this we have examined the testimony at length; and, without asserting that there were absolutely no errors committed, we think that a verdict for the plaintiff upon such evidence would have to be sustained. There was more

Merits of case. evidence to sustain the verdict, more tending to show negligence on the part of the defendant, than in many of the contested cases that come to this court. We do not mean that the testimony was one-sided entirely, for

there was abundance of strong conflicting testimony. But still, as to the matters of fact the verdict of the jury would have had to be sustained, and a reversal, if ordered, must have been on some technical error in the admission of evidence, or in the instructions. As to the amount of the verdict, it was unquestionably excessive; but whether it was so excessive that for that reason alone, after having been approved by the district court, we should have felt compelled to reverse the judgment, is a matter we shall not decide. Perhaps the justices might not agree upon that.

Two motions were made to suppress certain depositions, taken respectively on the 1st and 3d of May 1875, and the 21st of October 1875. As to the first depositions, Depositions; motions to suppress. the grounds assigned were, that they were taken before P. S. Noble, a clerk of the plaintiff's attorneys, and that they were so taken without notice to and in the absence of defendant's attorneys; and as to the other, the grounds were that they were taken in short-hand, and afterward written out and signed by the witnesses, and also that they were taken before said Noble. Upon the face of the depositions everything appears correct. The objections are raised only by extrinsic testimony. In support of these objections the affidavits of two witnesses were filed. They were opposed by counter affidavits. These counter affidavits show that the taking of the depositions in short-hand, and before P. S. Noble, was by consent of parties; that Noble, though a clerk of the plaintiff's attorneys, had no interest in this suit, and was not attorney or relative of either party, and was as a notary public in the habit of taking depositions for the different attorneys of Atchison for his own benefit, and not for the gain of the plaintiff's attorneys; and also that the notice to take the first depositions was served on one of the principal officers of the defendant, and that F. M. Pierce, an attorney in the office of defendant's attorney, though not regularly employed in this case, appeared at the time named as attorney for defendant and cross-examined the witnesses without any

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objection on account of the notice. The motion to suppress states that Pierce was employed specially by the defendant to appear and object on account of the notice. Upon the questions of fact raised by the various affidavits, we cannot see that there was such a clear preponderance of testimony against the ruling of the district court as will justify a reversal. Again, it does not affirmatively appear that all the testimony presented on the motion is preserved in the record. *McIntosh v. Comm'rs of Crawford Co.*, 18 Kas. 171.

We cannot forbear noticing at this point a matter which seems to have escaped the attention of counsel, and which tends to show how uncertain "skeleton bills" of exceptions are, even in their best estate. The skeleton bill, after referring to the motions to suppress depositions, states, that in support thereof defendant read "two certain affidavits as follows: [*Here copy two first affidavits made by W. W. Guthrie and F. M. Pierce.*]" The transcript filed with us shows at this place two affidavits of these gentlemen, of date November 10th. Further on the skeleton bill reads, "Plaintiff then read *contra* the certain affidavits of B. P. Waggener, P. S. Noble, and A. H. Horton, which are copied as follows: [*Here copy such affidavits.*]" The transcript here shows three affidavits of these three gentlemen respectively. The bill then further reads, "Defendant then read *contra* the certain other affidavits of Guthrie and Pierce, which are copied as follows: [*Here copy such affidavits.*]" And the transcript shows two such affidavits of date November 12th. Then according to the bill come the depositions themselves which were sought to be suppressed; but in the transcript there appear two more affidavits of P. S. Noble and one of B. P. Waggener, and which upon their face refer to the matters in the motion, and which are also verified on the 12th of November. Now, were these last affidavits really read upon the motion? Was it intended that they should be inserted in the bill of exceptions as copied for this court? or was this simply the act of the clerk, or copyist, thinking they ought to be in?

So also, where it is said that plaintiff read the certain affidavits of B. P. Waggener, etc., and the direction was to copy such affidavits, was it intended that the clerk should copy one affidavit apiece of these gentlemen? or, all affidavits of theirs he might find on file before the date of the motion? or, only such as upon examination he might deem pertinent to the matters in the motion? or, such as according to his memory were actually read? These questions find no satisfactory answer in the record. The transcript as it comes before us is doubtless correct, at any rate we may presume it to be so, as no question is made; but if it were challenged we should be at a loss from anything in the original bill to determine how many affidavits were properly copied into the record by the clerk.

One other matter remains for consideration. After the testimony was all in, the court adjourned for the arguments to the ensuing morning. At that time, before the jury had been called, but while they were present in the court room and in their hearing the counsel for plaintiff produced and read to the court an affidavit stating substantially, "that since the adjournment one of the defendant's employes and witnesses had admitted that the testimony that he had given adverse to the plaintiff he had been forced to give—that he knew he had done wrong, and done the plaintiff injustice, and that he was sorry for it." Upon this, and before proceeding further with the case, the witness, and the parties who claimed to have heard his admissions, were brought into court, questioned and cross-questioned as to the admission. When all had been so examined, the court, without taking any action on the matter so investigated, directed the argument to proceed. It is claimed that this was both "misconduct of the prevailing party," and "irregularity in the proceedings of the court, and the prevailing party, by which the defendant was prevented from having a fair trial," and resulted in a judgment excessive and outrageous in the last degree. It was neither. The attention of the court was called by affidavits to a matter which demanded investigation. It

4. Alleged misconduct of party—when to be investigated.

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was proper too to investigate it before the case was finally submitted to the jury; and while a private examination before the court, and out of hearing of the jury, would ordinarily at least in the first instance be the preferable course, we cannot think that the fact of its publicity, and the presence of the jury, turned it in this case into misconduct or irregularity sufficient to compel the reversal of the judgment. Suppose it were true, that defendant forced one of its employés to go into court and so testify against the plaintiff as to do him injustice and wrong; that would be of course misconduct, and sufficient if not discovered until after verdict, to compel a new trial. But if discovered before the case goes to the jury, must the party wait till after verdict and then seek to remedy the wrong by motion for a new trial? That often would be far from adequate remedy. It involves necessarily delay, and all that results or may result from delay. Waste of time, expense, annoyance, absence of witnesses, failing of memory, insolvency of defendant, are more or less certain consequences of a new trial. Besides, no jury can so fully appreciate the extent and force of the wrong as that which has heard the testimony by which the wrong was sought to be perpetrated. While therefore the party may wait until after verdict, and seek to remedy the wrong by motion for a new trial, he is not compelled to so wait, and may immediately upon discovering the facts call the attention of the court to it. On the other hand, if it be misconduct for a party to force an employé to testify untruly, it is no less misconduct for the opposite party to maliciously fabricate such a charge. And if the plaintiff had made such a charge and circulated it so as to come to the ears of the jury in any other manner than by directly and openly calling the attention of the court to and demanding an investigation of it, it would be misconduct. And more: Although openly presented to the court, and investigation demanded, if it should appear that it was wholly without foundation, and made without any reasonable grounds therefor, that would also seem to be misconduct. But where the

charge is true, or there are reasonable grounds to believe it true, the party is guilty of no misconduct in coming directly and openly into court and demanding an investigation in order that his rights may be protected against such a wrong. In this case the testimony was conflicting, and we do not think the charge was established; but still from the language which the witness admitted that he had used, to the effect "that he had to go to the court and testify," it is not strange that the plaintiff and his friends understood that the compulsion referred to was that of the employer, and not of the law. The charge was not wantonly brought. The plaintiff believed it. There were some grounds for believing it. It was apparently made in good faith, and there was no misconduct in making it.

Ordinarily, as we have said, such matters should first be investigated privately before the court, and not in the hearing of the jury, in order that their attention may not be distracted to side issues; but still, whether it shall be so had or not, is a matter largely within the discretion of the court. The charge may have become so public that there is a probability of it having reached the ear of the jury. In such a case the interests of justice and the rights of both parties would seem to demand that they know the exact truth rather than return a verdict with a suspicion of wrong in their minds. In the case before us it does not seem that the public investigation of the charge was such an error or wrought such prejudice to the rights of the defendant as would justify any interference with the judgment.

The judgment will be affirmed.

VALENTINE, J., concurring.

HORTON, C. J., not sitting, having been of counsel in the case.

MOUND CITY MUTUAL LIFE INSURANCE CO. V. EDWARD E.
TWINING *et al.*

1. **MOTION FOR NEW TRIAL; When Filed in Time, May be Heard at Subsequent Term.** This case was tried by the court without a jury. Afterward, and on the 26th of July 1875, the court made special findings of fact and conclusions of law, and upon such findings and conclusions rendered judgment in favor of the plaintiffs and against the defendant. On the same day the defendant filed a motion for a new trial, but on the same day the court adjourned *sine die* without taking any action upon said motion for a new trial. *Held*, That said motion did not become defunct by reason of said adjournment, but was continued to the next term of the court. [*Reed v. Sexton*, 20-201.]
2. **CASE-MADE; Time for Making; Extending Time.** A case may be made for the supreme court and served upon the opposite party at any time within three days after an order is entered overruling a motion for a new trial, although such order may not be entered at the same time that the judgment in the case is rendered, nor even until the next term thereafter; and the court may on entering said order extend the time still further for making and serving a case for the supreme court.
3. **LIFE INSURANCE; Non-Forfeiting Policy; Premium.** The decision in the case of *Life Insurance Co. v. Twining*, 12 Kas. 475, regarding the liability of the insurance company, the terms of its policy, and the non-payment of premiums at maturity, reaffirmed and followed. [*Ins. Co. v. McGowan*, 18-300.]
4. ——— **Methods of Insurance; Option of Assured.** Where an insurance company publishes that, in order to prevent forfeitures, and to save policies from lapsing, it has adopted two methods of insurance, between which policyholders may choose, and T. procures from the said company an insurance on his own life for the benefit of his heirs, and in doing so takes and receives a policy giving to him the benefits of one of said methods, and not of the other, *held*, that T., in taking and holding said policy, chooses one of said methods, and that his heirs cannot after his death abandon that method and choose the other.
5. ——— **Payment of Premiums When Due; Default; Custom; Waiver of Time.** Where the local agent of an insurance company adopts the custom of receiving premiums, due his company, at any time up to the first of the month next after they become due, and T. at the time holds an incorrect policy in said insurance company, and the agent in order to induce T. to take a corrected policy from the company informs T. of such custom, and tells him that if he takes such new policy and pays his annual premiums at any time up to the first of the month next after they become due, it will be sufficient, and also gives to T. a circular published by the company stating, "Thirty days grace allowed in payment of premiums," and T. takes such new and corrected policy by the

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terms of which the annual premiums become due on the 15th of October of each year, and on said policy is an indorsement stating in effect that the agents of the company have no authority to waive anything for the company, and this particular agent does not in terms have any such authority, and said agent again, and after said second policy is issued, makes the same statement to T. which he made prior thereto with regard to said custom, and with regard to receiving said premiums after they became due, and also thereafter gave T. other copies of said circulars, and the assured dies on October 24th, nine days after the second annual premium becomes due, and said second annual premium is never paid, *held*, that it must be presumed that the insurance company has knowledge of said custom of its agent and adopted the same as its own custom, and therefore that the company itself waived the payment of premiums within the strict time prescribed by the policy; and therefore, that as the assured died before the first of the month next after said premiums become due the beneficiaries may recover the amount of the insurance, less the amount of said second annual premium.

Error from Douglas District Court.

THE necessary facts, pleadings, and proceedings are fully stated in the subjoined opinion. The district court, at July Term 1875, gave judgment for plaintiffs for \$4,833.10, besides interest and costs, and the *Insurance Company* brings the case here on error for review.

Nevison & Alford, for plaintiff in error.

Solon O. Thacher, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This case was once before in this court; (12 Kas. 475.) At that time the judgment of the court below was reversed, and cause remanded for a new trial. On its return to the court below the parties filed new pleadings. The new petition filed by the plaintiffs reads as follows:

(*Title.*) "The plaintiffs show to the court that the defendant is a corporation created under the laws of the state of Missouri, and having an office and doing business within the state of Kansas, and duly empowered by law to do and transact the business of life insurance within the state of Kansas; that on the 8d of October 1870, one Lewis Twining, then of Law-

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rence, Kansas, applied to Stevens & Anderson, the duly-constituted general agents of the defendant in the business of insurance at Lawrence aforesaid, for a policy of insurance upon the life of him the said Twining; that said application was in writing, and was by the said agents of said insurance company forwarded to said company for their acceptance or rejection on the 18th of October 1870; that the said insurance company accepted said application, and forwarded their policy of insurance to their said agents on the 23d of said October, and that said agents on the 24th of said October delivered the said policy to the said Twining, as a contract of insurance on the part of said defendant; and the said Twining thereupon, and on said 24th of October, paid to said Stevens & Anderson for the said defendant the sum of \$150.95 as and for one year's premium of insurance upon the life of the said Twining, which was so accepted by the said Stevens & Anderson in behalf of the said defendant; and thereupon a contract of insurance was affected upon the life of the said Twining for one year from that date, and for the period of his life upon the payment of the like sum annually as a premium therefor, in pursuance of the terms and conditions of said policy of insurance which were the same terms and conditions contained in the policy of insurance, a copy whereof is annexed to this petition.

"And said plaintiffs further show, that afterward, and on the 19th of January 1871, the said Lewis Twining delivered up to the said defendant the aforesaid policy which was issued to him of an incorrect age of thirty-nine years, and under agreement with the defendant took from defendant another policy of which the annexed, marked 'Schedule A,' is a true copy, and which copy is made a part of this petition; that said Twining at the time of the delivery of said last-mentioned policy of insurance paid therefor to the defendant the additional sum of \$5.55; that said defendant, notwithstanding said contract was entered into on the 24th of October 1870, and the contract was to insure for the life of said Twining from that date, and the premium paid at that date was a full premium for insurance for one year from that time, inserted in the said policy that said premium was to be paid annually on the 15th of October in each year, and assured said Twining and gave him to understand that said policy was non-forfeitable by reason of any failure to pay premium thereon at the time the same became payable by the terms of said policy, and also held out and gave said Twining to understand and

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believe that if he paid said annual premium provided for in said policy on or before the first of the month next after the said 15th of October, it would be as effectual as though paid promptly on said October 15th in each year, and waived the payment of said premium as provided in said policy, and gave time for the payment thereof until the first of the month thereafter.

"And plaintiffs further show, that they are the heirs-at-law and legal representatives of said Lewis Twining, and the persons for whose benefit the said policy of insurance was delivered; that said Twining died at the city of Topeka on the 24th of October 1871, from natural causes, and not from his own hand, nor in consequence of any duel, nor by reason of the violation of any law of any state, nation or province; that said Twining did not, after the issuing of said policy of insurance, violate any of the conditions thereof, but lived in the state of Kansas and followed the occupation in said policy mentioned; that after the death of the said Lewis Twining, and on the 13th of March 1872, due proof of loss under said policy was made and served upon the said defendant according to the terms and conditions of said policy; that no part of said sum of five thousand dollars secured by said policy has been paid by said defendant, but that the whole amount thereof is now due from said defendant to these plaintiffs.

"The plaintiffs demand judgment for \$5,000, with interest thereon from June 11th 1872, and costs."

"SCHEDULE A.

"Mound City Mutual Life Insurance Company, of St. Louis, Mo.—Age, 40.—Number 2720.—Amount, \$5,000. Premium, \$156.50 annually.—Premium payable October 15th, each year.

"In consideration of the representations made to them in the application for this policy of insurance, and of the annual premium of \$156.50, to be paid on or before the fifteenth day of October in each and every year during the continuance of this policy, the first of the said annual premiums falling due on the 15th day of October 1870, do hereby insure the life of Lewis Twining, of Lawrence, county of Douglas, state of Kansas, for the use and benefit of his legal heirs or assigns of —, county of —, state of —, in the amount of five thousand dollars. And the said company does hereby agree to pay the said sum insured to the above-mentioned beneficiaries or their legal representatives within ninety days after due notice and satisfactory proof of the death of the said as-

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sured shall have been deposited in the office of the said company, deducting therefrom the loans or other indebtedness due the said company. And it is further agreed, that if the first annual premium shall have been fully paid to this company, and default be made in the payment of any premium thereafter to become due and payable, that such default shall not work a forfeiture of this policy, but if it be surrendered within thirty days after the date of such default, this company will, in consideration thereof, issue a paid-up policy, payable as hereinbefore provided, for the amount which could be bought by the net value of this policy, (the value to be determined on the basis of assumptions contained in section 29 of an act of the state of Missouri, entitled 'An act for the regulation of life assurance,' approved March 10th 1869,) considered as a gross single premium, according to the single-premium rates of this company. And it is expressly understood, that the sum of all loans or other indebtedness due this company shall be first deducted from the amount of such net value. And it is further understood and agreed, that the said assured may at any time by the usual modes of conveyance travel to and from any portion of the United States, British Provinces, Canada, or Europe. If however, the person whose life is hereby insured shall engage on any railroad as locomotive engineer, fireman, or as brakeman, or personally engage in blasting, submarine operations, or the production of highly-inflammable or explosive substances, or enter the military or naval service, (the militia when not in active service excepted,) without the consent of this company in writing first had and obtained, or die by or in consequence of engaging in a duel, or in known and willful violation of any law of this or any other country, or if any material fact respecting the health or habits of the assured shall have been willfully and intentionally misstated or suppressed in the application for this policy of insurance, and on the faith of which the policy is issued, then this policy to be null and void and of no effect.

"And the said—hereby acknowledge to have received a loan of—dollars, being one-third the annual premium on this policy, and that a similar loan is made on all the future annual premiums, said loan to remain a lien on said policy until paid or canceled by dividends, and to bear interest at the rate of — per cent. per annum, payable in advance. Proof of interest in life of said assured must be deposited with proof of death.

"Should this policy be assigned, or held as security, written

notice of such assignment and transfer must be given to this company. This policy to take effect and become binding on said company, only when the first annual premium shall have been paid to Stevens & Anderson, agents, at Lawrence, Kansas, whose receipt below shall be evidence of the same.

"In witness whereof, the said Mound City Mutual Life Insurance Company has hereunto affixed its corporate seal, and caused these presents to be signed by its President, or Vice-President, and Secretary, this fifteenth day of October 1870.

A. M. BRITTON, *Vice-President*. [SEAL.]

"S. W. LOMAX, *Secretary*.

"Received of Lewis Twining, of Lawrence, county of Douglas, state of Kansas, the first annual premium on this policy, this 19th day of January, 1871.

"STEVENS & ANDERSON, *Agents*.

"Edition of May 1869. [Annual Life Policy—non-forfeiting after payment of one annual premium.] Lewis Twining delivered up policy in regard to age, 39 years, and took this corrected policy of right age, 40 years.

"STEVENS & ANDERSON, *Agents*."

On the back of said policy is the following printed notice to policy-holders:

"NOTICE TO POLICY-HOLDERS.—*Payments of Premiums.* Renewal premiums may be paid to an agent, but only on the production of a receipt signed by the president or secretary, who are alone authorized to sign receipts on the part of the company. When receipts are delivered to a policy-holder by an agent, such agent should countersign the same, as an evidence of payment to him.

"*Powers of Agents.*—Agents are not authorized to make, alter, or discharge contracts, waive forfeiture, or bind the company in any way; their duties being simply the reception and transmission of applications for policies and premiums, under the rules and instructions laid down in their letters of appointment. Agents of the company are not under any circumstances authorized to write the receipt of premiums, or make any indorsement on the policy.

"*Restoration of Forfeited Policies.*—The company may, but solely as an act of grace or courtesy, and when the interest of the company will not be impaired in any way thereby, restore a forfeited policy. When a restoration is applied for, the application must invariably be accompanied by a certificate as to

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the health of the person whose life was insured, and at his expense, from a physician acceptable to the company. In all cases of restoration of forfeited policies, and in all cases where the premium is received after the day on which it became due, and after the expiration of the thirty days' grace, although the policy may not have been formally canceled on the company's books, the renewal or revival of the policy, in whatever form made, will be (in accordance with the decision of the commissioners of internal revenue,) subject to stamp tax, the same as if a new policy had been issued, and the new stamp must be paid for by the policy-holder.

"Alteration of Policies.—Changes in the manner of paying premiums, (as from yearly to half-yearly, or quarterly, or the reverse,) can be made; but when such a change is required by a policy-holder, the policy must be forwarded to the office of the company for the requisite indorsement. When a policy is altered at the request of the holder, the revenue stamps required in the new form must be paid for by him. A change of interest in a policy can only be made on the written request of the legal owner of the policy, and with the consent of the company.

"Assignments.—A wife cannot legally assign a policy drawn in her favor. A husband cannot assign a policy to his wife. When a policy is assigned, written notice of such assignment must be given to the company, for registration on its books. All assignments, to be valid, require a revenue stamp, equal in value to that on the policy, and the cost of such stamp must be borne by the policy-holder.

"Proofs of Loss.—In the event of the death of a person assured, application should be made to the company for a blank form of 'proof of death.' This form contains affidavits to be made by the attending physician of the deceased, by a friend present at the time of death, by the undertaker having charge of the interment, and by the person to whom the policy is payable. These proofs should be properly filled up and forwarded to the company, and if found satisfactory, payment of the policy will be made by check, or on the order of the legal holder of the policy, sixty days after the proofs shall have been received by the company, on surrender of the policy duly receipted. Ordinarily, if desired, policies will be discounted as soon as proofs of death have been approved by the company."

The new answer filed by the defendant to said new and

amended petition of the plaintiffs, after caption and title reads as follows:

"The said defendant for answer to the amended petition of the plaintiff in this action says: That is not true and therefore denies that on the 3d day of October 1870, or at any other time, the said Stevens & Anderson, mentioned in said petition, were the general agents of the said defendant, in the business of insurance, at Lawrence, or in any other business or at any other place. The said defendant also denies that said application for insurance was forwarded to said defendant for its acceptance or rejection on the 18th of October 1870, or that defendant accepted said application, and forwarded its policy of insurance to its agents on the 23d of October 1870, or that said agents on the 24th of October 1870 delivered the said policy to the said Lewis Twining, or that said Twining on the 24th of October 1870 paid to said Stevens & Anderson for the said defendant the sum of \$150.95, or any other sum, as and for one year's premium upon the life of said Twining, or for any other purpose, or that a contract of insurance was then effected upon the life of said Lewis Twining for one year from that date, or for any other time or date. The said defendant says, that on the 3d day of October 1870, said Lewis Twining made said application for insurance to said defendant, and which application for insurance was received by the said defendant prior to the 15th of October 1870, and that on said 15th of October said application for insurance of the said Lewis Twining was duly accepted, and the policy of insurance above mentioned was on that day executed and delivered by defendant to said Lewis Twining, and that said Lewis Twining on that day paid to said defendant the said sum of \$150.95 as and for the first annual premium on the life of the said Twining as mentioned in said policy of insurance, which said sum was on that day paid by said Twining for the purpose of and accepted by said defendant as a payment for one year's premium of insurance upon the life of said Twining, from the 15th of October 1870—the said Twining thereby receiving an insurance on his life by the defendant for one year from October 15th 1870, and for the period of his life, upon the payment on the 15th of October of each year thereafter the sum of \$150.95, provided the statements and representations in his said application were true in all respects, which was made a condition to acceptance of said application, which said policy is the one first mentioned in plaintiffs' said amended petition, and which was the only

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policy issued by the defendant to said Twining prior to the issue of the policy of which a copy is attached to said petition.

"The defendant further says, that said Twining in his application for insurance on the 8d of October 1870 aforesaid, stated his age at his nearest birthday to be thirty-nine years, whereas at his nearest birthday to that time he was forty years of age, which fact was not known to the defendant until about the 10th of January 1871, when the said Twining then agreed with the defendant to surrender the policy he then had, and pay to the defendant the further sum of \$5.55, (said sum being the additional amount he would have been compelled to have paid had he given his true age on the 8d of October 1870,) and take a new policy of insurance on his life for the same sum, to-wit, \$5,000, to be dated October 15th 1870, and instead of paying the sum of \$150.95, thereafter, annually on the 15th of October, to pay the sum of \$156.50, on the 15th of October annually thereafter, and the policy to be issued as aforesaid, upon the life of said Twining should require him to pay as an annual premium the sum of \$156.50, on the 15th of October annually thereafter during the life of the said Twining. In pursuance of said agreement said Twining, on the 19th of January 1871, surrendered to this defendant the policy first above described, and paid to said defendant the said sum of \$5.55, and no more; he having paid said sum of \$150.95 to the defendant on the 15th of October 1870, as specified in the policy first above mentioned; and the defendant did on said 19th of January 1871, deliver to said Twining the policy of insurance on which this action is brought, a copy of which policy is attached to said petition.

"The said defendant for further answer to said amended petition denies that there was any contract or agreement made between the said Twining and said defendant on the 24th of October 1870, or that defendant ever agreed to insure the life of said Twining for the term of one year from that date, or that said Twining paid on that day any money whatever, or that said Twining on that day or any other time paid to said defendant any money to pay premium for insurance on his life for one year from the 24th of October 1870, or that the date on which the premium was to be paid by said Twining to said defendant was inserted in said policy so as by the terms thereof to require the payment on a different day than the day agreed upon between the said Twining and said defendant.

"The said defendant for further answer to said amended

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petition, denies that it ever made any statements or representations to said Twining as to the nonforfeitable condition of the policy, or of any matter in relation thereto, other than those printed on or contained in the policy, a copy of which is attached to plaintiff's amended petition.

"The said defendant further denies that it ever held out or gave said Twining to understand or believe, that if he paid said annual premium provided for in said policy on or before the 1st of the month after said 15th day of October, it would be as effectual as though paid promptly on said October 15th in each year, or that it ever gave him to understand anything to that effect, or that said defendant ever waived or gave said Twining to understand or believe that it waived the payment of said premium as provided for in said policy, or gave time for the payment thereof until the first of the month thereafter.

"Said defendant for further answer to said amended petition denies that said Lewis Twining did not after the issuing of said policy of insurance violate any of the conditions thereof. Said defendant says that said Twining did violate the conditions of said policy in not paying the annual premium when the same by the terms and conditions of said policy became due, whereby said policy at the time of the death of said Twining had become and then was forfeited and void."

This answer was duly verified by affidavit. The plaintiff in reply thereto filed a general denial, not verified in any manner. A trial was then had upon these pleadings before the court, without a jury. Evidence was introduced of which we shall speak more fully hereafter. Afterward, on the 26th of July 1875, the court made special findings of fact and conclusions of law, which findings and conclusions read as follows:

FINDING OF FACTS.—1st. The defendant, the Mound City Mutual Life Insurance Company of St. Louis, Mo., is a corporation created under the laws of the state of Missouri, to do the business of life insurance. Through circulars published prior to the 3d day of October 1870, it advertised some of its features as, "Thirty days grace allowed in payment of premiums;" and, "All policies non-forfeitable after one annual premium is paid." Under the last-quoted feature two methods

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were stated to be in use by the company, between which policy-holders could choose.

2d. By the first method, called "paid-up policies," explained in the circular hereinbefore referred to, the policy-holder, on the annual life plan, after the payment of one annual premium, could within thirty days after failure to pay a premium surrender his policy and receive a paid-up policy for an amount which the net value of the surrendered policy at date of lapse, computed on the four-and-a-half per cent. American mortality basis, considered as a single premium of insurance, would purchase, according to the company's single-premium rates.

3d. By the second method, called "temporary insurance," explained in the circulars hereinbefore referred to, if the policy-holder on the annual life plan, after payment of one annual premium, should not be able to meet his renewal payments, his policy would be continued in force so long as four-fifths of its net value computed as before, considered as a single-premium "temporary insurance," would carry it, and then it would lapse, so that if death ensued within this period the policy (less the foreborne premiums with ten per cent. interest) would be paid in full.

4th. The defendant published, for the government of its agents, and gave to them, printed instructions to the effect that no policy should be delivered thirty days from its date; no policy should be in force until the premium was paid; the receipts for the renewal premium should be delivered only on payment of the premium on or before the day it is due, or within thirty days thereafter, but not afterward; a book would be furnished in which to register all policies and renewal receipts sent to them for collection; to remit all premiums promptly, and to remit in full all moneys in their hands on the first of every month.

5th. In 1869 the defendant employed one Alvin B. Hard, at Lawrence, in Douglas county, as its agent to solicit applications and collect premiums for insurance, and furnished him advertising circulars—among others, copies of the one hereinbefore referred to; also, blanks, and a book with the following printed on the top margin of the pages: "*Mound City Mutual Life Insurance Company of St. Louis, Mo.—Policy Registered at —Agency.*" On each page were ruled columns, with printed headings designating the entries to be made in each. In this book the agent registered each policy received in the course of his business.

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6th. About the middle of September 1870, one William Henry, before that time employed by the defendant as a special agent to solicit applications and collect premiums for insurance in any state or county he might be sent into, came to Lawrence, in Douglas county, and assumed control of, and succeeded to, and undertook the completion of the business before that time intrusted to agent Hard, from whom he received the book called the "Policy Register," and the circulars and blanks on hand, and was from that time the only authorized agent of the defendant at Lawrence until succeeded by Stevens & Anderson.

7th. On the 3d of October 1870, at the solicitation of agent Henry, one Lewis Twining made application for insurance. The application was sent to the home office at St. Louis, Mo., where, on the 15th, it was approved and a policy of life insurance issued on the annual life plan, on the life of the applicant, for five thousand dollars, and forwarded to the solicitor, who delivered it to the insured on the 24th of the same month, and received \$150.95 in full payment of the first all-cash premium for one year's insurance, and \$1.50 policy fee and stamp, as shown by the policy and entries on the policy-register, which the defendant required its agent to keep.

8th. On 23th of December 1870, the defendant employed Stevens & Anderson as its agents to transact its business in Douglas county. They had an office convenient of access on a principal street in Lawrence, where the policy-holders and other persons from whom they were soliciting insurance were frequent visitors, amongst whom they distributed the circulars hereinbefore referred to, and to whom they stated their custom to be not to require payment of renewal premiums before the last day of the month within which they became due; and we are informed by Stevens that this statement was expressly made by Stevens & Anderson to Lewis Twining.

9th. Afterward it was ascertained that Twining had misstated his age in his application for insurance; that he had represented his age as thirty-nine years at nearest birthday, when in fact it should have been stated at forty, and accordingly, at his own request, the error in his application was corrected, and on the 10th of January 1871 another policy was issued as of the same date as the former one, and forwarded to Stevens & Anderson who delivered it to the insured on the 21st of the same month, and received as increased premium for one year's insurance on account of difference in age, \$5.55.

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This policy is the one sued on, and described in plaintiffs' petition.

10th. By the terms of the corrected policy it appears that in consideration of the representations made in the application for insurance, and of the annual premium of \$156.50, to be paid on or before the 15th of October in each year during the continuance of the contract, the first of the annual premiums falling due on the 15th of October 1870, (the date of the original policy, and the date it was executed at St. Louis, Missouri,) the defendant insured the life of Lewis Twining for the use and benefit of his legal heirs or assigns, in the amount of five thousand dollars, conditioned that the policy should take effect and be binding only when the first annual premium should be paid to its agents named therein.

11th. It was a condition of the policy, that if default should be made in the payment of any premium subsequent to the first, such default should not work a forfeiture of the policy; but if it was surrendered within thirty days thereafter, the defendant would, in consideration thereof, issue a paid-up policy for an amount which could be bought by the net value of the surrendered policy (the value to be determined on the basis and assumptions contained in section 29 of an act of the state of Missouri, entitled "An act for the regulation of life assurance," approved March 10th 1869,) considered as a single premium, according to the defendant's single-premium rates. These rates were published in the circulars referred to.

12th. Under the provisions of section 29 of the act herein referred to, the net value of the policy is to be computed on the four-and-a-half per cent. American mortality basis, so that the agreement in the contract to issue a paid-up policy by its terms, corresponds in every particular with the method proposed in the defendant's circular, and expressly referred to in the second paragraph of these findings. At the age of forty the expectation of life, according to the table of mortality based on American experience, is 28-18 years. At the same age, according to the defendant's published table rates, to secure one thousand dollars payable at death only an annual premium of \$81.80 (or a single premium of \$445.55,) would be required.

18th. Below the policy these words are conspicuously printed in large letters: "*Annual Life Policy—non-forfeiting after paying one annual premium;*" and indorsed on the policy, the following: "*Notice to Policy-Holders;*" and thereunder,

"Powers of agents: Agents are not authorized to make, alter or discharge contracts, waive forfeiture, or bind the company in any way;" also, "Restoration of Forfeited Policies.—In all cases of restoration of forfeited policies, and in all cases where the premium is received after the day on which it becomes due, and after the expiration of the thirty days of grace, although the policy may not have been formally canceled, the renewal or revival of the policy, in whatever form made, will be subject to a stamp tax the same as if a new policy had been issued."

14th. The insured, Lewis Twining, died at Topeka in this state, on the 24th of October 1871, from natural causes, and left surviving him, as his legal heirs and beneficiaries under the policy, his widow, Mary E., and his two children, Edward E. and Emma A., in whose names as plaintiffs this action is prosecuted. Notice and proof of death, according to the defendant's rules, was delivered to the secretary of the company at its office in St. Louis, Mo., on the 18th of March 1872, whereby any amount due became payable, by the terms of the policy, June 11th 1872, ninety days after service of notice and proof of death; and excepting the failure to pay the second annual premium, the insured observed and kept all the conditions required by the terms of the policy to be by him observed and kept.

15th. The net value of the policy in suit on the 15th of October 1871, the day the second annual premium was payable, computed by the rule herein referred to, was \$164.64, which, according to the company's single-premium rates, would have purchased a paid-up policy on the life of a person at the age of forty, for \$871.78; and the same net value, considered as a single premium of temporary insurance, would have carried a policy of \$5,000 at the same age, one year and nineteen days, and would have continued the policy sued on in force (assuming that the first year of insurance expired on the 15th of October 1871,) until the 3d of November 1872; and after deducting the foreborne premium of \$156.50, with ten per cent. interest to June 11th 1872, \$10.40, the balance on the last-mentioned day would be \$4,833.10.

Conclusions of Law.—The court finds the law applicable to the foregoing facts, to be—

1st. In life insurance the premium is the consideration or compensation paid, or promised to be paid, by or in behalf of the insured, to the insurers for the risk assumed.

2d. It is competent for the parties to agree upon the terms

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of the insurance, and courts of law will enforce such contracts according to the ascertained intent of the parties.

3d. But if the terms of such contracts are ambiguous, the construction given thereto will not be favorable to the party whose exclusive or general business is to deal therein.

4th. When, by the terms of the policy, the risk of insurance does not commence until some consideration is paid, payment of the stipulated compensation for one year's insurance entitles the beneficiaries to an equivalent for the premium paid.

5th. When the first annual premium is paid, and it is optional with the beneficiary whether he will pay the second, a mere failure to do so at a stipulated time will not entitle the insurer to avoid his liability for one year's insurance.

6th. When the premium is payable annually on a day certain, if it is optional with the insurer whether he will receive it after that day, default in such payment will relieve him from liability beyond the time for which compensation has been received.

7th. As a general rule, an agent can bind his principal only while acting within the scope of his authority; but persons dealing with an agent may presume that he is so acting concerning his special employment, until some fact appears which would put an ordinarily prudent man on his guard.

8th. The holder of a policy of insurance is bound to take notice, not only of the terms of his contract as therein expressed, but he is also bound by all conditions and notices thereunder written or thereon indorsed at the time he received it, when the consideration for the contract is paid at the time of its delivery.

9th. An incorporated insurance company is a dealer in a special class of contracts, and is bound not only by the express letter of its contract, but as well by all circulars, notices, or other publications put forth by way of advertising its business and inducing persons seeking safe investments to patronize it.

10th. Where the insurer, by advertising-circulars, has promised to give thirty days' grace in the payment of premiums, and has recognized such days of grace by indorsements on policies, every policy-holder has a right to rely on such promise, and the effect of such promise would be to extend payment, and make the premium fall due on the last day of grace.

11th. A policy-holder may rely upon the statement of an

agent employed to collect premiums, that payment of premiums would not be required until the last day of the month within which they became due, "and relying on such promise, a failure to pay before that time would not work a forfeiture, even within the express terms of the policy."

12th. The liability of the insurer to pay the sum mentioned in a policy on the annual life plan, is contingent on the death of the insured, and the payment of premiums according to contract which fell due and were payable before the death ensued. Where an extension of time, or credit, in the payment of premiums is given, and death ensues before the lapse of time so given, the policy is payable as before.

13th. Where a policy of life insurance is issued on the 15th of October 1870, and by its terms the first annual premium is due and payable on that day, and the policy is not to be binding until the first annual premium is paid, and such payment is made on the 24th of October 1870, and death ensued on the 24th of October 1871, and no subsequent annual premium is paid, there is no forfeiture by reason of default in subsequent payments.

14th. Where the insurer has, by advertising-circulars, stated that "all policies are non-forfeitable after one annual premium is paid," and that two methods have been by it adopted, between which policy-holders can choose and thereby avoid forfeiture; and where one method did not require any act to be done by the insured to indicate his choice, and the condition existed on which the application of the method was based, it may be presumed, in the absence of evidence to the contrary, that such method was chosen.

15th. Under the non-forfeiture method referred to in the third paragraph of the findings of fact, the policy of insurance sued on in this action was continued in force, and was binding upon the defendant at the time of the death of the insured, for by its previous publication (as an inducement to the public to contract with the defendant) it became a condition of every policy thereafter issued by the company (except when inapplicable as in paid-up policies,) not containing a clause expressly excluding it.

Therefore the court concludes, that the plaintiffs are entitled to recover the sum of \$4,833.10, with interest thereon at the rate of seven per cent. per annum from June 11th 1872.

The foregoing are all the findings, both of facts and of law,

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as found by the court in the trial of said action. And thereupon, on the 26th of July 1875, the court found for the plaintiffs in the sum of \$4,838.10, with interest thereon at the rate of seven per cent. per annum, from the 11th of June 1872 until the 26th of July 1875, and gave judgment in favor of said plaintiffs and against said defendant for said sum and costs of suit. Thereupon the defendant filed a motion in said court for a new trial of said action, assigning therein the following reasons, to-wit:

“1st, The decision of the court is not sustained by sufficient evidence, and is contrary to the law. 2d, The findings of the court are not sustained by sufficient evidence, and are contrary to law. 3d, The decision of the court is not sustained by the findings of fact in the case. 4th, The court erred in assessing the amount plaintiffs were entitled to recover, said assessment being too large. 5th, Error of law occurring at the trial of said action and duly excepted to by defendant. 6th, The court erred in the trial of said cause in admitting evidence offered by the plaintiffs and objected to by defendant. 7th, The defendant has, since the trial of said action discovered new and material evidence in this cause, which it could not with reasonable diligence have discovered and produced at the trial.”

The transcript contains the following paragraphs:

“After said motion was filed the said court adjourned said term on said 26th of July, without day, and did not before adjourning make any order continuing said motion for a new trial to the next term, nor did said court at said term make any general order continuing motions or other proceedings pending in said court to the next term thereof. After the court had so adjourned the clerk of the court, in pursuance of a verbal direction of the judge of the court made at some prior term of the court, entered the following as an order made by the court, to-wit:

“‘Ordered by the court, that all motions, orders, demurrers, and all other matters not otherwise disposed of, be and the same are hereby continued until the next term of this court.’

“Afterward, on the 21st of December 1875, at the October term of said court, said defendant called up the said motion for a new trial for hearing, whereupon the plaintiffs objected

to the consideration of the same, upon the grounds that the same had not been continued for hearing, and the defendant by not bringing said motion to hearing at the term when the same was filed had lost the right to make the same; but the court overruled the objection, to which ruling the plaintiff excepted; and said motion was thereupon heard by the court and overruled, and the defendant excepted, and thereupon the court for cause shown, gave the defendant twenty days to make and serve a case in this action; which was served within the time given."

I. Said case was duly made, served, settled, and signed; and plaintiff in error now brings such case to this court, and upon the same asks for a reversal of the judgment of the court below. The defendants in error object to any consideration of said case, claiming that the same is a nullity, and this they do on the following grounds, to-wit:

1. Motion for new trial; when may be heard.

1st, They claim that, as the court below did not by any formal or specific act continue said motion for a new trial, therefore that said motion became defunct on the adjournment of the court *sine die*. And 2d, that, as the statutes require that every case made for the supreme court, or a copy thereof, shall be served upon the opposite party or his attorney "*within three days after the judgment or order is entered,*" unless the court or judge for good cause shown shall extend the time for making and serving such case, (Laws of 1871, page 274; Laws of 1870, page 168,) and as the present case was not made or served within three days after the time when said judgment was rendered, and as the court below did not within said three days make any order extending the time for making or serving said case, therefore that at the expiration of said three days the plaintiff lost all right to make a case for the supreme court for the purpose of reviewing said judgment, and the court below lost all power to extend that right or to give the plaintiff further time within which to make or serve his said case. Upon these grounds the defendant claims that the plaintiffs' "case-made" is a nullity, and therefore that there is nothing for this court to consider in this case. Upon these prelimi-

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nary questions presented to us by defendants in error, plaintiffs below, we would decide as follows:

1st. Said motion for a new trial did not become defunct by the adjournment of the court *sine die*, but it was continued to the next term of the court by the mere failure of the court to act upon it at the term at which it was filed.

2d. A case may be made for the supreme court and served upon the opposite party at any time within three days after an order is entered overruling a motion for a new trial, although such order may not be entered at the same time that the judgment in the case is rendered, nor even until the next term thereafter; and the court may, on entering said order overruling a motion for a new trial, extend the time still further for making and serving a case for the supreme court. (Laws of 1871, page 274; Laws of 1870, page 168.)

II. We proceed therefore to an examination of the findings and testimony presented in the record, and a consideration of the whole case, upon its merits. There seems to be no dispute concerning the contents of said insurance policy, nor as to the indorsements thereon; and it is agreed that one and only one premium has ever been paid, and that the insured died on the 24th of October 1871, just nine days after the second premium became due. Upon these facts alone the plaintiffs below would be entitled to recover a certain amount, but not the amount for which the court below rendered judgment. (*Life Ins. Co. v. Twining*, 12 Kas. 475, 482.) But the plaintiffs below claim that the other facts in the case as found by the court below, together with the facts above mentioned, would authorize just such a judgment as was rendered. The defendant below however claims that these other facts are immaterial, but if material that they were not correctly found by the court below. This requires an examination of said findings in connection with the evidence.

The first finding states that the insurance company "through circulars published prior to the 3d day of October 1870, adver-

2. Case made;
within what
time to be
served.

Review of facts
and findings.

tised some of its features," etc., and "two methods" "between which policy-holders could choose;" and the second and third findings simply state what these two methods were. These findings are supposed to be material because Twining, the insured, made his application for insurance on said 3d of October. The plaintiff in error claims that there is no evidence to support said first-mentioned finding, and we think the plaintiff in error is correct. The fourth finding states that "the defendant published for the government of its agents, and gave to them printed instructions to the effect that * * * the receipts for the renewal premium should be delivered only on payment of the premium on or before the day it is due *or within thirty days thereafter*, but not afterward," etc. The plaintiff in error claims that this finding is incorrect. We think it is correct as to such agents as Henry, but incorrect as to such agents as Stevens & Anderson. The fifth finding states that, "In 1869 the defendant employed one Alvin B. Hard as its agent to solicit applications and collect premiums for insurance, and furnished him advertising circulars," etc. The plaintiff in error claims that there is no evidence to sustain this finding, and we have been unable to find any such evidence. The sixth finding states that the agent Henry received a book and circulars and blanks from said Hard, etc. The plaintiff in error claims, and we think correctly, that there is no evidence to sustain this finding. The only evidence that we have found concerning Hard is as follows: Henry testifies that at one time "Hard was the reputed agent of the company, but not the regular agent," and the words, "A. B. Hard, Agent," were printed on the last page of a little book delivered sometime between 28th December 1870 and 19th January 1871, by the agent Stevens to Twining.

The seventh finding states that the agent Henry delivered the policy first issued "to the insured on the 24th of the same month [October 1870,] and received \$150.95 in full payment of the first all-cash premium for one year's insurance," etc. The plaintiff in error complains of this finding. The only evi-

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dence as to the time when said money was received is as follows: An entry in a book called "The Register of Policies," kept by the insurance company at Lawrence, shows by a tabular statement that said policy was received from the home office "Oct. 17," Oct. 28," (but the words and figures "Oct. 17" have several ink lines drawn through them, as if intended to be erased,) and that \$150.95 was received "Oct. 24, 1871." This entry contains other changes and erasures; and when the entry was made, or by whom it was made, is not shown. The changes and erasures were made (according to the testimony of the agent Stevens) on January 19th 1871, and probably the whole entry was made at that time, and by the same person. If the entry was made at any time during the year "1870," why was the year "1871" entered instead of 1870? Said money was not received "Oct. 24, 1871." The *year* is certainly wrong. It should be 1870, instead of 1871. And the agent Henry who received said money testified that the day of the month was also wrong. He testified that he received said money about the 16th or 18th of October 1870—not later than the 20th of that month—and that he knew that he did not receive it on the 24th of said month, nor at any time later than the 20th. This evidence of Henry's was all embodied in a deposition, and was read to the court on the trial of the case. The foregoing is all the evidence there was upon this subject. The foregoing finding is supposed to be material because Twining died on October 24th 1871. There was no evidence showing that said money was received "in full payment of the first all-cash premium *for one year's insurance.*" The policy itself shows that the insurance was an insurance *for life*, and that the first premium paid for an insurance of \$5,000 absolutely and unconditionally up to October 15th 1871, and for a less amount (\$871.78, as found by the court below,) after that time and for life upon the contingency that no further premium should be paid. In any event the insurance was *an insurance for life* for some amount. But just what the amount of the insurance would be at any time after October 15th 1871,

depended upon the future contingencies as to whether the subsequent premiums and how many of them would be paid. In this sense the policy was non-forfeitable. And there was no evidence outside of the policy showing that the first premium was to pay "for one year's insurance" from the time of payment. On the contrary, the agent Henry (who collected the first premium) testified as follows upon this subject:

"That at the time he delivered the policy to Mr. Twining it was stated that said policy would take effect from and after the date thereof; that he told Twining that said policy would take effect and be in force for one year from October 15th 1870, and that the money he received was to pay for the premium; that neither at time of delivering policy nor any other time did he tell Mr. Twining that if said premium was not paid on the 15th of October, or when due, that it would make no difference, nor did he ever use words to that effect, or ever convey to Mr. Twining any such impression; that he informed Twining at the time he delivered the policy to him that the premium must be paid promptly each year on the day it became due, that is, on the 15th day of October of each year; that he never told him anything to the contrary, and that he never at any time made any statement to Mr. Lewis Twining in any shape modifying either in words or substance, the terms or conditions of the policy."

The plaintiff in error also criticises the eighth finding of the court below. The material facts of the case are as we think substantially as follows: On the 3d of October 1870, Twining made an application to William Henry, an agent of the defendant insurance company, for an insurance on his own life, and in the application stated his age to be thirty-nine years at his nearest birthday, while in fact he was forty years of age at his nearest birthday. The application was sent to the home office of the insurance company at St. Louis, where it was approved and a policy issued dated October 15th 1870, Twining's age being stated therein to be thirty-nine years, and the premium fixed at \$150.95. This policy was sent back to the agent Henry at Lawrence, who delivered the same to Twining, and sometime, from the 16th to the 24th of October

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1870, received the first premium on said policy, amounting to the sum of \$150.95. On December 28th, then next, Stevens & Anderson became the agents for said insurance company at Lawrence, and about that time the said mistake in Twining's age was discovered. Also, about that time and afterward, Stevens gave to Twining various printed circulars issued by the insurance company, in one of which was the following:

"All Policies Non-forfeitable After One Annual Premium.— Another great advantage policy-holders in the 'Mound City' have, is, that they never need lose the benefit of their payments, as the company does not propose to speculate in the misfortunes of those who insure in it, but offers to all a full consideration for their money. Two methods are in use by the company, and its policy-holders can choose between them, viz.: paid-up policies, and temporary insurance.

"Paid-up Policies.— On the annual life plan, after one annual premium has been paid, if the policy-holder surrenders his policy within thirty days after failure to pay his premium, the company will issue him a *paid-up policy*, on the same plan as the first, for an amount determined as follows: The net value of the policy is computed at a date of lapse, on the four-and-a-half per cent. American mortality basis, and this net value, less any loans or other indebtedness that may exist against the former policy, is considered as single premium of insurance, and the amount it will purchase determined by the company's single-premium rates. On the ten or five-payment life plans, or any of the endowments, a paid-up policy will be issued (on the same conditions as above) for that fractional part of the sum originally insured, as the annual premiums paid are of whole number to be made. Thus, on the term payment life plan, one payment secures 1-5th, or 1-10th, as the case may be; two payments secure 2-5ths, or 2-10ths, etc., etc. On the annual endowment, one payment secures 1-5th, 1-15th, 1-20th, 1-25th, or 1-35th, according to the plan; and on the five or ten-premium endowments, 1-5th, or 1-10th, as the case may be.

"Temporary Insurance.— A plan similar to that of the Massachusetts non-forfeiture law has been adopted by the 'Mound City,' the practical workings of which are as follows: If at any time after the first annual premium has been paid, the policy-holder should not be able to meet his renewal payments, the company will continue his policy in force until the net

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value of the policy is exhausted, and then the policy lapses according to its own terms. The net value of the policy at date of lapse is computed on the same assumptions as given before, and from this net value the amount of all outstanding loans against the policy is deducted, and four-fifths of what remains is considered as a single premium of temporary insurance, and the policy is continued in force for the length of time that this single premium will carry it. Should the policyholder die within the period covered by this temporary insurance, the full amount of the policy will be paid by the company, less the sum of the foreborne premiums and ten per cent. interest thereon.

"The following table will explain the operation of this plan, the assumptions being that the premiums are all cash, and the period of temporary insurance dating from the time of lapse:

ORDINARY LIFE POLICIES.—AGES AT ISSUE OF POLICY.

No. of Premiums Paid.	Age, 30 years.		Age, 30 years.		Age, 40 years.		Age, 50 years.		Age, 60 years.	
	Years.	Days.	Years.	Days.	Years.	Days.	Years.	Days.	Years.	Days.
1.....		184		275	1	19	1	64		324
5.....	2	286	4	45	8	99	4	275	5	81
10.....	6	14	8	286	8	356	6	322	4	116
15.....	10	228	12	80	10	187	7	98	2	163
20.....	15	214	18	268	10	747	6	306	3	348

"*Features of the Mound City.*—All policies non-forfeitable after one annual premium is paid. Travel in the United States, British Provinces, Canada, or Europe, unrestricted. None but really extra-hazardous occupations restricted. A loan of one-third the premiums allowed if desired. Thirty days' grace allowed in payment of premiums. Especial attention is called to the non-forfeiture plans of this company. A great advantage this company has, is, the ability to make its investments in localities where high rates of interest prevail, and where consequently better returns can be made to policyholders. In the west and south, first-class real-estate loans bring from eight to ten per cent., while in the east six and seven per cent. are the best rates to be obtained.

"An annual premium of \$100, compounded for twenty years at eight per cent. gives, \$4,576.10; the same at six per cent., \$3,678.55; difference in favor of a western or southern company, \$897.55. To a practical business man this is a point of great interest, as he can see by a glance the advantages a

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policy-holder in a company investing at eight per cent. has over one, whose company can only obtain six per cent.

"A. B. HARD, Agent, Lawrence, Kansas."

Stevens also at this time and afterward told Twining that he (Stevens) would receive the premium falling due in any particular month up to the first day of the next month thereafter. His testimony upon this subject is as follows:

"*Question.*—State what was the custom of the defendant, if it had established any, as to the payment of yearly premiums upon policies at the time such premiums became due.

"*Answer.*—The company had established no custom excepting in so far as I did it myself. I had established it so that if I got my money on the first of the month after it was due it was all I required.

"*Question.*—State whether you communicated any such fact to Twining.

"*Answer.*—I believe I did in taking his application for another policy. Twining called at our office occasionally. I think the other policy was in February 1871. He was frequently in the office conversing about the other policy.

"*Question.*—State what you said to Twining as to the practice of the company, and your practice, in requiring prompt payment of premiums, and as to whether you should require it.

"*Answer.*—I don't think I ever stated to him anything as to the custom of the company. One of the inducements that I held out to him for taking another policy was, that if he paid the money at any time during the month it would be sufficient; that I had to forward the money the first of every month, and if I could only have the money then it would be all I required; that if he paid the money at the first of the month after it became due, it would do; that I had to send off my report on the first of each month. * * *

"I said we didn't care about having the money paid when due if it was only paid on the first of the month following. I was talking about the policy I then proposed to issue. I said, that if he paid the money at any time during the month it would be all we would require. Myself and my partner were the only agents here. I had to report once a month. I did not ask the company about it, and the company never authorized me to extend the time for payment of premiums on policies. I never told Twining about my power. All I told was,

that if I had the money on the first day of the month it was all I required. It was before and after this policy in suit was executed that I talked about the time of paying the yearly premium. I can't say whether or not I ever told Twining I would extend the time of payment of premiums on the policy in suit." "I had no authority from the company to give credit for premiums until the first of the month succeeding the time when they became due. It was a matter of convenience to myself and the customer that I extended the time."

John Charlton then testified in behalf of plaintiff as follows:

"I am an insurance agent at Lawrence—both life and fire insurance. Have been in the business nearly seven years. I was acquainted with the custom of insurance companies by their agents at Lawrence as to receiving of annual life premiums during the years 1870 and 1871. It was the custom of such agents during those years to receive the annual premium falling due during the month at any time previous to the first day of the month following."

This is all the evidence there was upon this subject. One of the instructions of the insurance company to the agent Henry reads as follows:

"5th. Receipts for the renewal of premiums, signed by the president, or secretary, will be sent to you, which you will countersign and deliver on the payment of the premium, on or before the day on which it is due, or within thirty days thereafter, but not afterward, until a new certificate from the physician is sent to the office and returned to you approved. The agent will in person or by mail notify the applicant ten days previous to the time when the renewal premium is due; and if not paid when due the notice will be repeated."

The instructions of the company on the same subject to the agents Stevens & Anderson read as follows:

"13. You will be furnished with a register, in which you will enter all policies, and renewal receipts sent you for collection.

"14. Renewal notices will be sent you in time to give policyholders ample notice of their dues.

"15. When a renewal premium is paid, you will deliver the

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renewal receipts, first countersigning the same as evidence of payment to you. Renewal receipts must be signed by the president, (or vice-president,) or secretary of the company; no others are valid."

Sometime about the last of December 1870, or first of January 1871, said policy was returned to the company at St. Louis and canceled, and a new one was issued in lieu thereof, just like the original in every respect except that it represented the age of Twining to be *forty* years instead of *thirty-nine*, and increased the annual premium to be \$156.50 instead of \$150.95 — the \$5.55 increase being added because of the addition of one year in the age of the insured. This new policy was delivered to Twining, and he paid the additional amount of \$5.55 on the first premium. This was about January 19th 1871. This new policy is the one now sued on. The second annual premium has never been paid. Whether the company ever gave Twining any special notice in writing of the time when said second premium became due, is not shown. On October 24th 1871, Twining died. The plaintiffs, who are the heirs of said Twining, after giving due notice then commenced this action on said new policy. The main question to be determined is, whether the plaintiffs are entitled to recover the whole amount (\$5,000) for which the life of Twining was originally insured, (less the amount of the second annual premium,) or are entitled to recover only the amount of a paid-up policy to be de-

Claims made by
defendants in
error, plaintiffs
below.

termined according to the stipulations of said new policy. The plaintiffs (defendants in error) claim that they are entitled to recover the whole amount for which the life of Twining was originally insured. And they claim the same upon the following grounds and for the following reasons:

1st. They claim that the insurance for \$5,000 was absolutely unconditional and non-forfeitable in every respect and particular. They claim that the insured, by paying the first annual premium, purchased an absolute, unconditional, non-forfeitable insurance for \$5,000 for the whole of his life, and

that no subsequent failure to pay any of the subsequent annual premiums could in any manner or degree destroy, lessen, or abridge such insurance, except possibly that the overdue premiums might be considered as debts due from the assured to the company, and might (after the death of the insured) be set off against the claims of the beneficiaries.

2d. The plaintiffs also claim that the first annual premium was not paid until October 24th 1870, notwithstanding the evidence of Henry to the contrary, and that by such payment the insured purchased an insurance for \$5,000 for a full year from October 24th 1870, (and this, notwithstanding the policy and the evidence in the case,) and that the year for which such insurance was purchased did not terminate at the beginning of the 24th of October 1871, but that it included all of that day. That is, we suppose that the plaintiffs will admit that in order for them to be entitled to the \$5,000 insurance which they claim by virtue of said purchase, the insured must have died *within* the year for which such purchase was made, and that he did not die *after the completion of such year*. If so, then the plaintiffs in effect claim that a year is not ended with the close of the 365th day, or with the beginning of the 366th day, after the commencement of such year; but that it is ended only on the beginning of the 367th day. They in effect claim that a year, beginning on the first day of January of any year would not end at the close of the 31st day of December following, but would end only on the beginning of the 2d day of the next January, and that all of the first day of the second January would belong to the first year. And if this claim of the plaintiffs is correct, then it would seem to follow that a child born on any day of the year, would not be a year old on the first anniversary of its birthday, but would be a year old only on the next succeeding day; that such anniversary would belong to the first year of its life, and not to the second; that a young man born on any day of the year would still be a minor on the 21st anniversary of his birthday, and must wait until the beginning of the next day before he could

claim to be of full age; that three days' notice in any case would not be complete on the beginning of the fourth day after the service of the same, but would be complete only on the beginning of the fifth day after such service; that the twenty days given to a defendant within which to answer would not expire at the termination of the twentieth day after the return-day of the summons, but that the defendant would have the whole of the twenty-first day within which to answer. (*Contra*, see *Neitzel v. Hunter*, ante, p. 221.) Now while these things would seem to follow from the plaintiffs' claim in this respect, it is possible they would not follow. It is possible that in computing a year's time the 366th day (and the whole of it) may be considered as a mere point in time, indivisible, and at which or during which the year may be considered as completed or not completed as justice and the preservation and protection of rights would require. Usually (as laid down by the authorities) if the time is to be computed from an act, or from an act done, (as in this case,) the year would terminate at the close of the 365th day; but where the time is to be computed from a date or from the day of a date, the year would terminate only at the close of the 366th day.

3d. The plaintiffs also claim that, as the company issued certain circulars, one of which the agent Stevens handed to Twining, showing that the company, in order to prevent forfeitures and to save policies from lapsing, had adopted two methods of insurance, between which policy-holders could choose, designating one of said methods as "paid-up policies," and the other as "temporary insurance," and describing each, therefore that the plaintiffs may now choose the second method, although Twining at the very time he became a policy-holder, and afterward, by accepting said policy and holding it chose the first. The first method is simply the one stipulated for in the policy sued on in this case. The second method is as follows: Where a policy-holder fails to pay a premium the company will nevertheless continue the policy in force for the full amount of the insurance less said premium and interest as long as four-fifths of the net value

of said policy, after deducting loans, will as a single premium carry such insurance. In the present case said insurance would have been carried nineteen days from the failure to pay the premium, and Twining died within that time.

4th. The plaintiffs also claim that, as the company instructed its agent Henry to give notice (written, or printed, and in addition to the notice given by the policy itself,) to policy-holders when their premiums became due, and as it was not shown in this case whether any such notice was ever given to Twining, or not, therefore that the plaintiffs should recover the full \$5,000 insurance in this case.

5th. The plaintiffs also claim that the statements made by the agent Stevens to Twining concerning his (Stevens') custom to receive premiums at any time up to the first of the month next after they became due, and his statement that he would so receive Twining's premiums, taken in connection with the custom generally of insurance agents at Lawrence to receive the premiums coming due to their respective companies at any time up to the first of the month next after the same became due, constituted a waiver on the part of the insurance company itself of payment being made strictly within the time prescribed by the insurance policy, and therefore that neither Twining nor his heirs lost anything by failing to pay said second premium at the time it became due, which was October 15th 1871, or prior to the death of Twining, which occurred October 24th 1871, just nine days after said second premium became due, and this, notwithstanding the endorsements on Twining's policy stating that the insurance company's agents had no authority to make any waiver for the company.

Responding to the foregoing claims made by defendants in error, we decide the questions therein presented, as follows. As to the *first* and *second* claims: Twining did not

2. Non-forfeiting policies; payment of premiums.

by the payment of the first annual premium purchase an absolute, unconditional, non-forfeitable insurance for \$5,000 for the whole of his life, nor for any other time extending beyond the 15th of October 1871.

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By said payment he purchased an insurance for said amount up to the 15th of said October, and after that time for such an amount (the court below finds it to be \$371.78,) "fully paid up" as could have been purchased with the net value of the policy, and nothing more, with the privilege however of paying the subsequent annual premiums at the time they became due, and by such subsequent payments keeping the insurance up to \$5,000. In this we simply reaffirm the decision made in this case when it was formerly here, and reported in 12 Kas. 475.

As to the *third* claim: As Twining by accepting and holding his said policy chose one of the two methods of insurance adopted by the insurance company to prevent forfeitures, his heirs cannot now abandon that method and choose the other.

4. Methods of insurance; option of assured.

The *fourth* claim of defendants in error, plaintiffs below, is wholly untenable.

The *fifth* claim of defendants in error we are inclined to think is tenable. Good faith and fair dealing would hardly permit an insurance company to allow its agents to use words and acts which would naturally mislead the insured and then to take advantage of the mistakes or errors of the insured brought about by such words and acts. We shall assume that counsel for plaintiff in error are correct in construing that the indorsements on Twining's policy in effect state that no agent of the company has any authority to waive the time for the payment of any premium. And assuming that the indorsements so state, then they are not strictly true. The agent Henry, who procured for Twining his first policy, had authority from the company to waive payment of premiums after they became due for thirty days. And the company itself printed and published circulars, copies of which Stevens gave to Twining both before and after Twining's second policy was issued, stating, "Thirty days' grace allowed in payment of premiums." Now Twining may have supposed that the agent Stevens who procured said second policy had the same authority to waive the time

5. Premiums, when payable; default; action of agents; waiver of time.

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for the payment of premiums that Henry had. And Twining may have supposed from said circulars alone that the company would waive payment of premiums for thirty days. Stevens stated to Twining before said second policy was issued, as well as afterward, that he would receive the premiums at any time after they became due up to the first of the month next thereafter; and he made these statements before the policy was issued to induce Twining to take said policy. And it was the custom of Stevens, as well as of all the other insurance agents at Lawrence, to receive premiums after they became due up to the first of the month next thereafter. Now it must be presumed that the insurance company knew of the custom of its own agent. A principal is always presumed to know what his agent does within the general scope of his agency. The knowledge of the agent in such cases is the knowledge of the principal. And as the agent at Lawrence adopted this custom, and in pursuance thereof received premiums up to the first of the month next after they became due, it must be presumed that the insurance company knew the same, and adopted the same. There is no evidence that the company ever found any fault with its agent for adopting this custom, and Stevens was still its agent when this suit was tried. It must therefore be presumed that the company itself adopted said custom; and if so, then the statements of its agent Stevens to Twining, made in pursuance thereof, would be binding upon the company—not perhaps as a contract, but as a waiver of payment within the strict time prescribed by the policy, which waiver Twining had a right to depend on until notice should be given to him that some other custom was adopted. It would hardly seem like justice for the agents of an insurance company to be permitted to adopt some custom, and then to make statements (and we might almost say agreements) upon the strength of such custom, and then, after such custom and such statements and agreements have had their effect in inducing particular action or non-action on the part of the assured, for the company itself to come in and repudiate such custom, statements, and agreements. We think that

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under such circumstances neither Twining nor his heirs have lost anything by the failure to pay said second annual premium at the time it became due; and as Twining died before the first of the month next after the same became due, his heirs may now recover the full amount of the insurance, less the amount of said annual premium. If Twining had lived until after the first of the month next after his said premium became due, and had then died within thirty days after such premium became due, whether his heirs could recover such amount it is not necessary for us to decide in this case. That is, it is not necessary for us to decide (further than we have already decided) what the effect of the company's publishing that "Thirty days' grace allowed in payment of premiums" would be in other cases. As tending to sustain the foregoing propositions with regard to waiver, and especially in cases where the words and acts of the company's agents would tend to mislead the policy-holder unless a waiver were presumed on the part of the company, we would refer to the following authorities: *N. Y. Life Ins. Co. v. McGowan*, 18 Kas. 300; *Helme v. Phila. Life Ins. Co.*, 61 Penn. St. 107; *Mayer v. Mutual Ins. Co.*, 38 Iowa, 304; *Thompson v. St. Louis Mut.*, 52 Mo. 469; *Ruse v. Mut. Ben. Life Ins. Co.*, 26 Barb. 556; *Ins. Co. v. Wilkinson*, 11 Am. Law. Reg. 486, 495; *Howell v. Knickerbocker Life Ins. Co.*, 44 N. Y. 277.

The judgment of the court below will be affirmed.

All the Justices concurring.

JAMES V. BEQUILLARD V. EDWARD L. BARTLETT.

1. DEMURRER TO EVIDENCE; *Conflict of Testimony; Question for Jury.* Upon a demurrer to the evidence, the court must presume that all the evidence demurred to, and upon which the party resisting the demurrer relies, is true, except in cases where evidence of a weaker kind is contradicted by evidence of a higher kind, and where the court could say as a matter of law that the weaker evidence should not be considered at all, but should be excluded. A court cannot upon a demurrer weigh conflicting evidence. That is the province of the jury. [*Brown v. R. R.*, 31-1; *Wolf v. Lasher*, 32-533; *Christie v. Barnes*, 33-317.]
2. EXEMPTION; *Merchandise.* Articles of merchandise bought by a merchant to be sold again on speculation, are not exempt in his hands from attachment and execution under the eighth subdivision of section 3 of the exemption law. [*Rice v. Nolan*, 33-28.]
3. ——— “*Tools and Implements*” of *Tradesmen.* A lamp and other articles kept by a watchmaker and jeweler, would be exempt from attachment and execution under said exemption law as “tools and implements,” provided such articles were necessary for his use in carrying on the business of making and repairing watches and jewelry.
4. ——— “*Stock in Trade; Raw Materials; Manufactured Articles.* Watches and jewelry manufactured by a watchmaker and jeweler, whether manufactured for particular customers upon special orders, or for customers generally and for sale to any person who might wish to purchase, whether completed or not completed, as well as the raw materials kept by such watchmaker and jeweler from which to manufacture watches and jewelry, are, in the hands of such watchmaker and jeweler, exempt from attachment and execution, as “stock in trade” under said exemption law, provided, that the aggregate amount in value of the articles exempted as “stock in trade” does not exceed four hundred dollars. [*Mallory v. Berry*, 16-293; *Voorhees v. Patterson*, 20-555; *Fish v. Street*, 27-270; *Jenkins v. McNall*, 27-532; *Davidson v. Sechrist*, 28-324; *Reed v. Cooper*, 30-574; *Bliss v. Vedder*, 34-57.]

Error from Wyandotte District Court.

ACTION by *Bequillard* to recover from *Bartlett* \$458.50, the value of certain personal property alleged to have been unlawfully taken by *Bartlett* and converted to his own use. *Bartlett* claimed the property as assignee in virtue of an assignment made to him for the benefit of *Bequillard's* creditors, while *Bequillard* claimed that said property was exempt to him under the exemption laws of Kansas. The principal facts and pro-

ceedings are fully stated in the opinion, *infra*. The property in dispute consisted of one glass show-case, one show-case with mirror, one iron frame for show-case, two tables, and one lamp, valued together at \$58.50, claimed by *Bequillard* as tools and implements necessary for carrying-on his business as a watchmaker and jeweler; also, as "stock in trade," the following—one blood-stone seal ring, two onyx rings, one plain enameled ring, one pearl ring, four plain gold rings, two plain silver rings, two carved silver rings, twenty engraved silver rings, (all finished,) two half-set crosses, gold mounted, one unfinished blood-stone seal ring, and one unfinished ring with clamps, of the aggregate value of \$128.50, (which *Bequillard* claimed as having been manufactured by him,) and two gold watches, two silver watches, two gold chains, twelve dessert spoons, six silver forks, six table spoons, one alarm clock, and one rosewood-case clock, of the aggregate value of \$271.50, which he had purchased for purposes of resale. Trial at September Term 1874 of the district court. Upon demurrer to the evidence, judgment was given in favor of defendant *Bartlett*, and *Bequillard* brings the case here on error.

D. B. Hadley, for plaintiff.

J. B. Scroggs, and *E. L. Bartlett*, for defendant.

The opinion of the court was delivered by

VALENTINE, J.: James V. Bequillard, (plaintiff in error and plaintiff below,) being involved in debt, executed a deed of assignment for the benefit of his creditors conveying to Edward L. Bartlett (defendant in error and defendant below,) all his property, "excepting nevertheless from the operation of" such "conveyance all such goods, chattels, stock in trade, wearing apparel, household furniture, and all other property and things legally exempt from levy and sale on attachment or execution by the laws of the state of Kansas." Bartlett immediately took possession of all the property which he supposed was transferred to him by virtue of said deed of assign-

Bequillard v. Bartlett.

ment; but the plaintiff claims that he took possession of more of his (plaintiff's) property than was so transferred. Whether he did or not, is the only question in this case. The plaintiff's action was for the value of the property claimed to have been taken wrongfully by the defendant. A trial was commenced before the court below and a jury. After the plaintiff had introduced his evidence, and rested, the defendant demurred to the evidence. The court below sustained the demurrer, took the case from the jury, and then rendered judgment in favor of the defendant and against the plaintiff for costs. The plaintiff now brings the case to this court for review. He claims that by the terms of said deed of assignment he reserved to himself all goods that were exempt by law from attachment and execution, and that the goods for which he

1. Demurrer to evidence.

sued in this action were so exempt. Whether they were so exempt or not, was the main question to be tried; but as the case comes to us, the question is not, whether said goods were absolutely exempt or not, but it is merely whether there was sufficient evidence to show *prima facie* that any of said goods were exempt. For, in all cases upon a demurrer to the evidence, the court (district, or supreme,) must presume that all the evidence demurred to, and upon which the party resisting the demurrer relies, was and is true, except in cases where evidence of a weaker kind is contradicted by evidence of a higher kind, and where the court could say as a matter of law, that the weaker evidence should not be considered at all but should be excluded. A court cannot upon a demurrer weigh conflicting evidence. That is the province of the jury. Therefore, if the evidence in this case showed *prima facie* that any one of the articles claimed by the plaintiff was exempt, the court below erred in sustaining said demurrer, and its judgment would in such a case have to be reversed.

The goods in controversy might be divided into three classes, as follows: first, the tools and implements by which plaintiff carried on his trade or business; second, the goods which he himself manufactured to sell; third, the goods which he purchased of others to sell. All of these

2. Exemption of property.

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goods, the plaintiff claims, were exempt from attachment and execution, under the following statute, to-wit:

"Every person residing in this state, and being the head of a family, shall have exempt from seizure and sale upon any attachment, execution, or other process issued from any court in this state, the following articles of personal property: * * * *Eighth*, The necessary tools and implements of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, and, in addition thereto, stock in trade not exceeding four hundred dollars in value."—(Gen. Stat. 473, 474, § 8.)

The evidence showed that the plaintiff resided in Wyandotte, Kansas; that he was the head of a family; that he was a watch-maker and jeweler by trade, and that he carried on the business in Wyandotte, Kansas, of making and repairing watches and jewelry, and of buying and selling watches and jewelry. This business was all carried on in one room. That is, the plaintiff made, repaired, and sold said watches and jewelry all in the same room. He kept one lamp to light this room, two show-cases in which to show and display his watches and jewelry, two tables on which to support the show-cases, and one iron frame to protect one of said show-cases. These articles were all used in the plaintiff's business, and were so used with respect to the goods manufactured by the plaintiff himself, as well as to those purchased of others. The defendant took all these articles from the plaintiff. The defendant also took thirty-seven articles of jewelry manufactured by the plaintiff himself for the purpose of sale, and kept by him for that purpose. Several of these thirty-seven articles were not fully completed when the defendant took them, but the most of them were. The defendant also took a large number of other articles of jewelry purchased by the plaintiff for sale, and kept by him for that purpose. The plaintiff claims that all of the foregoing articles, the lamp, the show-cases, the tables, the iron frame, and the jewelry, were exempt from attachment and execution, and therefore that they were all reserved to him by said deed of assignment, and therefore that the defendant had

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no right to take them. It will be noticed from the foregoing facts that the plaintiff was both a manufacturer and a merchant.

No exemption
in favor of
merchant.

As a merchant merely, we do not think that the plaintiff could hold any of said articles as exempt from attachment or execution. (*Guptil v. McFee*, 9 Kas. 30; *Grimes v. Bryne*, 2 Minn. 90.) Therefore, all of said articles which the plaintiff purchased and kept for sale merely for speculation, were not exempt from attachment or execution, for he held them merely in the character of a merchant. And if said show-cases, etc., were necessary to the plaintiff's business only in his character as a merchant, then we would think that they also were not exempt. If however they were necessary for the plaintiff's business in his character as a manufacturer,

4. Exemption
in favor of
manufacturer,
mechanic, etc.

then we would think that they were exempt as "tools and implements." From the evidence in the case it would seem that the lamp at least was necessary for the plaintiff's business as a manufacturer. Possibly some of the other articles may also have been necessary to him as a manufacturer. And as it would seem from the evidence that one at least (and perhaps more) of said articles was necessary for the plaintiff's business as a manufacturer, the question of whether it was so necessary or not should have been submitted to the jury. We also think that said thirty-seven articles of jewelry manufactured by the plaintiff himself were exempt as "stock in trade." (*Stewart v. Welton*, 32 Mich. 56.)

4. Stock in
trade: what
it includes.

Some of them were completed and some of them were not. Evidently those not completed were exempt. But we would think that the others were also exempt. The exemption laws are to be liberally construed so as to effect the humane purpose designed by the legislature in enacting them. If it were held that the raw material in the hands of a mechanic or tradesman was exempt, but that the goods manufactured out of such raw material and kept by such mechanic or tradesman for sale were not exempt, it would be to discourage such mechanic or tradesman from using his time and skill in manufacturing his raw materials into goods for the purpose of

selling them. This would be a violation of the spirit of this particular provision of the exemption laws. One of the objects of the exemption laws in exempting the tools and implements of a mechanic, miner, etc., and in exempting a certain amount of his stock in trade, is, to encourage him to be industrious so that he may earn a livelihood for himself and family; but if, when he uses his tools and implements, and such of his stock in trade as consists of raw materials, in manufacturing goods, these goods may be immediately seized on attachment or execution, he would not be encouraged in using his tools and implements and such stock in trade in manufacturing goods. Such a construction of the exemption laws would tend to encourage idleness instead of industry. A mechanic would not like to so use his raw materials as to lose both it and his labor. The words, "stock in trade," we think, are broad enough to cover, not only the raw materials from which the mechanic intends to manufacture goods, but also to cover the manufactured goods themselves; and they are also broad enough to cover not only goods manufactured for particular customers upon special orders, but also to cover goods manufactured for sale to customers generally, or to any person who might afterward choose to purchase. Some mechanics or tradesmen, like tailors, manufacture nearly all their goods upon special orders, while others, like miners of coal, (and the statute specially mentions "miners,") prepare their goods for customers generally, and without reference to special orders, or to whom any specific articles shall go. Now we would suppose that the coal procured by a miner for customers generally would be equally exempt with the coat made by a tailor for a particular customer. The amount exempted as "stock in trade," is of course limited; and if the mechanic, miner, or tradesman, takes a portion of it in manufactured goods he cannot of course take so much of it in raw material. In the aggregate the value of the articles, manufactured and unmanufactured exempted, as "stock in trade," cannot exceed four hundred dollars.

Grant v. Dabney.

The judgment of the court below will be reversed, and cause remanded for a new trial.

All the Justices concurring.

GEORGE GRANT v. W. E. DABNEY.

CONTRACT, In Writing; Interpretation and Construction. Where G. sent to D. a letter saying, "Please let Mr. S. and family have whatever they may want for their support, and I will repay you for the same," and thereafter D. (at the instance of the S. family) procured a physician to attend the family, and such physician under such employment furnished medicines and medical services of value, *held*, in an action brought by D. against G. therefor, that D. could not recover upon the authority of the letter for the services and medicines furnished by the said physician. [*Water-Power Co. v. Brown*, 23-696.]

Error from Ellis District Court.

At the April Term 1876 of the district court, *Dabney* recovered judgment against *Grant* for \$200 and costs. *Grant* brings the case here. The opinion contains a sufficient statement of the facts.

McClure & Humphrey, for plaintiff in error.

Gilkerson & Lane, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: The facts in this case are substantially these: The plaintiff in error sent to W. E. Dabney a letter, of which the following is a copy:

"VICTORIA, ELLIS COUNTY, October 1st, 1878.

"MR. DABNEY—*Dear Sir*: Please let Mr. Seth and family have whatever they may want for their support, and I will repay you for the same."
GEORGE GRANT."

During the months of October and November 1878, the said W. E. Dabney, at the request of the Seth family, members of

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whom at the time were very ill, procured one L. Watson, then a practicing physician and surgeon, to attend the family, and during said months Watson furnished medicines and professional services of the value of \$200. The question is presented, whether the plaintiff in error is liable to the defendant in error for said claim under the written instrument above described. The district court decided he was, and hence this action to reverse the judgment. It is well understood, that in construing written instruments, effect should be given, if possible, to all the words contained therein, and that the language employed should be taken in its usual, common, and ordinary signification. Nothing is contained in the record as to the situation or business of the parties to this action at the date of the letter, or written order, and hence we are not advised of the purpose of the plaintiff in error in delivering the writing, except as we may gather his intentions from the words used by him. We may fairly assume however, that the defendant in error was not a physician, nor a dealer in medicines, otherwise he would not have employed another to attend and furnish the services and articles sued for to the Seth family in their sickness. Under these rules of construction, and this view of the case, we do not think the action of the defendant in error should have been sustained by the district court upon the petition in the case and the evidence submitted. The written authority provides that Dabney should *let* the Seth family have whatever they might want for their *support*. Now the word *let*, thus used, ordinarily means to grant possession, to give, to furnish, etc. If A. says to B., "Please *let* C. have a horse and I will pay for it," the common understanding of the language would be that B. was to furnish one of his own horses, or a horse in his possession, to C., and not that B. should sell his horse to C. and that B. should charge and collect of A. the value thereof. Again, the word "support" is generally used to mean articles for the sustenance of the family, as food, etc. It is true, in some cases it would include medicines and medical services as necessities; but it is evident to us that it was not the intention or purpose of the plaintiff in error to

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give the word such a broad signification, and Dabney could not have reasonably so interpreted it. To hold the language of the letter to extend to the claim for medicines and medical treatment furnished by others than the party to whom the letter was addressed, would be giving a forced and strained construction not authorized in the writing. If the meaning of the word "support" is to be extended beyond its common import, it is difficult to determine the limit of the liability assumed by the writer. Further, to "*repay*," does not necessarily mean to pay money. It has also the meaning of return, restore, etc.; and to hold that Grant had the right to repay in kind of articles furnished for the support of Mr. Seth and family, would not be at variance with the language of the order. The construction of the court below of the written authority gave to its language an unusual one, and one which the mass of mankind viewing the question would not agree to.

The judgment of the district court will be reversed.

All the Justices concurring.

GEORGE GRANT V. W. E. DABNEY.

1. *CONTRACT, For the Payment of Money Only.* A contract in these words: "Please let Mr. S. and family have whatever they may want for their support, and I will repay you for the same," is not "a contract for the payment of money only," within the meaning of section 555 of the civil code. [*Ante*, 388.]
2. ——— *Enforcing Judgment, Pending Appeal.* Where a judgment was rendered in favor of D. and against G. on such a contract as that above described, and G. then took the case to the supreme court on petition in error, giving an undertaking as prescribed by sections 551 and 554 of the civil code, D. would have no authority to give the undertaking prescribed by said section 555, and obtain leave to enforce said judgment.

Error from Ellis District Court.

THIS case grows out of the judgment and proceedings mentioned in the case and between the same parties, *ante*, p. 388. The judgment in favor of *Dabney* was rendered on the 22d of April 1876. *Grant* brought the case on error to this court, and filed the necessary undertaking to stay proceedings, on the 6th of May following. On the 11th of July 1876, the district judge, on motion of *Dabney*, made an order as follows:

"It appearing to me that this is an action arising on contract for the payment of money only, and it appearing also that said plaintiff (*Dabney*) has filed an undertaking with the clerk of said court, with two sufficient sureties approved by him, conditioned as required by law, now therefore it is by me ordered, that the said plaintiff can enforce and hereby does have leave to enforce the said judgment in all respects as if no error proceedings were pending."

From this order *Grant* appeals, and brings the case here on error.

McClure & Humphrey, for plaintiff in error.

Gilkerson & Lane, and *J. W. Day*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: After the foregoing case of *Grant v. Dabney*, just decided, (*ante*, p. 388,) was brought to this court, and after an undertaking on the part of the plaintiff in error was duly executed and approved as prescribed by sections 551 and 554 of the civil code, (Gen. Stat. 737, 738,) for the purpose of staying the execution of the judgment therein rendered, the following proceedings were had, to-wit: *Dabney*, who in that case was plaintiff in the court below and defendant in error in this court, duly executed an undertaking in accordance with section 555 of the civil code, (Gen. Stat. 739,) for the purpose of obtaining leave to enforce said judgment notwithstanding said proceedings in error, and notwithstanding said first-mentioned undertaking; and upon his said undertaking, and upon due

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application to the judge of the court below, at chambers, he obtained said leave to so enforce said judgment. Grant, who in that case was defendant in the court below and plaintiff in error in this court, brought the case a second time to this court upon a second petition in error, and in this second case assigned for error the foregoing action of the judge of the court below in granting said leave to enforce said judgment. This second case is the one that we are now considering. The plaintiff in error in this case claims that said judge had no authority to grant said leave, but on the other hand the defendant in error (Dabney) claims that the judge had such authority, and cites said section 555 of the civil code as giving such authority. This the only statute or law under which it is claimed that the judge had any such authority. That portion of said section 555 which it is claimed gives to the judge such authority, reads as follows:

“In an action arising on contract for the payment of money only, notwithstanding the execution of the undertaking in the last section mentioned, to stay proceedings, if the defendant in error gives adequate security to make restitution in case the judgment is reversed or modified, he may, upon leave obtained from the court below, or a judge thereof in vacation, proceed to enforce the judgment.”

Now it will be seen that this section authorizes leave to be granted to enforce judgments notwithstanding proceedings in error, only in cases where the action is founded upon “contract for the payment of money only.” Now is the *contract* in this case a “contract for the payment of money only?” We think not. The only contract in this case reads as follows:

“MR. DABNEY—*Dear Sir*: Please let Mr. Seth and family have whatever they may want for their support, and I will repay you for the same.
GEORGE GRANT.”

The first thing to be done under this contract is for Mr. Dabney to “let Mr. Seth and family have” something. This something must be a thing or things which Seth and family “may want,” and it must be something “for their support.” Now this is not “the payment of money” at all. Then how

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can it be said that the contract is a "contract for the payment of money only?" The next thing to be done under the contract we will suppose is to pay money. That is, we will suppose that when Dabney "let Mr. Seth and family have" something, then, that Grant was not to "repay" in kind, but that he was to "repay" (or rather *pay*) in money. It will therefore be seen that while money might be paid under said contract, yet that it was not the *only* or even the principal thing to be done. The letting Seth and family have what they wanted for their support, was the principal thing to be done under the contract; and the payment of money therefor came in only incidentally and secondarily. The payment of money depended upon at least three contingencies—three conditions precedent—first, whether Seth and family should *want* anything; second, whether Dabney should *let* them have it; and third, whether it was for their *support* or not. Such a contract might more properly be designated a contract to procure articles for the support of Seth and family, than a "contract for the payment of money only." A promissory note is a contract for the payment of money only. So also would any other contract be a contract for the payment of money only, if nothing was to be done under it by either party except to pay money. But where something else is also to be done under the contract, the contract can hardly be called a contract for the payment of money only. And this is especially true where the payment of the money depends upon whether this something is done or not.

The order of the judge of the court below granting leave to enforce said judgment will be reversed.

All the Justices concurring.

J. M. HAGAMAN V. COMM'RS OF CLOUD COUNTY *et al.*

1. ENJOINING TAXES, *For Mere Irregularities; Equity.* Equity will not as a rule interfere to restrain by injunction the assignment of tax-sale certificates on real estate, where the property is subject to taxation, on the ground of irregularities in the assessment and levy of the taxes and the proceedings of the sale; unless the party seeking equitable relief shall first pay or tender the taxes which are admitted to be due, or just, or which the court finds from the evidence ought to be paid. [*R. B. v. Russell*, 8-558; *Parker v. Challiss*, 9-155; *Smith v. Leavenworth*, 9-296; *Ottawa v. Barney*, 10-280; *Lawrence v. Killam*, 11-499; *Comm'rs v. Ogg*, 13-206; *Challiss v. Heinkeltemper*, 14-474; *Challiss v. Comm'rs*, 15-49; *Stebbins v. Challiss*, 15-55; *Griffith v. Watson*, 19-23, 27; *Comm'rs v. Sergeant*, 24-572; *Wilson v. Longendyke*, 32-270.]
2. EVIDENCE; *Best Must be Produced; Assessment of Taxes.* Where the assessment-roll has been properly filed with the county clerk, and no claim is made that it is lost, or that it cannot be produced by the county clerk, held, not erroneous for the district court to reject evidence tending to prove who made the assessment of the real estate in controversy.

Error from Cloud District Court.

INJUNCTION, brought by *Hagaman*. The opinion states all necessary facts. The district court, at the October Term 1875, gave judgment in favor of the defendants, the *Board of County Commissioners*, and *W. J. Campbell*, county treasurer; and *Hagaman*, plaintiff, brings the case here.

Hagaman & Houston, for plaintiff.

Strain & Sturges, for defendants.

The opinion of the court was delivered by

HORTON, C. J.: This was an action to restrain the assignment of certain tax-sale certificates upon a number of lots belonging to the plaintiff in Concordia, and to have the said certificates, and the tax sales upon which they were based, declared void. On the trial, it appeared from the evidence produced by the plaintiff in error that the real estate was sold for the taxes of 1871, that it was subject to taxation for that year, but that certain irregularities existed in regard to the assessment and levy of taxes for that year, and also in the proceedings of the sales. The irregularities consisted chiefly in the

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assessment of the lots in gross, the levy of taxes in excess of the legal rates, and the want of a sufficient notice of the time of sale. No evidence was offered that the taxes were wholly illegal and void; neither was it alleged in the petition, nor proven on the trial, that the plaintiff had paid or tendered any part of the taxes. The defendants demurred to the evidence of the plaintiff. The court sustained the demurrer; and we are asked to reverse such ruling.

Upon familiar principles, and by the repeated decisions of this court, the plaintiff is not rightly entitled to the relief demanded until he has done that justice, or offered to do it, which he exacts from others. He who seeks equity, must do equity. The action of the court in sustaining the demurrer was correct. (*Gulf Rld. Co. v. Morris*, 7 Kas. 210; *Comm'rs of Leavenworth Co. v. Lang*, 8 Kas. 284; *City of Ottawa v. Barney*, 10 Kas. 270; *Challiss v. Comm'rs of Atchison Co.*, 15 Kas. 49.) To the suggestion of counsel for the plaintiff, that if the court found any of the taxes illegal, the judgment should have been for the plaintiff, conditioned upon his paying the legal tax, not that he had no case in court, we cannot better reply than by using the forcible language of Mr. Justice Miller in *Bailey v. A. & P. Rld. Co.*, C. L. J., vol. 1, 502, that, "Whenever parties come into this court to ask this court to enjoin the collection of taxes, or the collection of part of a tax, if there is any part which they admit to be due or just, or which the court can see in the statement made in the bill ought to be paid, there must be an allegation in the bill conforming to the fact, that they have paid it, or that they have tendered it; and it is not a sufficient allegation to come and say that 'we are willing,' or even that 'we have paid it into the court,' because the state is not to be stayed in its revenue, which is admitted to be due, in that way; and a party claiming that he will not pay his taxes, or any portion of them, cannot screen himself during the course of a long litigation from paying that which must be paid, and which everybody can see must be paid, by setting up a contest over that which is doubtful, and which may, or may not, be necessary to be paid."

Brake v. Ballou.

Osage Diminished Reserve Lands, in Cowley county, declared to have been made by him in trust for the use and benefit of *Ballou*, and to obtain a conveyance of the north half of it from *Brake*, on the grounds that the parties had, prior to the entry, made an agreement attempting to create such a trust, and that in consequence of such oral agreement *Brake* had settled upon and improved and entered the land in his own name, and *Ballou* had let him have money to enter it and make some improvements thereon. A demurrer to the petition was overruled, and after answer filed, the action was tried at the September Term 1874 of the district court. The court found in favor of plaintiff, that "the defendant holds the legal title to the quarter-section of land above described in trust for the plaintiff, which trust he in equity and good conscience ought to be compelled to fulfill," and gave judgment compelling the execution of a deed of conveyance passing the legal title to said lands to plaintiff. *Brake* excepted, and now brings the case here on error for review.

Buck & Kellogg, for plaintiff in error.

E. S. Torrance, and *L. J. Webb*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: The defendant in error (plaintiff below) states the facts of this case as follows:

"In the month of March 1871, the parties entered into a verbal contract, the terms of which were in substance, that *Brake* was to settle upon the land in controversy, the same being a quarter-section of the Osage Diminished Reserve, situated in Cowley county, and enter the same at the U. S. Land-Office for the benefit of *Ballou*, who was to furnish the money to make the improvements on the land necessary to enter the same under the laws of the United States, and also furnish the money to enter and pay for the land, and convey to *Brake* eighty acres of good bottom land, with sufficient timber thereon to improve said eighty acres for farming purposes. Afterward, *Ballou* did furnish the money to make the necessary improvements upon said quarter-section of land and to pay for

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and enter the same at the U. S. Land-Office. Brake settled upon and improved said quarter-section of land, and in the month of July 1871, upon making the necessary proof and payment, entered the same at said land-office in his own name. Afterward the parties were unable to agree as to what particular eighty acres should be conveyed to Brake in pursuance of said agreement, and Brake refused to convey any part of said quarter-section to Ballou. Ballou offered to convey to Brake either the north half or the south half of said quarter-section if Brake would convey to him the whole of said quarter-section, to which Brake refused to concede. The south eighty or half of said quarter-section is good bottom land, with sufficient timber thereon to improve the same for farming purposes. In addition to the foregoing facts, the petition also shows that the quarter-section of land in controversy was a part of two claims purchased by Ballou of Thomas Rucker and T. J. Raybell respectively, before the government survey of the Osage Diminished Reserve, for the aggregate sum of \$1,175. The money which Ballou furnished for the improvement of said quarter-section amounted to the sum of \$300, and the entrance-money furnished by Ballou amounted to the sum of \$210."

In his answer in the court below, defendant Brake denied the foregoing allegations of the plaintiff's petition not found by the district court, and also alleged in his answer that Ballou, in consideration of the defendant's agreement, agreed that he (Ballou) would convey to the defendant eighty acres of one of three other particular tracts of land, (describing them,) and that Ballou wholly failed to perform his agreement. The plaintiff, Ballou, in his reply denied these allegations of the defendant's answer. There does not seem however to be any claim by either party in the pleadings or elsewhere that Brake was, under the agreement, to have any portion of the land which he (Brake) entered at the U. S. land-office. The court merely finds on this subject that the plaintiff was to "convey to the defendant eighty acres of good bottom land, with sufficient timber thereon to improve said eighty acres for farming purposes." Under this finding the eighty acres of land to be conveyed might have been any "eighty acres of good bottom land, with sufficient timber thereon to improve the same for farming purposes," and might have been situated

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in any place where such an eighty-acre tract of land could have been found. The legal title to the land in controversy passed from the United States by entry and purchase to the defendant below, and is now in him. But the plaintiff below (Ballou) claims that because of said contract and the other facts in this case the equitable title to the land is in himself, and that Brake merely holds the legal title in trust for him, (Ballou.) The defendant below however claims that said contract is void, first, because it is merely in parol, and second, because it is in violation of the laws of the United States; and he also claims that the facts of this case do not and cannot create any trust in favor of the plaintiff below.

Under the laws of this state no express trust can be created except in writing. (Gen. Stat., p. 186, § 8; page 505, §§ 5 and 6; page 1096, § 1; *Franklin v. Colley*, 10 Kas. 260.) And implied or resulting trusts are not now created in all cases where they formerly were under the old chancery practice. Section 6 of the act concerning trusts and powers reads as follows:

“When a conveyance for a valuable consideration is made to one person, and the consideration therefor paid by another, no use or trust shall result in favor of the latter, but the title shall vest in the former, subject to the provisions of the next two sections.” (Gen. Stat. 1097.)

Section seven of said act has no application to this case; and the only portion of section eight of said act which has any application to this case reads as follows:

“The provisions of the section next before the last shall not extend to cases where the alienee shall have taken an absolute conveyance in his own name * * * where it shall be made to appear that, by agreement, and without any fraudulent intent, the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land, or some interest therein, in trust for the party paying the purchase-money, or some part thereof.”

Under these statutes, if there was no “fraudulent intent” on the part of the plaintiff and defendant in making said contract, and in entering said land and purchasing the same from the United States in the name of the defendant with the in-

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tention and understanding that the title should vest in him for the use and benefit of the plaintiff, then under the facts of this case a trust would result in favor of the plaintiff and he would be entitled to recover in this action. (*Franklin v. Colley*, 10 Kas. 260; *Foster v. Brost*, 11 Kas. 350.) For in such a case the plaintiff would in equity be the real owner of the land. But if there was any such "fraudulent intent" in making said contract, or in purchasing said land as aforesaid, then no such trust would result, and a court of equity would leave the parties where it finds them. (*McTaggart v. Harrison*, 12 Kas. 62; *Tucker v. Allen*, 16 Kas. 324, 325.) The only question then for us to consider is, whether there was any "fraudulent intent" on the part of the plaintiff and defendant. It will probably be conceded by both parties that at the time said contract was made, and at the time said land was purchased, there was no intention on the part of either of the parties to defraud the other; nor was there any such intention until some time after the land was purchased, and until some time after the legal title to the land was vested in the defendant. But the question is not merely whether either of the parties intended to defraud the other, but it is, whether they did not both intend to commit a fraud upon the government of the United States and against the laws of the United States. If they did, then we suppose the plaintiff cannot recover. (See authorities last cited, and *Brewster v. Madden*, 15 Kas. 249.) Said land was purchased from the United States under that provision of section 12 of the act of Congress of 15th July 1870, which reads as follows:

—"Which lands shall be open to settlement after survey, (excepting the sixteenth and thirty-sixth sections, which shall be reserved to the state of Kansas for school purposes,) and shall be sold to actual settlers only, said settlers being heads of families, or over twenty-one years of age, in quantities not exceeding one hundred and sixty acres, in square form, to each settler, at the price of one dollar and twenty-five cents per acre; payment to be made in cash within one year from date

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of settlement, or of the passage of this act." (16 U. S. Stat. at Large, 362.)

Under this statute no one but an "actual settler" could purchase any of said land, and he could not purchase more than 160 acres. The government evidently intended not only that no one but actual settlers should get any portion of said Osage Diminished Reserve, but also that every quarter-section of such reserve should be occupied by an actual settler. There is no pretense that the plaintiff was ever an actual settler at all on the land in controversy. Therefore he had no right himself to purchase said land from the government. And to procure any other person to purchase it for him, would be a fraud upon the government. If he could obtain title to lands in that way it would be to cause the government to sell its lands to others than actual settlers in violation of its own laws. In this way an individual might procure thousands of acres of lands, instead of only 160 acres as the law provides, and might procure the same without being an actual settler upon any portion of such lands, or even a resident of Kansas. Would not this be a fraud upon the government? Of course, where two settlers on a piece of government land are contesting as to which has the better right to enter the same, they may make a valid contract (by way of compromise) for one of them to enter the whole of it and then to convey a portion thereof to the other. (*Foster v. Brost*, 11 Kas. 350; *Snow v. Flannery*, 10 Iowa, 318.) Such would not constitute any fraud as between themselves, nor as against the United States. Perhaps also other valid contracts might be made with reference to government lands, but it is not necessary now to mention them. But a *parol* contract concerning the purchase and conveyance of lands belonging to the United States, made in violation of the spirit of the laws of the United States, and in fraud thereof cannot be enforced specifically or otherwise by a court of equity; and taking such contract together with all the other facts of this case, no trust estate in said lands resulted therefrom in favor of the plaintiff which can be declared or enforced by a court of equity.

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The judgment of the court below must therefore be reversed.

All the Justices concurring.

PETER CLIPPENGER *et al.* v. HIRAM C. HASTINGS.

COVENANT OF WARRANTY; *Failure of Consideration; Competency of Evidence.*

C. conveyed by deed, with covenants, two certain pieces of land to M. M. conveyed one of said pieces of land to H. H. was afterward evicted. H. then sued C. on the covenants. The deed from C. to M. expressed a consideration of \$575. On the trial it was shown that \$375 thereof was for the piece of land conveyed to H. and \$200 thereof was for the other piece of land; but C. offered to prove, that there was in fact no consideration for said deed except a worthless and useless patent-right, and that H. knew it when he purchased his said land. *Held*, That such testimony was competent, and that it was error to exclude it; that if C. in fact received no consideration from M., and if H. in fact knew this at the time of his said purchase, he cannot recover anything from C. on C.'s said covenants.

Error from Nemaha District Court.

ALL necessary facts appear in the subjoined opinion. *Hastings*, plaintiff, recovered judgment against *Clippenger* and wife, at May Term 1876 of the district court, and defendants bring the case here.

Joseph Sharpe, for plaintiffs in error.

Simon Conwell, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action for the recovery of damages for the breach of certain real covenants. On the 16th of January 1869, Peter Clippenger and wife sold and conveyed

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to Aaron W. Manchester two certain parcels of land. The consideration expressed in the deed for both parcels, taken together, was \$575. What the consideration for either piece taken alone was, is not shown. The deed also contained the following covenants, to-wit:

"And the said Peter Clippenger and wife do hereby covenant and agree, that at the delivery hereof they are the lawful owners of the premises above granted, and seized of a good and indefeasible estate of inheritance therein, free and clear of all incumbrances, and that they will warrant and defend the same in the quiet and peaceful possession of said party of the second part, his heirs and assigns, forever."

Afterward Manchester and wife sold and conveyed by deed one of said pieces of land to Hiram C. Hastings. Afterward Hastings was evicted therefrom; and he then commenced this action against Clippenger and wife for breaches of their said covenants. He did not make Manchester a party to the suit. On the trial of the case it was shown that the consideration of \$575 expressed in the conveyance from Clippenger to Manchester was made up of \$375 for the piece of land which Manchester conveyed to Hastings, and of \$200 for the other piece of land. But Clippenger offered to prove by his own testimony as follows:

"That the only and sole consideration that he has received for said conveyance was a worthless and useless patent-right called 'Calkins' patent fence;' that said conveyance was only obtained by believing the false and fraudulent representations of said A. W. Manchester as set forth in his (Clippenger's) answer, the allegations whereof he offered to testify were true, and that plaintiff (Hastings) had notice thereof when he purchased said land."

The district court decided such testimony improper, and ruled it out; and said court rendered judgment in favor of Hastings and against Clippenger and wife, and they now bring the case to this court. Several questions are raised in this court, but we do not think that it is necessary to decide any of them except the one whether said evidence was correctly or incorrectly ruled out. We think the evidence should have been admitted. If in fact Clippenger received no con-

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sideration for his land from Manchester, and if in fact Hastings at the time of his purchase knew it, Hastings cannot recover in this action. Nor can he recover anything from Clippenger and wife in any other action. Under such circumstances Hastings stands in no better condition than his grantor, Manchester, does.

The judgment of the court below will be reversed.

All the Justices concurring.

A. T. & S. F. RAILROAD CO. v. WM. IRELAND.

1. **PLEADING; TESTIMONY; Variance; Stock Law of 1874.** In an action under the act of 1874 relating to the killing and wounding of stock by railroad companies, the plaintiff alleged in his petition, among other things, that the defendant railroad company *killed* a heifer belonging to him, but the evidence showed that the railroad company *wounded* the heifer only, and that the plaintiff himself afterward knocked her in the head and killed her. The evidence and the verdict of the jury showed also that the heifer would have died from her said wounds, if she had not been knocked in the head, and that the plaintiff knocked her in the head, merely to stop her sufferings. *Held*, That the variance between the allegations of the petition and the proof was not fatal to a recovery.
2. ——— ***Killing Cattle by Railroad Company; Measure of Recovery.*** In such action, the court instructed the jury that if they found for the plaintiff, they might find for the *full value* of the heifer. There was no evidence tending to show that the heifer was worth anything after she was killed, and the jury substantially found that she was worth nothing after she was killed. The jury found in favor of the plaintiff, and assessed his damages at eighteen dollars, which from the evidence was the full value of the heifer. The court rendered judgment in favor of the plaintiff for this amount. *Held*, That the court did not err in giving said instruction, or in rendering said judgment. The plaintiff, the court, and the jury, were under the circumstances entitled to consider the case as though the railroad company had itself actually killed said heifer. [*R. R. v. Mower*, 16-573, and cases cited.]
3. **Costs; Offer to Confess Judgment.** Prior to the commencement of the trial, the defendant offered to confess judgment for twenty dollars and costs; but the plaintiff refused to accept the offer. The plaintiff recovered a judgment for eighteen dollars as damages, and twenty-five dol-

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lars for attorney-fees, besides costs. What the attorney's services rendered prior to said offer to confess judgment were worth, is not shown. *Held*, Not error to render judgment against the defendant for all of plaintiff's costs. [*R. R. v. Mower*, 16-573, and cases cited.]

Error from Lyon District Court.

At the March Term 1876 of the district court, *Ireland* recovered judgment against the *Railroad Company*, and such company brings the case here on error. The facts are stated in the opinion.

Ross Burns, and *J. G. Waters*, for plaintiff in error.

Randolph & Sedgwick, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought under the act relating to the killing and wounding of stock by railroad companies, (Laws of 1874, page 148.) The first question raised by counsel for plaintiff in error, relating to the jurisdiction of the district court, has been decided and settled adversely to the claim of plaintiff in error by the decisions in the cases of *Shuster v. Finan*, and *Miller v. Bogart*, decided at this term, (*ante*, pp. 114, 118.)

The second question raised by counsel for plaintiff in error relates to a supposed variance between the allegations of the petition of the plaintiff below and the proof in the case; and the third question raised by counsel for plaintiff in error relates to a supposed error with regard to the measure of damages. We shall consider the second and third questions together.

The plaintiff below, *Ireland*, alleged in his petition among other things, that the defendant railroad company *killed* a heifer belonging to him. The proof however showed that the railroad company *wounded* the plaintiff's heifer only, and that the plaintiff himself afterward knocked her in the head and killed her. The plaintiff testified among other things as follows: "I knocked her in the head; I did it to stop her suffering. She could not get up, and would have died anyway." There was no evidence tending to show that the

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heifer might have recovered from her wounds if she had not been knocked in the head; and the other evidence tends to show that she was very badly wounded. Upon said petition and said evidence the court below allowed the plaintiff to recover, and instructed the jury among other things that if they found that the railroad company *killed* the heifer, (and should also find the other necessary facts in the case in favor of the plaintiff,) they should find a verdict in favor of the plaintiff for the *full value* of the heifer. The jury found a verdict in favor of the plaintiff, and assessed his damages for the injuries done to the heifer at \$18, and also found that the plaintiff was entitled to an attorney-fee of \$25 for prosecuting the suit. They do not say in their verdict (except inferentially) what the heifer was worth before she was killed; but they attempt to say, and perhaps say it substantially, that she was worth nothing after she was killed. There was no evidence tending to show that she was worth anything after she was killed. They also find that the plaintiff killed the heifer by knocking her in the head, but that she would have died from her wounds which she received from the railroad company if she had not been knocked in the head. We think this last-mentioned finding (as well as the others) is sustained by sufficient evidence. The eighteen dollars damages allowed by the jury for the injuries done to the heifer was evidently (from their verdict and from the evidence) the exact value of the heifer. Now under the circumstances of this case we think that there was no fatal variance between the allegations of the plaintiff's petition and the evidence, and the plaintiff was entitled to recover the value of his heifer. That is, under the circumstances of this case we think that the plaintiff, the court and the jury, were all entitled to consider the case as though the railroad company had actually killed the heifer. And if the railroad company had actually killed the heifer, then the plaintiff would have been, under the statute, entitled to recover her full value, and also to recover attorney-fees. We therefore think that the court below did not err in these respects.

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The fourth question raised by counsel for plaintiff in error relates to costs. The plaintiff in error claims that the court below erred in rendering judgment against it for all the costs of the defendant in error, (plaintiff below.) Prior to the commencement of the trial in the court below the defendant company, (plaintiff in error,) offered to confess judgment for twenty dollars and costs. Ireland refused to accept such offer. Afterward Ireland recovered a judgment for \$18 as damages for the injuries done to the heifer, and \$25 for attorney-fees; total, \$43, besides costs. What the attorney's services rendered prior to said offer to confess judgment were worth, is not shown. But evidently they were worth more than two dollars. Under the circumstances therefore we do not think that the court below erred in rendering said judgment for costs.

The judgment of the court below will be affirmed.

All the Justices concurring.

HILIARE LANOUE *et al.* v. MCKINNON & Co.

1. APPURTENANCES; *Mills; Mill-Dam, and Water-Power.* Where it appears from a mortgage that certain pieces of real estate, with two mills, and "all and singular the hereditaments and appurtenances thereunto belonging," are mortgaged, and it also appears from the pleadings and admissions of the defendants and mortgagors that a certain mill-dam and water-power are appurtenant to said mills and real estate, and it does not appear whether said dam and water-power are situated on said real estate or not, it is not error to render judgment that said mortgage is a lien upon said dam and water-power as well as upon the real estate more particularly described in the mortgage. [*Clough v. McDonald*, 18-114; *Swerdfeger v. State*, 21-475, 476; *Dougherty v. Porter*, 18-206; *Neitzel v. Hunter*, 19-222, 223; *Green v. McMurtry*, 20-189, 201; *Garvin v. Jennerson*, 20-371, 373.]
2. ATTORNEY-FEE; *When Recoverable by a Co-Defendant; Foreclosure.* Where M., one of several defendants in a foreclosure suit, sets forth in his answer a cause of action on a promissory note and mortgage against L., a

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co-defendant, *held*, that this, in legal effect, is *the bringing of an action* on such note and mortgage against such co-defendant; and therefore, where such co-defendant has stipulated in such mortgage to pay an attorney-fee to the holder thereof for the prosecution of any action that might be brought to recover any amount due on said note and mortgage, the court when rendering judgment on said note and mortgage does not err in also rendering a judgment for an attorney-fee. [*Toby v. Allen*, 3-399.]

Error from Cloud District Court.

HILIARE LANOUE was the owner of several parcels of real property in Cloud county. He together with his wife *Harriet*, on the 17th of August 1874, executed their note for \$3,000 and a mortgage to secure the same to the *Mo. Valley Life Ins. Company*, such mortgage being on a certain portion of such real property. Afterward, and on the 27th of October 1874, they executed their note for \$3,000 and a mortgage to secure the same to *Annie L. McKinnon* and two others (partners as "*McKinnon & Co.*,") such mortgage covering the property described in the mortgage to said *Life Ins. Company*, and certain other property. And on the 24th of August 1875 they executed their note for \$815 and a mortgage to secure the same to the *Great Western Manufacturing Company*, such mortgage covering a portion of the property described in the mortgage to the *Life Ins. Company*. On the 14th of August 1875, *P. Plamondin* recovered a judgment against said *Hiliare Lanoue* for \$204.95, and costs, which judgment was a lien on all the real property of said *Lanoue* except that part thereof occupied by him and his family as a homestead. The note given to *McKinnon & Co.* was on its face due and payable 27th October 1875, but by reason of the conditions of the mortgage given to secure the same, and the alleged breach of such conditions, *McKinnon* claimed that such note had become due and payable previous to the 17th of September 1875, and on the day last named said *McKinnon & Co.* commenced their action against *Lanoue* and wife on said note, and to foreclose their said mortgage; and they joined as co-defendants said *Mo. Valley Life Ins. Company*, said *Great Western Manuf. Company*, and said

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Plamondin. The summons to the *Lanoues* was issued September 17th, returnable September 18th, with answer-day fixed for October 8th. Each of the other summonses was issued September 17th, returnable on the 27th, with answer-day fixed for October 19th. Neither answer nor demurrer was filed by defendants *Lanoues*, but they appeared specially and moved to set aside the summons as to them, which motion was overruled. Defendant *Plamondin* answered October 5th, setting up his judgment-lien. Defendant *Mo. Valley Life Ins. Company* answered October 13th, setting up its mortgage-lien, and demanded judgment for \$3,000, and interest, and ten per cent. thereon as attorney-fees, and for the foreclosure of its mortgage. Defendant *The Great Western Manuf. Company* answered October 13th, setting up its mortgage-lien, and demanded judgment for \$815, and interest, and ten per cent. thereon as attorney-fees. The October Term 1875 of the district court commenced Monday, October 25th. The action was placed on the trial docket for that term, the day fixed for hearing being the fourth day of such term, and was then tried. Personal judgments were rendered against defendants *Lanoues* as follows: in favor of plaintiffs *McKinnon & Co.*, and defendants *Mo. Valley Life Ins. Co.* and *Great Western Manuf. Company*, for the respective sums, principal and interest, stated in the notes and mortgages by them respectively held, and a decree of foreclosure and for the sale of mortgaged premises was duly made and entered. The priority and amounts of the respective liens found by the court were as follows: *first*, in favor of the *Mo. Valley Life Ins. Co.* for \$3,325 debt and interest, and \$321.50 as attorney-fees; *second*, in favor of *McKinnon & Co.* for \$3,300 debt and interest, and \$830 as attorney-fees; *third*, in favor of *Plamondin* for \$214.55; *fourth*, in favor of *Great Western Manuf. Company*, for \$815 and interest thereon. The defendants *Lanoue* and wife moved to set aside the findings and decree, and for a new trial, which motion was overruled and denied, and they now bring the record here on error for review. The other defendants below, and the plaintiffs below, are joined as defendants in error.

L. J. Crans, and *E. J. Jenkins*, for plaintiffs in error, contended, first, that the district court erred in overruling the motion to dismiss the action, because no legal summons had been issued against them; (code, §§ 105, 122; 8 Kas. 677, 683; 10 Barb. 117;) second, that the court had not acquired jurisdiction of said Lanoue and wife at the time of the entry of said judgment and decree; third, that the action was not triable at the October Term 1875, the time fixed by law for the pleadings to have been made up not having expired; (code, § 851; laws of 1871, ch. 116, § 5;) fourth, that the judgment in favor of the Mo. Valley Life Ins. Company was declared a lien on property not included in the mortgage executed to such company; fifth, that no attorney-fee was recoverable by the defendant the Mo. Valley Life Ins. Company.

Strain & Sturges, for McKinnon & Co.

T. A. Hurd, for Life Ins. Co. and Manuf. Company.

The opinion of the court was delivered by

VALENTINE, J.: Nearly all the legal questions raised in this case have heretofore been decided in other cases, and it will therefore not be necessary for us now to enter upon any discussion of them. All except the last two questions raised by the plaintiffs in error will be found settled in the following cases and statutes, to-wit: *Clough v. McDonald*, 18 Kas. 114, first proposition of the syllabus; *Neitzel v. Hunter*, ante, p. 221, first and fourth propositions of the syllabus; *Dougherty v. Porter*, 18 Kas. 206, first and third propositions of the syllabus; *Cooper v. Condon*, 15 Kas. 572, first proposition of the syllabus; Gen. Stat. 743, sections 569, 572.

The two new questions are as follows: First, Did the court below in rendering judgment in this case declare that the mortgage of the Missouri Valley Life Insurance Company was a lien upon property not included in said mortgage? Second, Did the court below err in rendering judgment in favor of the Missouri Valley Life Insurance Company for attorney-fees?

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I. Said mortgage included the following property situated in the city of Concordia, Cloud county, to-wit: All or nearly all of block 195, with a stone grist-mill and a steam saw-mill upon it, and some lots, and "all and singular the hereditaments and appurtenances thereunto belonging." The court below in rendering judgment declared "that the said mortgage is the first lien upon the lands in said mortgage and in the said answer and in the said petition described." Now this declaration of the court below is undoubtedly correct with reference to the lands described in said mortgage and said answer; but whether it is correct with reference to the lands described in said petition, is questioned. The petition not only described said block, and lots, and mills, but also in connection with said block and mills mentioned a *dam and water-power* in the following words to-wit: "and the dam and water-power *appurtenant* thereto." The plaintiffs in error also in their mortgage to McKinnon & Co., (which is the mortgage described in the petition,) mention said block and mills, and dam and water-power in the same way. That is, they admit in their mortgage to McKinnon & Co. that the dam and water-power are appurtenant to said block and mills; and there is nothing in the record that we have found tending to show the contrary. Indeed, from anything that we have found in the record said dam and water-power may have been on the land described in the said first-mentioned mortgage. But whether they were on such land or not they were *appurtenant* thereto, and were therefore included in the mortgage; and the court below did not err in declaring the mortgage a lien thereon. Whether the court below erred in determining the priority of the various liens as between the various parties who are now defendants in error, is not a question for the plaintiffs in error to raise. The defendants in error are not complaining.

II. The plaintiffs in error in their mortgage to the Missouri Valley Life Insurance Company stipulated as follows: "And the parties of the first part herein promise and agree, to and with said party of the second part, that in any action that

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may be brought for any amount that may be due and unpaid upon said note, or by virtue of any of the provisions of this mortgage, or to enforce the same, the party of the second part or its assigns shall be entitled to and may have, recover, and receive, of and from the said parties of the first part, ten per cent. upon the amount due and recoverable at the time payment shall be made, or judgment rendered, as and for fees and compensation of attorney or attorneys of the party of the second part or its assigns for services in such action," etc. The plaintiffs in error claim that no judgment for attorney-fees should have been rendered in this case in favor of the Missouri Valley Life Insurance Company because *the action* was not brought by such company. McKinnon & Co. were the plaintiffs in the court below, and the Missouri Valley Life Insurance Company was a co-defendant with the plaintiffs in error. The insurance company set up in its answer its cause of action on said mortgage, and on the note which the mortgage was given to secure. This we think was in effect bringing an action on said note and mortgage. Such a view seems to be recognized in the case of *Toby v. Allen*, 3 Kas. 399, 412, 418. And such a view we think is generally recognized.

The judgment of the court below will be affirmed.

All the Justices concurring.

ALFRED FISHER V. COMM'RS OF RUSH COUNTY.

1. **ASSESSMENT AND TAXATION; *Property and Business Outside, and Beyond the Jurisdiction of Kansas.*** Persons residing in this state are not subject to assessment and taxation in respect to business or interests beyond the territory and jurisdiction of the state, and which the laws of the state cannot in any way reach or protect.
2. ——— The maxim of the common law, *Mobilia sequuntur personam*, does not always nor absolutely apply for the purpose of taxation to intangible personal property.
3. ——— Where, prior to 1875, a citizen of Rush county in this state sold and conveyed certain real estate situated in Iowa, and received in part consideration from the vendee four promissory notes amounting in the aggregate to the sum of \$1,800, and the notes were secured by a mortgage on the real estate conveyed by the vendor, and the contract was made in Iowa between the parties, the notes and mortgage were made payable in that state, and left there by the owner for collection, and never were in Kansas, an attempt to list and tax said notes in 1875, by the officials of Rush county, was unauthorized and illegal. [*Wilcox v. Ellis*, 14-588; *Brooks v. Kager*, 23-115; *Blain v. Irby*, 25-501.]

Error from Rush District Court.

ALL necessary facts are stated in the opinion. *Fisher* applied to the *Board of County Commissioners* and asked such board to remit certain personal-property taxes assessed against him. The county board refused to remit the taxes. The question of the legality of the taxes was by agreement submitted to the district court, and such court, at the May Term 1876, held and decreed that such taxes were legal and valid. From this decision and judgment *Fisher* appeals, and brings the case here on error.

E. N. Gunn, and *S. W. Taylor*, for plaintiff in error.

The opinion of the court was delivered by

HORTON, C. J.: The facts of this case are briefly these: Prior to 1875, Alfred Fisher, of Rush county, sold and conveyed certain lands which he owned in the state of Iowa, and

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received as part consideration from the purchaser four promissory notes, amounting in the aggregate to the sum of \$1,800, the said notes being secured by a mortgage on the lands sold. The contract for the sale of the lands was made in Iowa, the notes were made payable in that state, were left in that state for collection, and have never been in the state of Kansas. The assessor of Brookdale township, Rush county, in 1875 listed these notes for taxation; and the sole question presented to us is, whether the said notes, deposited in the state of Iowa, and secured by a mortgage upon premises situated there, are subject to taxation under the laws of this state. To be taxable here, resort must be had to a legal fiction to draw the debt into Kansas. This court, in *Wilcox v. Ellis*, 14 Kas. 588, held the maxim, *Mobilia sequuntur personam*, does not fully apply for the purposes of taxation, even where the property is intangible. Following the argument there expressed, we find from the facts in the case at bar, that nothing pertaining to the notes, or to the debt which they evidence, has ever been in Kansas, except that the owner of the notes is here. Now as the state of Iowa, and not Kansas, must furnish the plaintiff in error with all the remedies that he may have for the enforcement of all his rights connected with said notes, debt, etc., it would seem more just, if said notes are to be taxed at all, that the state of Iowa and not Kansas should tax them, and that we should not resort to legal fictions to give the state of Kansas the right to levy taxes thereon. In support of this doctrine, we refer to the case of the *People v. Gardner*, 57 Barb. 356, in which the court says: "By a legal fiction, the personal estate of the owner has, for some purposes, been deemed to follow its owner; but in the adjustment of systems of taxation this fiction has been very generally rejected, on the ground that it was productive of unjust consequences." See also, *Hoyt v. Commissioners, &c.*, 23 N. Y. 225; *People v. Commissioners, &c.*, 35 N. Y. 440; *Green v. Van Buskirk*, 7 Wall. 139; and cases of *State Tax on Foreign-Held Bonds*, 15 Wall. 800, 819; *Tuppan v. Merchants National Bank*, 19 Wall. 490. Concluding that per-

sonal property and business do not always follow the owner for the purpose of taxation, if the business transacted or the *situs* of the property is not in the state where the owner resides, we must answer the question presented in the negative, and decide the notes in controversy not taxable in Kansas.

It may by some be considered unjust and unequal that a citizen of this state should be allowed to possess notes and debts in another state secured by mortgages, and not pay taxes upon them here. It should not be forgotten that the duty of the judicial branch of the state government is limited to declaring the law as it exists; and any considerations involving its policy or impolicy belong properly to the legislative power. Still, we can see no good reason to complain at the results reached. Taxation and protection are correlative terms. Protection to that portion of property not taken or absorbed by the tax, is the consideration or compensation for all legitimate taxation. Without this protection, or some benefit to be returned therefor, taxation would be but another form for spoliation, or confiscation. To sustain the decision of the district court would be to ignore this fundamental principle upon which taxation is based, and authorize the assessment and taxation of persons in respect to business or interests beyond the territory and jurisdiction of Kansas, and which the laws of the State could in no way reach or protect. This principle, if logically followed out, would extend to real estate and to all conceivable business, titles, and transactions of the citizens of our commonwealth in other states and countries, and at once the power of taxation would be limited no longer to persons, property, and business within its jurisdiction. No argument should be necessary to prove the weakness of such a proposition, for the power of taxation, however vast in its character, and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state.

No brief was filed in this court on the part of the defendant in error, and hence we have disregarded the questionable man-

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ner in which the case comes here, and have passed upon the facts presented, regardless of any irregularities appearing in the proceedings.

The judgment of the district court will be reversed.

All the Justices concurring.

P. B. CASTLE v. D. W. HOUSTON.

1. **LIBEL; Defense, in Criminal Prosecutions.** In all criminal prosecutions for libel, the truth of the matter charged as libelous is not a full and complete defense unless it appears that the matters charged were published for public benefit; or in other words, that the alleged libelous matter was published for justifiable ends; but in all such proceedings, the jury, after having received the direction of the court, shall have the right to determine, at their discretion, the law and the fact. [*Mundy v. Wight*, 28-177.]
2. ——— **Defense in Civil Actions for Damages.** In all civil actions for libel, brought by the party claiming to have been defamed, where the defendant alleges and establishes the truth of the matter charged as defamatory, such defendant is justified in law, and exempt from all civil responsibility. In such actions, the jury must receive and accept the direction of the court as to the law.
3. ——— In a civil action prosecuted by a party to recover damages against the publisher of a newspaper for an alleged libel, and a plea of justification is filed, and thereon evidence of the truth of the matter published is submitted, and the court instructs the jury to the effect that "the fact of the language being true is not alone an answer to the charge, but can only be shown in mitigation of damages; that it is not a defense simply to show the truth of the matter published, but the party must go further and show that it was not only true but that he did it with good motives and for justifiable ends; that he had some purpose in view that was justifiable; that if the defendant acted honestly, for good purposes, and for justifiable ends, and what he said was true, then he is to be excused or acquitted;" and after a verdict for the plaintiff, on motion of the defendant, the court grants a new trial for misdirection of the jury, *held*, not error, as the instructions are not applicable in a civil action.
4. ——— **Pleading; Justification.** Where, in an answer to a civil action of libel, the defendant files the defense "that the matters charged as defamatory are true," and no motion is filed to make the answer more specific; no demurrer is presented thereto; no objections are taken on the

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trial to the proof of the truth of the alleged libelous publication, and the court and all the parties treat the defense as one of justification on the ground of the truth of the publication, *held*, that it is too late after the verdict to attack such answer as insufficient as a plea of justification.

Error from Leavenworth District Court.

CIVIL ACTION, brought by *Castle*, to recover damages sustained by him by reason of a certain alleged libel published by *Houston*. The defendant, *Houston*, was the editor and publisher of the *Daily Commercial*, a newspaper printed at Leavenworth, where *Castle* resided. In the winter of 1875, while the state legislature was in session at Topeka, *Houston* had a correspondent at Topeka, who wrote regularly for the *Commercial* in regard to proceedings and matters pending in the legislature. Previous to the meeting of the legislature certain adverse criticisms had been made in several quarters, notably in the annual report of the auditor of state, regarding the insurance department and its management; and the plaintiff, *Castle*, was generally credited with inciting and provoking such criticisms. The *Commercial's* correspondent was A. J. DOWNING, and he wrote over the signature, "JACK." The alleged libel appeared in one of "JACK's" letters, and is set out in the opinion, *infra*. The pleadings and proceedings in the district court are sufficiently stated in the opinion. The district court, at the May Term 1875, after verdict in favor of the plaintiff, on motion set aside such verdict, and granted a new trial; and from such order and proceeding, *Castle* appeals, and brings the case here on error.

Byron Sherry, and *Scott Ashton*, for plaintiff.

T. A. Hurd, for defendant.

The opinion of the court was delivered by

HORTON, C. J.: This was an action commenced in the district court of Leavenworth county, to recover damages for libel. The petition alleges in substance, that the defendant was editor, proprietor, and publisher, of the Leavenworth Daily Commercial, a newspaper printed in the city of Leaven-

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worth, and that on the 20th of January 1875, there was published in the said paper, of and concerning the plaintiff, a certain false and malicious libel, in words as follows, to-wit:

"The insurance department of our state will in all probability be subject to a thorough investigation, as a bill has already been introduced into the senate to investigate. This is right. Every insurance company in the state is willing an investigation be had. Mr. Russell, ex-superintendent, invites it, and the present superintendent is anxious for the same.

"There is a cadaverous-looking individual of Leavenworth loafing around here who seems exceedingly anxious for an investigation, in hopes that the superintendent will be done away with and the department presided over by the auditor. A clerkship in the dim distance makes him enthuse. I cannot blame Castle much, knowing that board and other bills too numerous to mention have been pressing him for some time, and then doubtless the Northwestern Life would be glad to hear from him as he was published as a defaulter to that company. He is one of the most promising individuals (to his landlords) I know of, and the cry of fraud from such a completely played-out insurance agent has but little bearing with an intelligent body of legislators. If his caliber was as large as his bore, he would be a success. JACK."

In answer to the petition, defendant set up three defenses, *first*, an admission that the article complained of was published in defendant's paper, of and concerning the plaintiff, but denied that the same was published with malice; *second*, that defendant had no personal knowledge of the publication of the article at the time of its publication, with the further allegation, that the several matters and things in the article, complained of as defamatory, were true, and published for justifiable ends and purposes; and *third*, a general denial. To the answer plaintiff filed a reply, denying generally, save and except what was admitted, all the allegations in the answer. When the case came on for trial, it was submitted to a jury, and plaintiff obtained a verdict for \$1,250, whereupon defendant gave notice of motion for a new trial, which was filed, and after being argued was by the court sustained, upon the ground that the court had erred in its instructions to the jury.

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The plaintiff excepted, and has brought the case here for review.

It appears from the record that the court below granted the motion for a new trial on the ground that the jury was misdirected by the following instructions, viz.:

"The fact of the language being true, is not alone an answer to the charge, but can only be shown in mitigation of damages.

"It is not a defense simply to show the truth of the matter published, but the party must go further, and show that it was not only true, but that he acted with good motives and for a justifiable end, and that he had some purpose in view that was justifiable. If that be the case, if he acts honestly for good purposes and for justifiable ends, and what he says is true, then he is to be excused or acquitted."

In this condition of the case, we must first inquire whether the instructions above set forth were improperly given on the trial. If erroneous as a statement of the law controlling the case, they certainly may have misled the jury. If correct in principle, and applicable under the issues presented, the court erred in granting a new trial for the reason given. An examination of this question will lead to a brief review of the law of libel in both criminal and civil prosecutions, so far as to consider and determine when a defendant may be permitted to give the truth in evidence as a full justification of alleged libelous matter.

It was at one time the rule of the common law, that the truth of the charge, however honorable and praiseworthy the motives of the publisher, could not be given in evidence in a criminal prosecution. Hence originated the familiar maxim, "The greater the truth the greater the libel." This doctrine was based upon the theory, that where it was honestly believed a particular person had committed a crime, it was the duty of him who so believed or so knew, to cause the offender to be prosecuted and brought to justice, as in a settled state of government a party grieved ought to complain for an injury to the settled course of law; and to neglect this duty, and publish the offense to the world, thereby bringing the party

published into disgrace or ridicule, without an opportunity to show by the judgment of a court that he was innocent, was libelous; and if the matter charged was in fact true, (thereby insuring social ostracism,) the injury caused by the publication was much greater than where the publication was false. A false publication, it was contended, could be explained and exposed; a true one was difficult to explain away. As an additional reason for this rule, it was also held that such publications, even if true, were provocative of breaches of the peace, and the greater the truth contained therein the greater the liability of hostile meetings therefrom. That this was the true rule of the common law has been denied by many of the ablest jurists in both England and America, who maintained that the liberty of the press consisted in the right to publish with impunity, truth, with good motives and for justifiable ends, whether it respected government, magistracy, or individuals. It certainly was derived from the polluted source of the star-chamber, and was considered at the time an innovation, but like some other precedents, although arbitrarily and unjustly established, it came to be followed generally by the courts, and sustained as the law of the land. In 1804, in the state of New York, this principle of law was recognized and asserted in the case of *The People v. Croswell*. In that case the defendant was prosecuted for libel for having published in his newspaper, at Hudson, in that state, called the Wasp, the charge against Thomas Jefferson, then president, that he (Jefferson) paid Callender for calling Washington a traitor, a robber, and a perjurer. The defendant, through his counsel, Alexander Hamilton, applied to the judge at the circuit to put off the trial to obtain the testimony of Callender to prove the publication true. Lewis, C. J., presiding, denied the motion, because the testimony was inadmissible, as the truth of the facts charged as libelous did not amount to a complete justification. 8 Johns. (N. Y.) Cases, 336. This case attracted so much attention that, after a verdict of guilty had been rendered, and while the case was pending in the courts of New York on a motion for a new trial, the legislature of that state passed

a law providing that in every prosecution for writing or publishing any libel, it should be lawful for the defendant, upon the trial, to give in evidence, in his defense, the truth of the matter contained in the publication charged as libelous, and that such evidence should not be a justification, unless it should be further made satisfactorily to appear that the matter charged as libelous was published with good motives and for justifiable ends. Since the adoption of the New York statute declaratory of the law of libel in criminal actions, nearly every state in the Union has made the subject a matter of constitutional or statutory provision. The wise framers of our own constitution, peculiarly acquainted with the beneficial influences of free discussion and a free press, as participants in the historical incidents and conflicts surrounding the settlement of the territory of Kansas, modified the tyrannical and harsh rule of the common law as stated in the star-chamber of England, and thereafter generally understood and interpreted, by providing in section 11 of our bill of rights, that—

“The liberty of the press shall be inviolate; and all persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such right; and in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted.”

Nevertheless, these framers, in a spirit of wisdom, and to preserve order, were careful not to give, as against the interests of the public, complete license even to the truth when published for the gratification of the worst of passions, or to affect the peace and happiness of society. They prescribe that the *accused* should be acquitted, not on proof of the truth of the charge alone, but it should further appear the publication was made for justifiable ends. Following the intendment of the constitution, the legislature afterward provided in the act relating to crimes and punishments that—

“In all prosecutions or indictments for libel, the truth thereof may be given in evidence to the jury, and if it appears to them that the matter as charged as libelous was

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true, and was published with good motives and for justifiable ends, the defendant shall be acquitted." (Sec. 272, Gen. Stat. 376.)

But the law-makers, jealous of the liberty of the press, and fearing the construction of the law by the courts in such prosecution, further provided in a succeeding section of the same act, that —

"In all indictments or prosecutions for libel, the jury, after having received the direction of the court, shall have the right to determine at their discretion, the law and the fact." (Sec. 275, Gen. Stat. 377.)

While the rule of the common law, as generally applied, was so exacting and rigorous to the defense of justification in criminal prosecutions for libel, a different doctrine was applicable in civil cases. In the case of *King v. Root*, 4 Wend. 114, 139, Chancellor Walworth clearly states this difference as follows: "The difficulty which existed in England, previous to Mr. Fox's libel act, was, that in criminal prosecutions the defendant was not permitted to give the truth in evidence; and yet the jury were required to imply malice. But in civil cases, the defendant was permitted to give the truth in evidence as a full justification. Such was declared to be the law by the judges at the time that bill was under discussion in parliament, and there never has been any alteration of the law in England on this subject in civil suits." The case of *King v. Root*, supra, was originally tried at one of the circuits in New York before Hon. Samuel R. Betts. The defendants, King and Verplanck, were editors of the New York American, printed in the city of New York in 1824. These editors published concerning one Root, lieutenant-governor of that state, among other things, that in August of that year he addressed the state senate, then in session, "while blind with passion and rum, when he was unwashed, unshaven, haggard, with tobacco-juice trickling from the corners of his mouth, and in a condition outraging all order, decency and forbearance." Root brought a civil action to recover damages for the alleged libel, and the defendants admitted the publication

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and pleaded the truth as justification. The trial judge instructed the jury, "if the defendants had only published the truth, they had an unquestionable right to do that, and they must be acquitted."

Blackstone, in his Commentaries, asserts that the truth could always be given in civil cases in justification of libel, and seems to consider the defendant's exemption in such instances as extended to him in consideration of his merit in having warned the public against the evil practices of a delinquent. He says that it is *damnum absque injuria*, intimating that the acts of the defendant, who justifies a libelous publication, do not constitute a wrong in its legal sense, and then proceeds to observe that this is agreeable to the reasoning of the civil law. (3 Bl. Com. 125.) This is illogical; and Starkie bases this exemption on the better reason, that in such instances the plaintiff has excluded himself from his right of action at law by his own misconduct, and not to any merit appertaining to the defendant. When a plaintiff is really guilty of the offense imputed, he does not offer himself to the court as a blameless party, seeking a remedy for a malicious mischief; his original misbehavior taints the whole transaction with which it is connected, and precludes him from recovering that compensation to which all innocent persons would be entitled. (Folkard's Starkie on Slander and Libel, Am. ed., § 692.)

There are many good and sufficient reasons why a publisher of a statement, true in fact, yet given to the public with a malicious design to create mischief, should be amenable to the criminal laws, and not be liable in a civil action. On general principles no right to damages can be founded on a publication of the truth, from the consideration that the reason for awarding damages in every such case fails. The right to compensation in point of natural justice is founded on deception and fraud which have been practiced by the defendant to the detriment of the plaintiff. If the imputation is true, there is no deception or fraud, and no right to compensation. The criminal action in libel is supported to prevent and restrain the commission of mischief and inconvenience to society. Take

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the case of two men who agree to engage together in fisticuffs: the law for the protection of the peace of society, and to prevent greater collisions, may arrest and punish both combatants, and yet neither may be able to recover from the other personal damages. Where a person makes the publication solely to disturb the harmony and happiness of society, or to maliciously annoy and injure the feelings of others, or to create misery by exposing the latent and personal defects of associates or acquaintances, the interests of the public require some preventive notwithstanding the truth of the publication. This is furnished by the criminal law. But mere injury to the imagination or feeling, however malicious it may be in its origin, or painful in its consequences, is not properly the subject of remedy by an action for damages. Such offenses being unconnected with any substantive right, are incapable of pecuniary admeasurement and redress. They admit of no exact definition; and, therefore, to extend a remedy to such injuries generally, would be productive of great uncertainty and inconvenience, and open far too wide a field of litigation. Again, it seems to be clear that a party who acquires an advantage by concealing the truth, which he could not have attained to had he divulged it, so far is guilty of fraud in the concealment that he cannot upon any principle claim a right to acquire that benefit, and therefore cannot complain that he is injured by the publication of the truth. (Starkie, *id.*, 35.) In this view the truth hurts no one.

In accordance with the doctrine that the defendant is justified in law, and exempt from all civil responsibility, if that which he publishes be true, it is provided in the civil code, section 126, that—

“In all actions mentioned in the last section, (libel and slander,) the defendant may allege the truth of the matter charged as defamatory, and may prove the same and any mitigating circumstances, to reduce the amount of damages, or he may prove either.”

This section of the code may be construed to mean, “in actions for libel or slander, the defendant may allege the truth of

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the matter charged as defamatory, and may prove the same (as a defense or full justification,) and (he may also allege) any mitigating circumstances (in the same answer) to reduce the amount of damages, or he may prove either (the truth as a defense, or mitigating circumstances to reduce the damages.)" In other words, under the code, the truth is a full justification in a civil action; and in the absence of justification, mitigating circumstances may be proved to reduce the damages; and justification and mitigation may be set forth in the same answer, and the defendant may prove either, or both. (Gen. Stat. 653.)

If it be contended that within the provisions of the constitution, the proof of the truth as a defense in a civil action is no justification, except it be also made to appear that the publication was had for justifiable ends, we answer, that in view of the rule of law applicable in such cases at the time of the adoption of the state constitution, we do not think such a construction proper. It is not in accordance with the spirit or the letter of that instrument. It provides that in civil and criminal actions the truth may be given in evidence to the jury, and where an *accused* is on trial, that is, where a person charged with a crime for the publication of alleged libelous matter is being tried, he is not to be *acquitted* except the publication is true and the same was published for justifiable ends. In that event only is the *accused* party entitled to an acquittal. The word "*accused*" is used in the constitution; and an "*accused*" being one who is charged with a crime or misdemeanor, it cannot well be said to apply to a defendant in a civil action. If the motive of the party publishing the truth is to be considered in civil suits, under the constitution, then this section quoted, instead of operating to the protection of individuals charged in personal actions for damages for the publication of alleged libelous matter, as was doubtless intended by the framers of the constitution, would have the effect to hold parties responsible in cases where at the common law they would be entitled to a verdict. The constitution contains no grant of powers to the legislature. It is only a limitation on the exercise of its authority; and the legislature, in its discretion, has

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the right to pass any act not violative of the state or federal constitutions. The object of section 11 of the bill of rights was to prevent the passage of any law in Kansas restraining or abridging the liberty of speech and of the press. By it, the harsh rule of the common law, as generally recognized in libel prosecutions, was greatly modified; but we cannot seriously think that it was intended thereby to abrogate that principle of the common law—sustained and upheld under the exacting and arbitrary construction of libels in England—that proof of the truth is a complete justification in all civil actions. Nor can we believe that thereby it was intended that the legislative power of the state was forever deprived of conferring the right upon a defendant in a civil action of libel to plead the truth of the words charged as a full and complete defense. To assert otherwise would be to assert that the constitution abridged and curtailed the liberty of the press in civil actions more than the common law—more than the provisions of the constitutions of other states. The modification of the common law by the constitution we construe in favor of the liberty of the press, not against it. To conclude otherwise would be to ignore the popular sentiment in Kansas at the adoption of the constitution, and assume that the successful contestants in behalf of a free press were forgetful in their victories of its powerful influences in their behalf, or had unwittingly deprived themselves of rights allowed in England under the sway of despotic monarchs and the rule of arbitrary judges. The constitution of Rhode Island provides, “in all trials for libel, both civil and criminal, the truth, unless published from malicious motives, shall be sufficient defense to the person charged.” And it was held in that state that the truth of the charge is a good defense in a civil action for libel. (*Perry v. Mann*, 1 R. I. 263.) From our review of the authorities, the provision of our constitution, the civil and criminal codes, we deduce these important principles:

First: In all criminal prosecutions, the truth of the libel is no defense unless it was for public benefit that the matters

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charged should be published; or in other words, that the alleged libelous matter was true in fact, and was published for justifiable ends; but in all such proceedings the jury have the right to determine at their discretion the law and the fact.

Second: In all civil actions of libel brought by the party claiming to have been defamed, where the defendant alleges and establishes the truth of the matter charged as defamatory, such defendant is justified in law, and exempt from all civil responsibility. In such actions the jury must receive and accept the direction of the court as to the law.

Under this view, the court below misdirected the jury in a very material point, and properly, on attention being again called to the matter by a motion for a new trial, granted such motion, and set the case again for hearing. The instructions given might have been applicable in a criminal proceeding, where the motive of the publication is important, and where the jury have the right to determine the law as well as the fact; but were erroneous in a civil action, where the facts charged were proven in justification. The instructions assumed that the truth is not a full and complete defense unless it was shown to have been published for good purposes and justifiable ends. This is not correct. If the charges made by the defendant are true, however malicious, no action lies. (*Root v. King*, 7 Cow. 613, 632; *Townsend on Slander and Libel*, § 211; *Foss v. Hildreth*, 10 Allen, 76; *Baum v. Clause*, 5 Hill, 196; 1 Stark. on Sland. 229; *Rayne v. Taylor*, 14 La. An. 406.)

The plaintiff in error contends that the instructions could not have been prejudicial to the defendant in error, as the plea of justification was insufficient in form, and therefore the district court erred in granting a new trial. The answer among other things alleged "that the matters charged as defamatory were true." No motion was filed in the case to make the answer more definite or certain; no demurrer was presented; no objection taken to the evidence of the truth of the charge, as we can ascertain; and from the record we must assume

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that the case was tried on the theory that the defendant was attempting to show as justification the truth of the publication, and we may assume that the evidence tended to prove the truth of the publication. Under these circumstances the point now made by counsel of the plaintiff as to the immateriality of the instructions is not well taken. The case was heard by the district court on the supposition that the plea of justification was sufficiently formal—the instructions of the court discuss what is necessary to be shown to make the truth a full justification, and the jury having been misdirected in the hurry of the trial, no error was committed in setting aside the verdict. Had the action of the court been otherwise, on proper application, we would have reversed the judgment. If any delay has resulted to the plaintiff in error in obtaining a speedy trial, it has been caused by the pendency of this proceeding in error in this court, where it was brought by the plaintiff. For this action the defendant in error was not responsible.

The order of the district court setting aside the verdict of the jury in the case and granting a new trial is affirmed.

All the Justices concurring.

REPORTER'S NOTE.—The decision and opinion in the foregoing case when first announced attracted general attention, not only among members of the legal profession, but editors, journalists, and public men generally, as well, being the first authoritative exposition of the "LAW OF LIBEL," in this state. The construction given by the court to section 11 of the bill of rights, which had previously been much discussed, and upon which there was a wide difference of opinion, as prescribing one rule for civil actions, and another and different rule for criminal prosecutions, is new. Two constructions had previously been contended for—first, that in all actions for libel, civil and criminal, proof of the truth of the matter charged or alleged as libelous, was a complete defense, without regard to the motive or purpose with which the publication was made; second, that in all such actions, civil and criminal, the defense was not complete unless it was shown on the trial that the alleged libelous matter was true in fact and that it was published from proper motives and for justifiable ends. As showing something of the opinions entertained by this latter class of constructionists, the following extract is made from an article written by "W. C. W." on Kansas

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journalism, and published in the Topeka "Daily Commonwealth" of 12th July 1877, under the heading, "ABOUT LIBELS:"

"And this brings us to the 'law of libel.' * * * We frequently notice in the newspapers of the day, and especially those conducted by the younger and more inexperienced journalists, the idea put forth or asserted, that whatever is true may be published by any newspaper with impunity. No more fearful mistake is made by any journalist regarding the conduct of his paper. 'The greater the truth, the greater the libel,' is a familiar law maxim. * * * This rule was founded upon the doctrine, that where it was honestly believed a particular person had committed a crime, it was the duty of him who so believed, or who so knew, to cause the offender to be prosecuted, and brought to justice; and to neglect this duty, and yet publish the offense to the world, thereby bringing the party published into disrepute and general disgrace without an opportunity to show by the judgment of a court that he was innocent, was slanderous, or libelous; and if the matter charged was in fact true, thereby insuring social ostracism, the injury caused by the publication was much greater than where the publication was false. A false publication could be explained and exposed—a true one was difficult to explain away. This rule of the common law still obtains in some of the American states. In some it has been modified, and in others it has been nearly abrogated. In Kansas it has been only modified. Here, the general rule still is, 'the greater the truth, the greater the libel.' The modification is found in our bill of rights—thus:

"Sec. 11. The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, *being responsible for the abuse of such right*; and in all civil or criminal actions for libel, *the truth* may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted."

"The meaning of this clause is, that if the 'alleged libelous matter' be in fact true, 'the truth' may be given in evidence,' and a verdict rendered for the defendant in any action, civil or criminal, *if it shall satisfactorily 'appear that the alleged libelous matter was published for justifiable ends.'* But it requires both propositions to constitute a justification—the libelous matter must be true, and the ends for which the publication was made must have justified or warranted the publication. Publishing facts, solely to injure another, and not to benefit or protect the public, is not justifiable, but libelous; and publishing falsehoods, even though believed to be true, and from the best of motives to the public, is also libelous. This we believe is the correct construction of the clause in question. Journalists and others will therefore see that their first duty, before publishing a damaging statement against any one, is, to see to it that they get the truth; and next, to be sure that they are not actuated by personal spite, or malice, or partisanship merely, but that the interests of the public require the publication of the facts. And let them remember this—that if in a given case, a defendant in a libel suit should be able to prove his statement true, and yet unable to show that the *public interests* justified the publication, such *proof* and such *failure of proof* would be conclusive of the fact that his publication was *malicious*, and therefore libelous. If Kansas editors and journalists would study the 'law of libel' somewhat, we think Kansas journalism would be improved."

The views so expressed appear to have been correct with respect to *criminal* actions, but not so with respect to civil actions for damages. The distinction made by the court in the *Castle-Houston* case, between civil and criminal actions did not, when announced, satisfy either class of the former disputants. Editors and journalists generally, contending for the "largest

Discussion, on the "Law of Libel."

liberty" for the press, (which with some means the fullest freedom, *without legal responsibility for its abuse*,) regarded the decision of the court as right with respect to *civil* actions, but as erroneous with respect to *criminal* prosecutions; while many lawyers, and the more conservative among the journalists and public men generally, regarded the decision of the court as a proper exposition and construction of § 11 of the bill of rights with respect to *criminal* actions, yet as erroneous with respect to *civil* actions. Immediately upon the announcement of such decision the general discussion was reopened. While it was conceded that *the law* was settled by the decision of the court, the correctness of the decision itself, upon principle and authority, was not universally acquiesced in. Some of the discussions then appearing in the newspapers are valuable contributions upon "*The Law of Libel*" in Kansas, and it may not be unprofitable to preserve them in connection with the official report of the case decided. To this end the following articles are appended. The two articles signed "G." were written by Hon. ROBERT CROZIER, of Leavenworth, formerly the Chief Justice of the Supreme Court, and now Judge of the First Judicial District. The writer of the article signed "D." resides at Atchison, and is a lawyer of eminence, ability, and experience.

THE LAW OF LIBEL.*—To the Editor of the Commonwealth: In the case of *Castle v. Houston*, recently decided by the supreme court of this state, it was held that in a civil action for libel, the truth of the alleged libelous matter was a complete defense. In the opinion of the court, delivered by Chief Justice HORROR, the following may be found:

"*First:* In all criminal prosecutions the truth of the libel is no defense, unless it was for public benefit that the matters charged should be published; or in other words, that the alleged libelous matter was true in fact, and was published for justifiable ends; but in all such proceedings the jury have the right to determine at their discretion the law and the fact.

"*Second:* In all civil actions of libel brought by the party claiming to have been defamed, where the defendant alleges and establishes the truth of the matter charged as defamatory, such defendant is justified in law, and exempt from all civil responsibility. In such actions the jury must receive and accept the direction of the court as to the law."

Doubtless the court was right in the first of these propositions, but that it was correct in the second, is not so clear; and I beg to submit, modestly, some considerations bearing upon the subject. The following constitutional and statutory provisions are cited by the Chief Justice as applicable in the matter:

"The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such right; and in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted."—*Section 11, Bill of Rights.*

"In all prosecutions or indictments for libel, the truth thereof may be given in evidence to the jury; and if it appears to them that the matter charged as libelous was true, and was published with good motives and for justifiable ends, the defendant shall be acquitted."—*Section 272, Crimes Act.*

"In all indictments or prosecutions for libel, the jury, after having received the direction of the court, shall have the right to determine, at their discretion, the law and the fact."—*Section 273, Crimes Act.*

"In all actions mentioned in the last section, (libel and slander,) the defendant may allege the truth of the matter charged as defamatory, and may prove the same, and any mitigating circumstances, to reduce the amount of damages, or he may prove either."—*Section 285, Civil Code.*

* THIS article was first published in the Topeka Commonwealth, March 5th, 1878.

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After stating the undeniable fact, and giving Mr. Starkie's reasoning in defense thereof, that in civil cases, in England, the truth is a complete defense, and having showed quite conclusively that the same rule obtains in the state of New York, the Chief Justice proceeds to argue that, notwithstanding the above quoted constitutional provision, the law is the same in Kansas; and of course he is right, unless this provision compels a different conclusion. In examining the subject it is to be constantly borne in mind, that the question is, What is the law? not, What should it be? As to the latter, different opinions may be entertained; but as to the former, there should be but one.

The Chief Justice concedes that in criminal cases, by reason of the constitutional provision above quoted, the truth of the alleged libel, of itself, is not, nor can it be made a complete defense; but he claims among other reasons, that because of the use of the word "*accused*," the whole section, so far as the truth being an incomplete defense is concerned, is limited to criminal cases. That such was not the intention of the framers of the constitution, it seems to me is conclusively shown by the history and language of the section. In the officially published proceedings of the convention it appears, (pp. 100 to 103,) that on July 15th 1859, Mr. Hutchinson, chairman of the committee on preamble and bill of rights, reported, among other things, the following as the eleventh section of the proposed bill of rights:

"Sec. 11. The liberty of the press shall be forever inviolate, and all persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such right."

On July 18th, (p. 194,) the report of the committee being before the convention for consideration, Mr. Ingalls offered the following amendment, which was adopted:

"At the close of the section, add the following words: 'and in all actions for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the alleged libelous matter is true, and was published for justifiable ends, the accused party shall be discharged or acquitted.'"

The report of the committee, thus amended, together with other portions of the constitution, having been referred to the committee on phraseology and arrangement, on July 25th, (p. 345,) that committee through Mr. Ingalls, its chairman, reported it back with amendments—among others the following:

"In section 11, strike out word 'forever.' * * * Before 'actions' read, (insert,) '*civil, or criminal*.' After word 'jury,' read, 'and if it shall appear.' Strike out words, '*is true, and*.' Strike out '*discharged or*.'" * * *

"The several amendments recommended by the committee on phraseology and arrangement were then considered and concurred in, by sections."

Had the section remained as amended upon the motion of Mr. Ingalls, on July 18th, there would have been strong ground for the position that the words "accused," "discharged," and "acquitted," limited the word "actions," to criminal proceedings; not so much because of the words "accused," and "acquitted," (as they would be admissible, and sometimes are used, in civil proceedings,) but because of the word "discharged," which is used in reference to persons in criminal or quasi criminal proceedings alone. According to lexicographers, "accused" sometimes means "charged," "called to account," and "acquitted," would be as appropriate in a civil as in a criminal proceeding for libel, as in either case the verdict for the defendant at common law would be "not guilty." As to the word "acquitted," the Chief Justice doubtless would agree with me, inasmuch as he cites with approval the case of *King v. Root*, 4 Wend. 414, a civil action in which the trial judge instructed the jury that in a certain contingency, "the defendants must be acquitted."

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But the section was not permitted so to remain. The attention of the convention was specially called to the language used; and as if for the sole purpose of prohibiting a construction that would limit the word "actions" to criminal proceedings, the committee on phraseology asked the convention to insert immediately preceding the word *actions* the very words of all others the most appropriate for that purpose, viz., "*civil or criminal*," and also to strike out "*discharged*," a word peculiarly appropriate in criminal proceeding. Had the conceded object of the convention been to prevent the very construction now placed upon the section by the supreme court, it would be difficult, in the light of history, to conceive of a more direct mode of attempting its accomplishment.

The Chief Justice attempts to fortify the position taken by the court by referring to the sections of the statutes above quoted; but in this, it seems to me, he is at least inconsequential, if not unfortunate. After quoting and commenting upon the constitutional provision, he says: "Following the intendment of the constitution, the legislature afterward provided in the act relating to crimes and punishments, that in prosecutions, or indictments for libel," etc., (setting out sections 272 and 275 above quoted.) Now, instead of the legislature "*following* the intendment of the constitution" in the enactment of these sections of the crimes act, they were in fact enacted by the territorial legislature in *February 1859*—five months before the convention met to frame the constitution, and more than two years before the first legislature under it assembled. (Gen. Laws 1859, pp. 280, 281, §§ 263, 267; Comp. Laws 1862, pp. 338, 339, §§ 263, 267.)

Again: The Chief Justice says: "In accordance with this doctrine * * * it is provided in the civil code, section 126," etc., (copying the section above quoted.) This section originated in New York in 1849, under a constitutional provision expressly limited to "criminal prosecutions or indictments." In 1852 the legislature of Ohio somewhat modified and adopted it, the language of their constitution being, "In all criminal prosecutions for libel," etc. In 1858 the territorial legislature of Kansas copied it from the Ohio code, verbatim; reenacted it in the revision of 1859, and it was carried into the revision of 1868, without the change of a word or letter, and so it stands to-day.* But we are told that this section, originally framed and reenacted under constitutional provisions thus limited, when found upon the statute-book of a state whose constitution is in express terms freed from such limitation, may be construed to mean—

"In actions for libel or slander, the defendant may allege the truth of the matter charged as defamatory and may prove the same (as a defense or full justification,) and (he may also allege) any mitigating circumstances (in the same answer) to reduce the amount of damages, or he may prove either (the truth as a defense, or mitigating circumstances to reduce the damages)."

Very manifestly this would be legislation, not construction. The constitution of New York says: "In all criminal prosecutions or indictments for libel;" that of Ohio, "In all criminal prosecutions for libel;" and the legislature of each state enacts a statutory provision thereunder long before our constitutional convention meets; yet it is said that the very same statutory provisions, under the constitution providing that "In all *civil or criminal* actions for libel," etc., may by construction be made to mean precisely the same thing in the latter, as in the former. Is it not putting it mildly to say, that the conclusion of the Chief Justice, from his own premises is inconsequential?

The Chief Justice cites but one adjudicated case in support of the position taken by the court. In no state constitution adopted before that of this state, can be found a provision upon this subject similar to that con-

* Gen. Laws of 1858, p. 84, § 125; Gen. Laws of 1859, p. 101, § 125; Comp. Laws of 1862, p. 145, § 125; Gen. Stat. of 1868, p. 603, § 125.

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tained in our constitution, except in that of Rhode Island. There the language is, "In all trials for libel, both civil and criminal, the truth, unless published from malicious motives, shall be a sufficient defense to the person charged." This language would, to any person not a lawyer, seem to be so plain and comprehensible that comment would be superfluous. Yet a case is cited, and apparently relied upon by the Chief Justice, in which it is said that the truth, in a civil trial, is a complete justification, although published from malicious motives. I deny this case any weight, for two reasons: first, the language of the constitution of Rhode Island will admit of no such construction; and second, the decision is not that of a court of last resort in that state. The case was a trial before a jury, and the language referred to that of the trial judge in a charge to the jury, evidently uttered in the hurry of a *nisi prius* trial, upon a point not shown to have been in controversy in the case. It is but charitable to suppose that the charge was given by a judge who overlooked the fact that recently before such trial occurred a constitution embodying the clause above quoted had been adopted in Rhode Island, and that the old charter (which would have authorized such a view of the law) was not then in force.

In what I have said I have not the slightest disposition to lessen the great respect the people of the state entertain for the eminent tribunal whose decision is the subject of this communication. I hope I have been actuated by a spirit intensely in favor of the truth upon a subject vastly important to a people so eminently a writing and reading community as ours is known to be. While I hope it is unnecessary for me to say that I have great confidence in the ability, learning, and high purposes of the gentlemen composing the supreme court, I cannot think I am exceeding the duty of a citizen when I ask them to reexamine the subject in the light of the foregoing considerations, some of which, very manifestly, were overlooked in arriving at the conclusion reached in the case referred to. G.

THE LAW OF LIBEL.*—*To the Editor of the Champion:* Soon after the publication of the opinion in the case of *Castle v. Houston*, lately decided by the supreme court of this state, a newspaper printed in Kansas City, in commenting thereon severely censured that portion of the decision which held that the truth of a publication, alleged to be libelous, was not a complete defense in a criminal action. The position assumed by that paper, in view of the provisions of our state constitution and criminal statutes, was so palpably absurd that little attention was paid to this adverse criticism. Recently, a correspondent of the "Commonwealth," writing over the initial "G.," has sought to attack the decision on other grounds; and while fully indorsing the doctrine of the court criticised by the journal referred to, attempts to question the correctness of the principle that in all *civil actions* of libel the defendant is justified in law, and exempt from all civil responsibility, if he alleges and establishes the truth of the matter charged as defamatory. The communication is very ably and ingeniously written, and makes the best argument possible on that side of the question. Having had some experience in my own practice, in libel cases, and having, in years gone by, given the subject careful consideration, and differing entirely with "G." in the propositions and arguments advanced by him, I have a few thoughts to suggest in "reviewing the reviewer."

I read the opinion of the supreme court with great satisfaction and approval, and I assert most unhesitatingly, that the principles of law therein enunciated are based upon authority, reason, and justice; that a correct interpretation has been given to the provisions of the constitution and statutes quoted in the opinion; and that the members of the supreme court

*THIS article was first published in the Atchison Daily Champion, March 10th, 1878.

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struck the golden mean in deciding, on the one hand, that the malicious and malignant libeler who assails the reputation of another without justifiable ends, solely to gratify his feelings of hate, or envy, or dissension, can be severely punished under the provisions of our criminal laws, even if the charges are true; and, on the other hand, that the impecunious vagabond or graceless scoundrel shall not be able to annoy newspaper editors, and obtain cheap notoriety, from a judgment of one cent and costs in a civil action of libel, as often as he is exposed, because on the trial the editor, although proving the truth of all the publications, fails to satisfy a jury of twelve men that his purposes were entirely worthy and commendable.

If it be said, that it is not justifiable (because it cannot serve any good end) to publish a statement of acts committed by a person many years prior thereto, who has afterward reformed and lived uprightly, I answer, that all of this is true, and the opinion of the supreme court points out the protection which the law gives by a criminal prosecution in just such cases. Instead of leaving the matter in the hands of the person assailed, the public prosecutor of each county has the authority to have the violator of the law tried, convicted and punished. In this way, criminal prosecutions for libel are made to subserve a wholesome purpose, and cannot be used merely to aid personal ends, or gratify malice. The decision made in the *Castle-Houston* case is in favor of the liberty of the press; not its licentious use, or abuse. I challenge the production of any respectable authority, of any state north of Mason & Dixon's line, contrary to the decision, or holding that in a civil action of libel the truth is not a full justification, when sufficiently and properly pleaded. But it may be answered that our constitution is *sui generis*; that no other state has ever adopted a constitution so arbitrary and oppressive against the rights of the press. This I deny; and the very answer sought to be given is an argument against the conclusions reached by "G." The 11th section of the bill of rights was not intended by its framers to fetter or limit the publication of the truth, except as to authorize the enactment of laws to provide for the public prosecution of publishers of accusations or charges when they were not made for justifiable ends. This, undoubtedly, was on the principle that such publications tend to breaches of the peace, and thus to the disturbance of society at large.

"G." however claims that the history and language of said section 11 of our bill of rights make it clear that in civil actions the truth is not a complete defense, and asserts that when the conclusion of said section provides in what instances the *accused* party, on trial for libel, shall be acquitted, that the word *accused* embraces a defendant in a civil action, as much as a party arraigned upon an indictment or information. I confess I cannot see the force of the reasoning adopted by the critic in this regard, and am too obtuse to be convinced. If the word *accused* had not been intended to be limited to parties in criminal proceedings, the committee on phraseology in the constitutional convention would have changed the section to read, "and if it shall appear to the jury that the alleged libelous matter is true and was published for justifiable ends, the defendant in any civil or criminal action shall be exempt from all liability," or used other words to convey like import. Certainly, if the word *accused*, taken in conjunction with *acquitted*, was not intended to be restricted to criminal cases, the committee on phraseology was extremely unfortunate in the use of language.

It is said that "*accused*" sometimes means "charged," "called to account," and would be as appropriate in a civil as in a criminal proceeding for libel. Let us examine this view. It is a settled rule of construction, that in interpreting clauses or provisions of a constitution, we must presume that words have been employed in their natural and ordinary meaning. This is but saying that no forced or unnatural construction is to be put upon

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their language. Bouvier defines "*accused*" to be, "one who is charged with a crime or misdemeanor." No other definition is given. Webster defines "*accuse*," "to charge with, or declare to have committed, a crime or offense; in law, to charge with an offense, judicially or by a public process; as, to *accuse* one of a high crime or misdemeanor." Worcester gives the meaning of "*accused*," as, one "charged with a crime," and of the verb "*accuse*," says: "to *accuse* is a more formal transaction than charge." While the word "*accused*" sometimes means "charged," and "called to account," these are not its natural and ordinary significations; these are only the secondary, not the primary definitions. The framers of the constitution and the people who accepted it, employed the word *accused* in its natural sense, viz., "a person charged with a crime or misdemeanor." The attempt of "G." to construe it otherwise, is an act of subtlety and ingenious refinement to force a meaning which the framers of that instrument, in my humble opinion, never meant.

The fact that sections 272 and 275 of the crimes act, and section 126 of the civil code, were enacted prior to the time of the adoption of the constitution, and were retained in the compiled laws of 1862 without change, and were *afterward*, in 1868, reënacted, as stated in the opinion of the supreme court, is an argument of the legislative construction of section 11 of the bill of rights, as interpreted by our law-makers. Considering the construction of section 126 by the courts of New York and Ohio, (from which states we derive them,) it certainly is an anomalous section to have been retained by the revisers of 1868, if the truth is not a full defense in civil actions of libel. Following the intentment of the constitution, the legislature afterward (viz., in 1868,) provided in the act relating to crimes and punishments, that in all prosecutions and indictments for libel, the proceedings should be had as set forth in said sections 272 and 275; and further provided, in 1868, by the reënactment of said section 126, as construed by the New York and Ohio courts, that "in civil actions for libel or slander, the defendant may allege the truth of the matter charged as defamatory, and may prove the same (as a defense or full justification,) and (he may also allege) any mitigating circumstances (in the same answer) to reduce the amount of damages, or he may prove either (the truth as a defense, or mitigating circumstances to reduce the damages)."

"G." denies the case of *Perry v. Mann*, cited from 1 R. I. Rep. 263, as of any weight, for two reasons, which he gives as follows: "first, the language of the constitution of Rhode Island will admit of no such construction; and second, the decision is not that of a court of last resort in that state. The case was a trial before a jury, and the language referred to that of the trial judge in a charge to the jury, evidently uttered in the hurry of a *nisi prius* trial, upon a point not shown to have been in controversy in the case. It is but charitable to suppose that the charge was given by a judge who overlooked the fact that recently before such trial occurred, a constitution embodying the clause above quoted had been adopted in Rhode Island, and that the old charter (which would have authorized such a view of the law) was not then in force." To this I answer, that the constitution of Rhode Island will admit of the construction given in *Perry v. Mann*, supra, notwithstanding its unusual and peculiar terms. According to the law-writers, "good motives and justifiable ends" are shown and sustained in civil cases by proof of the truth alone. "Were the truth in such cases to be no defense, it would follow that a guilty man would be entitled to far greater damages, in respect of a true representation, than an innocent man could claim in respect of a false one." Unfortunate indeed would be the result if such a doctrine should be established by our court of last resort.

Recurring to the Rhode Island authority, I find upon investigation that the opinion was delivered by the Chief Justice of the supreme court of

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that state in 1849; that the constitution then in force had been framed and adopted in 1842, and there had been no recent change in the organic law, or charter, shortly prior to the trial, as "G." intimates. On further examination, I find that in 1849 the judicial power of that state was vested in one supreme court, and in such inferior courts as the general assembly might from time to time ordain and establish; that the judges of the supreme court should, in all trials, instruct the jury in the law; and from the statutes of that state, I also ascertain the supreme court then consisted of one chief justice and three associate justices, and that they, or two of them, composed the court; that the court had jurisdiction of all actions and pleas of a civil nature, in law and equity, brought legally before it; that such court was required, when requested by the reporter, to communicate to him a statement of their decision or opinion in any case, and from these the reports of that state were published. (P. L. of R. I., 54-88.) Hence it is scarcely possible that the opinion or charge of the supreme court in the case cited could have been uttered in the hurry of the trial; otherwise, when furnished to the reporter, it would have been corrected, if erroneous, or likely to mislead.

Even assuming "G." to be correct in his belief that the word "*accused*" in the bill of rights was intended to apply to a defendant in a civil as well as a criminal action, still, unless the 11th section is construed to restrict and abridge the freedom of the press, the legislature had the power, by the re-enactment of section 126 of the civil code in 1868, attended with the construction given it in New York and Ohio, to make the truth a full justification in civil actions of libel. "Where one state adopts a law from another, the judicial construction given to the statute in the state where it originated follows it to the state of its adoption." "G." concedes that in New York and Ohio section 126 has been construed as interpreted by our court. If our constitution is subject to the construction attempted by "G.," why the great difference in the provisions of sections 272 and 275 of the crimes act, in relation to libel prosecutions, and section 126 of the civil code, relating to civil actions? Why are the defenses in civil actions of *libel* and *slander* of the same character? Will any one claim that the truth is not a justification in a *slander* suit?

Since our laws were compiled in 1862, and revised in 1868, why have not the provisions of sections 272 and 275 been substantially embraced in section 126 of the civil code, if like defenses were applicable in civil and criminal suits? No other answer can be given, than that in libel and slander actions of a civil nature the truth has always been deemed a complete justification. This is the reason of the different provisions in these sections of the civil and criminal codes.

But further, if the word "*accused*" applies to civil actions, even then the truth of the publication in a civil action would be a full defense. There can be no basis upon which damages can be founded in a civil action for libel, where the charge is true. In the words of the supreme court: "Such offenses being unconnected with any substantive right, are incapable of pecuniary admeasurement and redress." Exemplary or punitive damages cannot be awarded in the absence of compensatory damages; nominal damages are allowed only as compensation, and where the charge is true, but published from unworthy motives, no compensation can be granted; hence no exemplary damage. Therefore no nominal or other damages, and the result, no cause for action.

I admit the question involved in this controversy is of vast importance, and I have attempted to consider it in the same spirit of truth and candor as actuated "G." We are reading, writing, and publishing people, and if our constitution compels every defendant in a civil action of libel, when the publication is admitted, to not only prove the truth of the publication,

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but to go further, and by additional evidence establish that it was made for justifiable ends, we need at once a new constitution, which will not shadow forth perpetual apprehension of litigation, and forever terrify the conscientious editor with fear of infinite vexation. If this construction is to be given to that instrument, then its framers were not imbued with the spirit of the age; and instead of "the liberty of the press being inviolate," we have taken already one step in the path pursued by President McMahon in republican (?) France, where in the case of the radical *Mot d'Ordre*, the manager was fined \$1,000 for publishing a reflection on that official's Irish ancestors. Happily, our supreme court has not thus construed the provisions of our constitution in civil cases of libel; and a reexamination of the late libel case would, in view of the authorities bearing upon the matter, if properly presented, only more strongly and forcibly evince the wisdom of the decision already made. In civil actions of libel, the proof of the truth is proof of the "good motives and justifiable ends" of the publication. D.

THE LAW OF LIBEL AGAIN.*—*To the Editor of the Commonwealth:* Soon after the publication of my former article on the law of libel, there appeared in the *Atchison "Champion"* a communication over the signature "D.," upon the same subject, to which I beg the indulgence of a brief reply.

I controverted the correctness of the decision in *Castle v. Houston* upon the sole ground that the supreme court had erred in the construction of section 11 of the bill of rights; and, in support of my position, gave the recorded history of the insertion therein of the words, "civil and criminal," before "actions." I thought there was some significance in the fact, that after the remainder of the section had been adopted these words were inserted by a direct vote of the convention, while "D." not only makes no reference to this circumstance, but wholly ignores their presence for any purpose. I conceded that, as originally adopted, by reason of the words "accused," "acquitted," and "discharged," the section might have been reasonably held to apply to criminal proceedings alone, but insisted that the convention meant something by striking out "discharged," and inserting "civil and criminal." "D." differs with me because "accused" was not also stricken out and "defendant" inserted. The bar can judge between us.

In regard to the Rhode Island case cited by the Chief Justice, "D." says: "It is scarcely possible that the opinion or charge of the supreme court in the case cited could have been uttered in the hurry of the trial; otherwise, when furnished to a reporter, it would have been corrected, if erroneous, or likely to mislead." I suppose this means, that when the Judge furnishes his charge to the reporter for publication, he shall not write out what he actually did say to the jury, if erroneous, but shall write what he should have said. What is to be thought of the morals of such a course, to say nothing of the impropriety thereof?

In commenting upon this Rhode Island case, "D." says: "According to the law-writers, good motives and justifiable ends are shown and sustained in civil cases by proof of the truth alone." The language of the constitution of that state is: "In all trials for libel, both civil and criminal, the truth, unless published for malicious motives, shall be a sufficient defense to the person charged." Certainly it must be conceded by the veriest "school-man," that the words, "trials," "defense," and "charged," are equally proper and appropriate in civil and criminal proceedings. Now suppose, for publishing a libel, a person is proceeded against both civilly and criminally, as may be done: is it to be said, under such a provision, that "good motives

* This article was first published in the *Topeka Daily Commonwealth*, April 23d, 1873.

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and justifiable ends" are shown and sustained by proof of the truth upon the "trial" in the one case, and not in the other? If so, upon what word or phrase can such a distinction be based? Yet we are told that it must be so because the supreme court of Rhode Island has thus decided; i. e., folly, rained upon judges' heads, necessarily becomes wisdom when filtered through judicial wigs!

In conclusion, I beg to say to my reviewer, that he seems to have wholly misconceived the purpose of my former communication. It was no part of my object to discuss the policy or impolicy of the provision in our constitution; but to ascertain the signification of the language used, and show, by its own action, the intention of the convention in framing it, while he, from the supposed impolicy of the provision as construed by me, argues that the convention must have meant nothing in inserting the words "civil or criminal," and that with, or without them, the section would mean the same. Upon the question of policy, we might agree; upon the question of law, it seems we cannot.

G.

FRANK O'RILEY *et al.* v. MOSES WATERS.

TRESPASS TO PROPERTY; *Liability of Wrongdoer for Damages.* O. hired to A. a horse and buggy. During the bailment A. let W. take the property. While in W.'s possession, and in the absence of A., through his (W.'s) reckless driving the horse ran away, and both horse and buggy were injured. *Held*, That W. was to the property a wrongdoer, and that for the injury caused to the property, by his tortious conduct, the owner could maintain an action against him.

Error from Davis District Court.

ACTION by *Frank O'Riley*, and *John K. Wright*, as partners, against *John Anderson* and *Moses Waters*, claiming \$500 damages for injuries to plaintiffs' horse and buggy. The facts fully appear in the opinion. *Waters* demurred to the petition, claiming that it did not state facts sufficient to constitute a cause of action as to him. The district court, at the April Term 1876, sustained the demurrer. From such decision the plaintiffs appeal, and bring the case here on error.

McClure & Humphrey, for plaintiffs.

C. G. Cox, for defendant.

The opinion of the court was delivered by

BREWER, J.: Plaintiffs were livery men. They hired a horse and buggy to one Anderson, to drive from Junction City to Fort Riley, and back. Anderson, after driving to Fort Riley, let Waters take possession and drive back. While so doing, through Waters' reckless driving, the horse and buggy were both injured. Was Waters' responsible to plaintiffs? We think so. And this responsibility arises, not by reason of the breach of any express contract with the plaintiffs, or because Waters occupied in any just sense the relation of servant to Anderson, but by reason of the injury done to the property of plaintiffs by the wrongful conduct of Waters. The action is one sounding in tort, rather than in contract. It may be true, that Anderson is also responsible for the entire loss, though himself guilty of no negligence at the immediate time of the injury, as it was a breach of his contract to turn the property over to Waters. But whatever responsibility attaches to Anderson, it in no manner releases Waters from the consequences of his own wrong. It is generally true, that a wrongdoer is responsible to the party injured for the consequences of his wrong. Waters was, in reference to this property, a wrongdoer. The plaintiffs are the parties whose property his wrong has injured. They may have recourse against others, but this in no manner prevents them from looking to the immediate cause of the injury, the wrongdoer himself. The claim of defendant is, that plaintiffs can look alone to Anderson, their bailee, and with whom alone they had a contract, and that Anderson alone can look to Waters. If this was a matter sounding entirely in contract, there might be some force in the claim, and it might be that only the parties to the contract were responsible for any breach. But the basis of plaintiffs' cause of action is the tort of Waters, and for this he is responsible to whomsoever it has injured. The case of *Branfield v. Whipple*, 10 Allen, 27, is in point. In that case it appeared that plaintiffs hired a team to Whipple. Whipple let one Rowell drive,

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and by his reckless driving the team was injured. No contract was made with Rowell by plaintiffs, though they knew of his driving. Action was brought against both Whipple and Rowell, and it was sustained. In the opinion the court says: "The answer that the horse was immoderately driven by Rowell, is conclusive of his liability, but does not necessarily show that Whipple might not also be liable."

The decision and judgment will be reversed, and the case remanded with instructions to grant a new trial.

All the Justices concurring.

WM. H. KEELING v. P. H. KUHN.

1. **EXCEPTING TO INSTRUCTIONS; Saving Errors, for Review.** Where one of the questions in the case is, the construction to be given to a license, and the court submits in its charge the matter of construction to the jury, and at the close of the charge inquires if there are any exceptions, and is answered by the defendant, "Only in the construction of the license; I take it that it is a matter for the court to construe the license," and the record fails to show whether the court changed its charge, or otherwise noticed or acted upon this suggestion, and fails to show affirmatively that all the instructions given are preserved, and further recites that defendant excepted to "the refusal of the court to give instructions so asked explaining the license," and no such instructions so asked and refused appear in the record, *held*, that the rulings of the court are not so preserved by exceptions as to be available here for review. [*Wyandotte v. Noble*, 8-444; *Atchison v. King*, 9-551; *Barlow v. Emmet*, 10-358; *R. R. v. Little*, 19-287; *Bard v. Elston*, 31-274; *Comm'rs v. Boyd*, 31-765.]
2. **LICENSE, To Enter Upon Lands.** The respective rights and liabilities of land-owner, of licensee, and of tenant of such licensee, considered, and discussed.

Error from Leavenworth District Court.

ACTION by Kuhn, to recover rent alleged to be due from Keeling for the use and occupation of a certain dwelling-house for the period of fifteen months, from 1st October 1873 to 31st December 1874. The rent claimed to be due had accrued in

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favor of one Henry Kuhn, and he had assigned his claim to *P. H. Kuhn*, the plaintiff. Trial at March Term 1875. Verdict and judgment for plaintiff for \$285.59, and defendant *Keeling* brings the case here.

D. G. Swain, and *J. W. English*, for plaintiff in error.

H. M. Herman, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This was an action to recover rent. The plaintiff's assignor testified to a full, unconditional contract of lease, delivery of possession to, and occupation by, the tenant. The jury found in favor of the plaintiff. Upon this therefore the judgment would have to be sustained.

The other matters upon which the defendant, plaintiff in error, claims that the judgment was wrong are these: The house, the subject of the contract, was upon the military reservation of Fort Leavenworth. It was built in 1863 by the assignor of the plaintiff, Henry Kuhn, and occupied by him continuously until turned over to the defendant in October 1873. It was built under a permit from the military authorities. And the defendant claims that the license granted by the authorities had been revoked, Kuhn notified to remove the building, and that failing so to do, the building had become the property of the United States. Upon the question of this license, the court left it to the jury to say whether the license was to continue as long as Kuhn was in the employ of the government, during the mere pleasure of the authorities, or as long as the building should last. Counsel claims that the court should have construed the license itself, as a question of law, and that its failure so to do was error compelling a reversal. As the record now stands it seems to us the action of the court in this respect is not so preserved that we can declare there was error. At the close of the charge the record shows that the court asked the plaintiff if he had any exceptions to it, and was answered in the negative. A like query was put to the defendant, and was answered thus: "Only in the

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construction of the license; I take it that it is a matter for the court to construe the license—for the court to settle, and not the jury. From the very nature of the case, it must be such a permission as must be construed by the court as a matter of law, and the court should determine the character of the license itself.” Whether the court after this claim of counsel was made recognized its correctness, and gave further charge to the jury, the record does not disclose. It nowhere appears that all the instructions are preserved. Further than that, the record reads: “To the refusal of the court to give instructions asked explaining the license, defendant excepted at the time, and excepts.” But the record contains no instructions so asked and refused. We are not advised by anything in it what construction the learned counsel claimed to the district court should be put upon the license; nor does it affirmatively appear that the court did not respond favorably to whatever claim counsel made in this respect. How then can we hold that it erred?

Outside of this question of practice, we concur in the main with the views expressed by the counsel for plaintiff in error in their brief. Mr. Kuhn by his permit obtained no interest in the soil. The building was personal property belonging to him. All his rights arose by virtue of the license; and he who claims rights through a license must show the terms and extent of that license, or it will be held to be merely one revocable at pleasure. The original permit was not in evidence; but in lieu thereof was a letter from Gen. Easton, the chief quartermaster, written sometime two years thereafter, stating that he had at the time given Mr. Kuhn a permit to build the house. There is nothing in that, or in any of the testimony, from which it could be inferred that the license was other than one revocable at pleasure, certainly at least after the termination of Kuhn's employment in the government service. Upon the revocation of a license, the building does not become forfeited to the land-owner, but the licensee has a reasonable time in which to remove it from the premises. What is such reasonable time, is a question of fact for the jury, and may vary with the size

Keeling v. Kuhn.

and condition of the building to be removed, the time of the year, the condition of the weather, the distance to be moved, etc. The land-owner cannot himself prescribe the time within which the removal must be made, so as to preclude all inquiry as to its reasonableness. If the licensee fails to remove the building within such reasonable time, he will lose his rights in it, and it will become forfeited to the land-owner, unless such failure to remove arise from some fault of the land-owner. Of course, if the latter interfere directly or indirectly to prevent a removal, he can claim nothing on account of the failure to remove. Notwithstanding a revocation of the license, and notice to remove, the land-owner may consent thereafter to the building remaining upon the land, and to its lease, or other use for the benefit of the licensee; and whoever leases the building and obtains possession thereof under representations that such consent has been obtained, will be liable to the licensee for the rent, although no such consent was in fact obtained, until at least such reasonable time after the latter has ascertained the mistake as will enable him conveniently to obtain possession and remove the building. It may possibly be that the last proposition would uphold the judgment in this case upon the testimony, giving credit in accord with the verdict of the jury to the testimony of Kuhn rather than to that of Keeling, or at least justify a judgment for a portion of the rent sued for; but we need not definitely determine that question, as the matters heretofore noticed are decisive. Though to avoid any misunderstanding it may be proper to say, that even according to Mr. Kuhn's testimony the time for which he has recovered rent was ample to have enabled him, after the discovery of the mistake, to have asserted his rights to the possession as against Keeling, and that any further rights he may have in the premises, if any, are between him and the government.

The judgment will be affirmed.

All the Justices concurring.

THE STATE OF KANSAS V. THEODORE WHITE.

1. **PRIVILEGED COMMUNICATIONS; *Client and Attorney; Privilege of Party, as a Witness.*** A defendant charged with the crime of bigamy, being on the trial and testifying in his own behalf, was required by the court to answer on cross-examination whether he had not been consulted or advised by his counsel in regard to obtaining a copy of a decree of divorce alleged to have been granted prior to the second marriage, against the objection of such defendant that the communications between himself and his attorneys were privileged. *Held*, That the court erred, as the defendant had not referred to any consultation or advice in connection with his attorneys in his direct examination, and that the communications were privileged. Any communication which an attorney is precluded by statute from disclosing, his client cannot be compelled to disclose against his objection of privilege. [*Wilkins v. Moore*, 20-540.]
2. **DISCHARGE OF JURY, in *Criminal Actions; Disagreement; Absence of Defendant.*** On a criminal trial for bigamy, the court being satisfied that the jury could not agree, discharged them in the absence of the prisoner and his counsel, after they had been together for deliberation from four o'clock P.M. to six o'clock A.M., and had the record show that the discharge of the jury was granted after it had been made to appear to the court that the jury could not agree upon a verdict, and thereafter overruled the motion and plea of the prisoner interposed for his release and discharge on account of the action of the court. *Held*, That the motion and plea were properly overruled.
3. **RECORDS; EVIDENCE; *Marriage Licenses.*** The books of record of marriage licenses kept by the probate judges of the several counties are evidence of all matters required by the statute to be contained therein. [*Baughman v. Baughman*, 29-285.]

Appeal from Wilson District Court.

INFORMATION for bigamy. The information charged that *White*, being a married man, and having actual knowledge that he had a wife, to-wit, one Ella White, then being and living in the state of New York, from which said wife he had never been divorced, did, at the county of Wilson, in the state of Kansas, in the month of February 1877, unlawfully marry and take to wife another person, to-wit, one Miss M. F. McG., etc. *White* was found guilty, at the May Term 1877, and sentenced to imprisonment in the penitentiary, and he now brings the case here for review.

Chase, Kirkpatrick & Burge, for appellant.

Willard Davis, attorney-general, for The State.

The opinion of the court was delivered by

HORTON, C. J.: The defendant White was charged on information with the offense of bigamy. The first jury impaneled to try the cause could not agree, and were discharged without finding a verdict; and another jury, before which the cause was tried at the same term, rendered a verdict of guilty. Thereupon the defendant was sentenced to the penitentiary for the term of three years, and he now appeals to this court.

I. The serious error alleged is, the action of the court in compelling the defendant to disclose communications between himself and his attorney. Evidence having been admitted concerning a divorce having been granted between the prisoner and his first wife, in the state of New York, prior to the second marriage, the defendant, testifying in his own behalf was required by the court to answer, on cross-examination, "if he had not been consulted, or advised by his counsel in regard to obtaining a copy of such decree." Objection was duly made to the question on the ground that the communications between counsel and client were privileged; but the court overruled the objection, and in so doing committed material error. The defendant in fully answering the question gave the advice of one of his lawyers to him. The statute provides that an attorney shall be incompetent to testify concerning communications made to him by his client in that relation, or his advice thereon, without the client's consent. This statute would be of no utility or benefit, if the client could be compelled, against his consent, to make such disclosures. It would be absurd to protect by legislative enactment professional communications, and to leave them unprotected at the examination of the client. In such an event, in all civil actions, the confidential statements of client and counsel would be exposed, and likewise the same

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would occur in all criminal actions where the defendant should testify. The authorities are otherwise. The true view seems to be, that communications which the lawyer is precluded from disclosing, the client cannot be compelled to disclose. This privilege is essential to public justice, for did it not exist no man would dare to consult a professional adviser, with a view to his defense, or to the enforcement of his rights. Whar. on Ev., § 583; *Hemenway v. Smith*, 28 Vt. 701; *Carnes v. Platt*, 15 Abb. Pr., (N. S.) 337; *Merrit v. Morgan*, 21 Wend. 487; *Williams v. Fitch*, 18 N. Y. 546-550; *Britton v. Lorenz*, 45 N. Y. 51-59; *Bigler v. Reyher*, 43 Ind. 112; 1 Greenl. on Ev., §§ 286-240. It is urged against a reversal of the judgment that the question might have been answered by "yes," or "no," and that the advice or conversation testified to was not very material, and could not have been prejudicial to the rights of the defendant. We answer that the district court violated a very important rule of evidence, and forced the disclosure of privileged communications in a criminal case where the liberty of the defendant was at stake; and we will not stop to weigh the effect of the answer, or determine how far the rights of the prisoner were sacrificed. It is very important to public interests that the purpose of the statute as to such communications should be maintained in all its rigor. It is the best rule. *Obsta principis*. If a client sees fit to be a witness, he makes himself liable to a full cross-examination. But in this case the defendant did not, in his direct examination, refer to his counsel, or any conversation with, or advice from them; and the question was inexcusable. This conclusion disposes of the case in this court, but as some other questions are presented in the briefs of counsel, we briefly give our views of two of them which may upon a new trial again demand the attention of the district court.

II. Error is alleged in the discharge of the jury on the 4th of May 1877, from further consideration of the cause, in the absence of the defendant and his counsel. It appears that the jury, in the charge of the bailiff of the court, were out delib-

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erating in the case after the cause had been duly submitted to them fourteen hours—from four o'clock, P. M. of May 3d to six o'clock, A. M. May 4th—and the record shows that they were discharged because it appeared to the court that the jury could not agree. While it is true that the court should not have had the jurors called into the court-room and discharged in the absence of the defendant and his counsel, the error committed thereby was an immaterial one, and for which this court would not reverse the judgment. Neither should the motion, nor the plea in bar filed by the defendant have been sustained on account of such action. The irregularity of the court consisted in taking action in the absence of the prisoner, and his counsel, not in the fact that the jury were discharged after it had been made to appear to the court that they could not agree upon a verdict, and after a finding and entry of this fact were duly made a matter of record. The court had a right to discharge the jury after they had been kept together until it satisfactorily appeared that there was no probability of their agreeing. Gen. Stat. ch. 80, civil code, § 281; and ch. 82, criminal code, § 208. In the case of the *United States v. Perez*, 9 Wheaton, 579, it was held that the court had the right to order the discharge of the jury; and the security which the public have for a faithful, sound and conscientious exercise of this discretion rests in this, as in other cases, upon the responsibility of the judge, under his oath of office. And it is held by all the federal courts, and the courts of Massachusetts, New York, Illinois, Kentucky, Mississippi, Iowa, and some other states, that where the jury have deliberated so long without finding a verdict as to preclude a reasonable expectation that they will agree, unless compelled to do so by famine or exhaustion, they may be discharged, if the record shows the necessity for such action, without the consent of the defendant, and the prisoner be tried by another jury. In *The State v. Vaughan*, 29 Iowa, 286, it was held in a case very similar to this, that the defendant should have been present at the time the court discharged the jury, but as the defendant if present

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could only have objected to the action of the court, and since such objection would and must have been unavailing, no prejudice could have resulted from his absence, and hence such action of the court would not operate to reverse the case, or discharge the prisoner.

III. As tending to prove the second marriage of the appellant, and that it was celebrated in Wilson county, the state offered in evidence, against the objections of the appellant, the records of the probate court of Wilson county, containing a copy of the marriage license issued Feb. 25th 1877, by the probate judge of said county to the appellant, and authorizing him to be joined in marriage to one Miss Martha F. McGray, together with the copy of the return indorsed on the license, showing that the marriage was solemnized in said county on the 27th of February 1877 by one James A. Hunter. The law makes it the duty of the probate judges to correctly record such licenses, and returns, and provides a severe penalty for neglecting so to do; and further provides that the books of record of marriage licenses kept by the probate judges of the several counties shall be evidence in all courts. Gen. Stat. 561, ch. 61, §§ 6, 7, and 11. As the probate judge of Wilson county produced the books of record of his office, and duly identified the same, the court properly admitted the records in evidence. The law seems to have been strictly complied with, and as the original records were introduced, no copy thereof was needed nor was any certificate or seal of the probate judge necessary to be attached thereto to make them admissible as evidence. Neither was the return of the person performing the marriage ceremony invalid, because it did not show on its face that the person whose name was subscribed to it was a person authorized by the statute to perform such ceremony. The defendant should have been identified as the person to whom the license was issued to make the same admissible, if he obtained it in person.

For the error committed in the action of the court in com-

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elling the disclosure of the communications between the defendant and his attorney, the judgment is reversed, and the action remanded for a new trial.

All the Justices concurring.

JANUARY TERM, 1878.

PRESENT:

HON. ALBERT H. HORTON, CHIEF JUSTICE.

HON. DANIEL M. VALENTINE, } ASSOCIATE JUSTICES.
HON. DAVID J. BREWER, }

B. A. LITOWICH V. BLANCHE LITOWICH.

1. **FOREIGN JUDGMENT, OR DECREE, When Void; Utah Divorce.** A judgment rendered by a probate court of Utah territory, attempting to dissolve the marriage relation existing between a husband and wife who had neither of them ever resided there or been within the territory, and being rendered without any actual notice to the wife, is void absolutely and entirely for want of jurisdiction in the court to render such a judgment.
2. ——— And where the judgment in such a case does not appear to be void upon its face, it may be shown to be void, in Kansas, by evidence *abunde*. [*R. R. v. Streeter*, 8-133; *Kay v. Walter*, 28-115; *Martin v. Gray*, 19-461; *Brinkman v. Shaffer*, 23-531; *Chambers v. Bridge Co.*, 16-270.]
3. **ALIMONY; Residence of Wife; Action.** A wife may commence and maintain an action in Kansas for alimony, without having been a resident of the state for the whole of the year next preceding the commencement of such action.
4. ——— **Alimony, and Suit Money, Pendente Lite.** Upon a motion, in such an action, for alimony *pendente lite*, (including suit money,) the merits of the action are not involved any further than is necessary for the purpose of ascertaining whether the plaintiff is or is not prosecuting her action in good faith. Her petition should state a cause of action; and it should then be made to appear, *prima facie*, by evidence or by the admissions of the parties, that the parties were husband and wife, that the wife needed alimony *pendente lite*, that she was prosecuting her action in good faith; and evidence might also be introduced to show the pecuniary and social condition of the parties, and the probable expenses of the litigation, for the purpose of determining the amount of alimony (including suit money) to be allowed the wife during the pendency of the action.

Error from Saline District Court.

IN an action against her husband, *B. A. Litowich*, and two others, as defendants, *Mrs. Blanche Litowich*, as plaintiff, obtained an order directing her said husband to pay a certain sum for her support pending the action, and for the expenses of the suit, and an order restraining her husband and *Ed. Wittman*, one of said defendants, from conveying or disposing of certain property. These orders were granted 31st August 1877, at chambers. Defendants *Litowich* and *Wittman* appeal, and bring the case here on error.

John Foster, for plaintiffs in error.

J. G. Mohler, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by *Blanche Litowich*, against *B. A. Litowich*, *Ed Wittman*, and *Ray Hollingsworth*, for the purpose of obtaining alimony from said *Litowich*, her alleged husband, and of restraining all the defendants from selling or disposing of the property of her said alleged husband. At the time of the commencement of this action the plaintiff obtained an order from the judge of the court below, at chambers, granting to her, as alimony *pendente lite*, (using the word alimony in a broad sense, including suit money,) \$100 for attorney-fees and expenses of the suit, and \$100 for her support, and restraining the defendants from disposing of any of her husband's property except "in the due course of their trade and business as merchants in the town of Salina." Afterward the defendants moved to vacate said order. Pending this motion, the plaintiff moved for an attachment against said *Litowich*, requiring him to answer for an alleged contempt in not obeying said order with respect to the payment of alimony. By consent of parties these two motions were heard together, and at the same time. It would also seem that the judge of the court below also heard still another motion at the same time, made

Statement of
the case.

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by the plaintiff for additional alimony. A vast amount of evidence was introduced upon the hearing of these motions, and upon this evidence the judge vacated said order with respect to Hollingsworth, and after modifying such order in some particulars with respect to the other two defendants continued it in force substantially as to them. The judge refused to grant the attachment asked for by the plaintiff, and refused to give her any additional alimony. Defendants Litowich and Wittman excepted to the rulings of the judge of the court below against them. They also moved for a rehearing of their motion to vacate said order, which motion was also overruled, and they duly excepted; and they now bring the case to this court for review.

While the judge of the court below may have committed some immaterial errors, we cannot say that he committed any substantial error. It would seem to us that alimony *pendente lite* should have been allowed in this case; and we cannot say that \$200, including suit money, was too much.

1. Utah divorce; foreign judgment, when void.

And we also think, that under the circumstances of this case the injunction *pendente lite* was also proper. That the said B. A. Litowich and Blanche Litowich were married to each other on March 26th 1876, and that they remained husband and wife from that time up to April 5th 1877, is admitted by all the parties. The plaintiff claims that she still remains the wife of said B. A. Litowich. But the defendants claim that on the 5th of April 1877, the said B. A. Litowich was divorced from the plaintiff, and that the marriage relation then existing between them was wholly severed and dissolved. And to prove such divorce, the defendants introduced in evidence a duly-certified copy of a judgment rendered by the probate court of Davis county, Utah territory, purporting to grant such divorce. This judgment shows upon its face that there had been "pleadings," and a "summons," and "service of summons," and "proof" in the case in which it was rendered; and yet no such pleading, or summons, or service, or proof, was introduced in evidence on the hearing of the motions in this case. The judgment upon its face seems

Litowich v. Litowich.

to be valid; but whether it would still appear to be valid if the whole of the record of the case in which it was rendered had been introduced in evidence, we cannot tell. But from evidence *dehors* the record we know that said judgment is void absolutely and entirely. It was rendered wholly without jurisdiction. The parties thereto, B. A. Litowich and Blanche Litowich, were married in Kansas. They resided together in Salina, Kansas, up to the 8th of January 1877, when Mrs. Litowich went to her mother's at Atlantic City, N. J., expecting her husband soon to sell his property in Kansas and follow her. Afterward he did sell said property, (the sale however was probably a sham sale,) and then on the 5th of March 1877, leaving Salina, went to Denver, to Cheyenne, and to Chicago, Ill., where he employed a lawyer, (A. J. Dexter, by name,) to procure a divorce for him. This lawyer procured said Utah divorce. Neither of the parties had ever resided in Utah, neither of them had ever been there. And neither of them had ever had any expectation of residing there. After procuring said divorce said B. A. Litowich returned to Salina by way of Kansas City, reaching Salina on the 14th of April 1877. He then repurchased his former interest in a mercantile establishment located at Salina, and is now residing there and doing business there as a merchant. On the same day that he returned to Salina he wrote to his wife concerning said divorce, and this was the first notice that she ever received from any source that he had any intention or desire to procure a divorce. The letter is as follows:

SALINA, KANSAS, APRIL 14, 1877.

MRS. BLANCHE: I received your letter. I just got to Salina. I am living in Chicago, Ill., and think to go back there soon. I shall not remain in Salina only two days longer. I have sued you for a divorce at Chicago. Would have notified you before, but was not sure where you were. Don't write to me any more. Try and think of some one else.

Respectfully, B. A. LITOWICH.

Mrs. Litowich, having learned that her husband had remained at Salina, subsequently returned, and on 31st August 1877 she commenced this action for alimony. We think that

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said parties B. A. and Mrs. Litowich were still husband and wife when this action was commenced; and are now husband and wife. Said Utah judgment, being void for want of jurisdiction, did not change their matrimonial status, nor affect any of their rights with respect to each other. That a judgment rendered without jurisdiction is void, we have assumed as settled law. And the supreme court of Indiana has recently decided that a judgment granting a divorce rendered by a probate court in Utah, upon jurisdictional facts and circumstances almost precisely like those upon which the present judgment was rendered, was a judgment rendered without jurisdiction and consequently void. (*Hood v. The State*, 5 Cent. Law Jour. 85.) And this decision of the supreme court of Indiana, is in accordance with the unbroken current of authority. (2 Bishop Marriage & Divorce, § 144.) And where the judgment granting the divorce does not appear to be void upon its face, it may be shown to be void by evidence *aliunde*. (*Hoffman v. Hoffman*, 46 N. Y. 30, 38; *Kerr v. Kerr*, 41 N. Y. 272; *Borden v. Fitch*, 15 Johns. 121, 141; *Leith v. Leith*, 39 N. H. 20; *Pollard v. Wegener*, 18 Wis. 569, 576.) And indeed, any judgment from a sister state, void for want of jurisdiction, may be shown to be void in any proceeding, direct or collateral, and by evidence *dehors* the record, provided that the record itself does not show the invalidity of the judgment upon its face. (*Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Gaslight Co.*, 19 Wall. 58; *Rape v. Heaton*, 9 Wis. 828, 382; *Price v. Ward*, 25 N. J. L. (1 Dutch.) 225; *Aldrich v. Kinney*, 4 Conn. 880; *Starbuck v. Murray*, 5 Wend. 148, 156; *Shumway v. Stillman*, 6 Wend. 447, 452; *Hall v. Williams*, 6 Pick. 232, 237; *Carleton v. Bickford*, 18 Gray, 591; *Pollard v. Baldwin*, 22 Iowa, 328; *Norwood v. Cobb*, 15 Texas, 500; same case, 24 Texas, 551.) In Ohio it has been held that even if the foreign judgment granting a divorce to the husband, without jurisdiction of the wife, and while she resided in Ohio, were sufficient to dissolve the marriage relation, still that such a judgment would not be any bar to an action afterward brought by the wife in Ohio against

2. Want of jurisdiction may be shown by evidence aliunde.

Litowich v. Litowich.

her said husband to procure alimony. (*Cox v. Cox*, 19 Ohio St. 502, and 20 Ohio St. 439.)

The defendants claim that the plaintiff cannot maintain this action because she was not an actual resident, in good faith, of this state for one year next preceding the filing of her petition for alimony in this case, and cite as authority therefor sections 640 and 649 of the civil code. (Gen. Stat. 757, 759.)

3. Action for alimony; residence of wife.

Now except for the absence of the plaintiff from 8th January 1877 to 28th August 1877, while she was visiting her mother at Atlantic City, N. J., and except for the absence of the defendant from 5th March 1877 to 14th April 1877, while he was traveling and procuring his said Utah divorce, etc., both parties were actual and *bona fide* residents of the state of Kansas for much more than one year next preceding the commencement of this action. They were both residents of Kansas prior to said absence, and were both residents when this action was commenced. But for the purposes of this case we will suppose that neither of the parties was a resident of Kansas for the whole of the year next preceding the commencement of this action: then may the plaintiff maintain this action? We think she may. The statute provides that, "The wife may obtain alimony from the husband without a divorce, in an action brought for that purpose in the district court, for any of the causes for which a divorce may be granted." (Code, § 649.) There is no statute requiring that either party shall be a resident of the state of Kansas in order that the action for alimony may be maintained; and the statute requiring a residence for one year on the part of "the plaintiff in an action for divorce," does not apply in an action for alimony. Residence forms no part of "any of the causes for which a divorce may be granted;" nor is it mentioned in the statute among such causes. (See § 639, civil code.) The "causes, for which a divorce may be granted," are all supposed to be founded upon *wrongs*, and not upon meritorious conduct.

The defendants claim that the judge below erred in refusing to permit them to go into the merits of the case, and to

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show that the allegations of the plaintiff's petition were false. We do not think however that any substantial error was committed in this respect. Upon a motion for alimony

4. Proceedings
for alimony
pendente lite.

pendente lite, the merits of the action are not involved any further than is necessary for the purpose of ascertaining whether the plaintiff is or is not prosecuting her action in good faith. (2 Bishop Mar. and Div., §§384, 406a, 407.) Her petition should state a cause of action; and it should then be made to appear, *prima facie* at least, by evidence, or by the admission of the parties, that the parties were husband and wife, that the wife needed alimony *pendente lite*, and that she was prosecuting her action in good faith; and evidence might also be introduced to show the pecuniary and social condition of the parties, and the probable expenses of the litigation, for the purpose of determining the amount of alimony (including suit money) to be allowed *pendente lite*. All these things we think were sufficiently shown to entitle the plaintiff to the alimony allowed her. The causes alleged for the permanent alimony were "extreme cruelty," and "gross neglect of duty."

We do not wish to say anything now concerning the merits of the action. The judge below may have committed some errors in allowing B. A. Litowich to be cross-examined upon matters not given in evidence in his examination in chief, but if so the errors were wholly immaterial. Strike out all of the testimony of Litowich so given, and still the same result would necessarily follow. Strike it all out, and still there would be ample evidence to show that said Utah divorce was rendered without jurisdiction, and is therefore void.

We cannot say from the record brought to this court that the judge below erred in receiving in evidence the above-quoted letter. After an instrument in writing is offered in evidence, and before it is received, the adverse party is entitled to an inspection thereof. We cannot say from the record that the judge below disregarded this rule; but even if he did, we cannot see in this particular case how it could have worked any injury to the defendants.

Mastin v. Gray.

It not appearing that the district judge committed any substantial error, his orders granting alimony, etc., must be affirmed.

All the Justices concurring.

JOHN J. MASTIN V. BARZILLAI GRAY *et al.*

JURISDICTION OF PERSON; JUDGMENT; *When False Return of Service May be Impeached.* In an action to recover possession of real property, it was shown that the plaintiff's title was founded upon a sheriff's deed made in pursuance of a sheriff's sale on an execution issued by the clerk of the district court on a transcript of a judgment of a justice of the peace filed in said clerk's office, which judgment was rendered on default against J. H. B., the then owner of the land in controversy, on a constable's return of service of summons, which return stated that said writ was "executed on the 15th December 1860, by leaving a certified copy at the usual place of residence" of said J. H. B. The district court permitted the defendant to impeach said deed, judgment, and constable's return, by showing that the said return was false, that the said J. H. B. was not at the time a resident of Kansas, that she had no residence in Kansas, and was not herself in Kansas, but at that time, and for a long time before and afterward, she resided and was herself personally in the Indian Territory. *Held*, That the court in this did not commit error. [*McNeill v. Edie*, 24-110; *Kay v. Waller*, 28-115; *Buller v. Craig*, 29-207; *Perry v. R. R.*, 29-424; *Brinkman v. Shaffer*, 23-531; *Reynolds v. Fleming*, 30-111; *Hanson v. Wolcott*, 19-208; *Meixell v. Kirkpatrick*, 23-316; *Busenbark v. Busenbark*, 33-578.]

Error from Wyandotte District Court.

EJECTMENT brought by *Mastin*, as plaintiff, against *Gray* and two others as defendants. *Gray's* co-defendants were tenants, holding under him. *Mastin* claimed title in fee to the land sued for, and claimed the right of possession. *Gray* admitted possession in himself, and claimed as purchaser from the original owner. All the facts are stated in the opinion. Trial at

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the April Term 1876. Judgment for defendants, and plaintiff brings the case here.

F. M. Black, and *D. B. Hadley*, for plaintiff.

B. Gray, defendant, for himself.

The opinion of the court was delivered by

VALENTINE, J.: This was an action in the nature of ejectment. The plaintiff claims title to the land in controversy, under a sheriff's deed, purporting to convey such land from one Jane Hicks Brown, the judgment-debtor, to one of the persons under whom the plaintiff claims. The defendant Gray claims title under a deed executed by said Jane Hicks Brown herself. The main question in the case is, whether said sheriff's deed is valid or not. But involved in this question are these other questions: Can a constable's return of service on an original summons in a justice's court, and all subsequent proceedings founded thereon, including a sheriff's deed, be impeached in an action in the nature of ejectment by evidence *aliunde* showing said constable's return to be false, and showing that the defendant, in the justice's court, never in fact had any notice of the pendency of the suit in such court?

It appears from the record in this case that, on the 15th of December 1860, one S. P. Bartlett commenced an action in a justice's court, in Wyandotte county, on two promissory notes against said Jane Hicks Brown. A summons was duly issued by the justice and delivered to H. H. Sawyer, constable. Afterward the constable returned the same with the following indorsement thereon, to-wit: "Executed on the 15th December 1860, by leaving a certified copy at the usual place of residence of the within named defendant, Jane Hicks Brown.—H. H. Sawyer, constable." Jane Hicks Brown made no appearance in the justice's court; and therefore the justice at the proper time rendered judgment against her by default for \$88.85 and costs. A transcript of this judgment was duly filed in the district court, execution was issued thereon, said land was sold under the same, the sale was duly confirmed by the district

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court. The sheriff then, on March 25th 1865, executed a deed for the land to the purchaser, which deed was duly recorded February 1st 1866. The purchaser took possession of the land under his deed, and he and those holding under him continued to hold the possession thereof until in 1871, when B. H. Tertelling the then holder of said land under said sheriff's deed, having mortgaged the land to the plaintiff in this case, and having become a bankrupt, abandoned the land, and Barzillai Gray, the holder of the adverse title, took possession thereof. The land was sold under the bankruptcy proceedings against Tertelling, and Mastin, the plaintiff in this action, became the purchaser for the purpose of obtaining payment of his said mortgage. He received his deed from the assignee in bankruptcy on the 30th of August 1872. Now if said sheriff's deed is valid, then the land in controversy belongs to the plaintiff Mastin; but if it is not valid, then the land belongs to defendant Gray; and the whole question depends upon the validity or invalidity of said constable's return. It also appears from the record in this case that Jane Hicks (that was her maiden name) was a Wyandotte Indian woman. In the spring of 1860, she resided in Wyandotte county, in this state, with a Wyandotte Indian man by the name of Leander Brown. Whether they were married or not, is not shown. During that spring they had a misunderstanding, and Jane Hicks left Brown and went to the Indian Territory to reside. Afterward Brown married another woman, with whom he lived for seven years; but in 1869 he commenced to live with Jane Hicks again. Jane Hicks remained in the Indian Territory during the whole of the remainder of the year 1860, after she first went there, and she had no residence in Kansas after the spring of 1860. Therefore the return of the constable, that he served said summons on the 15th of December 1860, "by leaving a certified copy at *the usual place of residence*" of said Jane Hicks Brown, cannot be true. He probably left the copy at the residence of said Leander Brown, but whether he did or not, is not shown by the record.

We now come to the question whether said constable's re-

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turn, and the subsequent proceedings founded thereon, including the sheriff's deed, can be impeached in this action by evidence *aliunde*. A sheriff's deed founded on a void judgment is of course void. *North v. Moore*, 8 Kas. 143; *Shields v. Miller*, 9 Kas. 390. A judgment rendered without jurisdiction is void. *Butcher v. Bank*, 2 Kas. 70. And a personal judgment, rendered without notice to the defendant, is rendered without jurisdiction, and is consequently void. *Case v. Hannahs*, 2 Kas. 490, 496; *K. P. Rly Co. v. Streeter*, 8 Kas. 138. This far we think all the authorities agree. A sheriff's return of service of original process may, in a direct proceeding, and before judgment, be impeached so far as such return states facts which do not come within the personal knowledge of the sheriff himself; such facts, for instance, as where "the usual place of residence" of the defendant is located. *Bond v. Wilson*, 8 Kas. 228. (This proposition is denied in Missouri: *Hallowell v. Page*, 24 Mo. 590.) In many cases such a return may be impeached for falsity, even after judgment is rendered thereon; and the judgment itself may be declared void. *Knowles v. Gaslight Co.*, 19 Wall. 59; *Carleton v. Bickford*, 13 Gray, 591; *Norwood v. Cobb*, 15 Texas, 500; same case, 24 Texas, 551. And probably in all cases such a return may be impeached in a direct proceeding to perpetually enjoin the judgment founded on such return, because of the falsity of such return. *Chambers v. Bridge Co.*, 16 Kas. 270; *Earl v. McVeigh*, 91 U. S. 508; 3 Cent. L. J. 689. (This proposition is also disputed; and particularly in Nebraska it is disputed: *Johnson v. Jones*, 2 Neb. 126. Though in the Nebraska case it was really not necessary for the court to decide the question.)

A judgment void for want of notice may be set aside at any time even after the lapse of more than three years, on a motion made therefor by the defendant. *Foreman v. Carter*, 9 Kas. 674. And this may be done in some cases even where it requires extrinsic evidence to show that the judgment was rendered without notice and without jurisdiction. *Hanson v. Wolcott*, ante, 207. Where the record itself shows that the judgment was rendered without notice, and without jurisdiction, all the

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courts unite in holding that the judgment is void, and may be impeached anywhere, and collaterally as well as directly. Where the record is silent on the subject, a majority of the courts hold that the record may be impeached collaterally as well as directly, and by extrinsic as well as internal evidence. And a great majority of the courts hold that a judgment from another state may be impeached for want of jurisdiction collaterally as well as directly, and by extrinsic evidence as well as by the record itself. (*Litowich v. Litowich*, ante, p. 451, and cases there cited.) But the difficult question to determine arises when it is attempted to impeach a domestic judgment collaterally, and by extrinsic evidence. There are authorities which hold that it cannot be done. *Hahn v. Kelley*, 34 Cal. 391; *McDonald v. Leewright*, 31 Mo. 29; *Cullen v. Ellison*, 13 Ohio St. 446; *Johnson v. Jones*, 2 Neb. 126; *Willcox v. Kassick*, 2 Mich. 165; *Granger v. Clark*, 22 Me. 128; *Cook v. Darling*, 18 Pick. 393; *Finneran v. Leonard*, 7 Allen, 54; *Lightsy v. Harris*, 20 Ala. 409; *Coit v. Haven*, 30 Conn. 190. While there are other authorities which hold that it may be done. *Ferguson v. Crawford*, decided by the New York Court of Appeals, September 18, 1877, 4 Law & Eq. Rep. 682; *Adams v. Saratoga & Wash. Rld. Co.*, 10 N. Y. 828, 332; *Bolton v. Jacks*, 6 Robert. (N. Y.) 166, 198; *Porter v. Bronson*, 29 How. Pr., 292; *Tebbetts v. Tilton*, 31 N. H. 273; *Sanborn v. Fellows*, 22 N. H. 273, 288. And there are many authorities which tend to uphold the doctrine that any judgment rendered without jurisdiction may be impeached in any proceeding; and that in doing so, anything contained in the record, (of which such judgment forms a part,) purporting to give or prove jurisdiction, such as the recital of a sheriff's return, or service of summons, or a service by publication, or any constructive service, or any appearance by attorney, or a finding by the court of such service, notice, or appearance, may be impeached and contradicted by any evidence, extrinsic as well as intrinsic, and may be shown to be untrue and false. *Elliott v. Piersoll*, 1 Pet. 328, 340; *Hickey v. Stewart*, 3 How. 750; *Shelton v. Tiffin*, 6 How. 163; *Williamson v. Berry*, 8 How. 495, 540; *Webster v.*

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Reid, 11 How. 437, 460; *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Gaslight Co.*, supra; *Earl v. McVeigh*, supra; *Borden v. Fitch*, 15 Johns. 121, 141; *Latham v. Edgerton*, 9 Cow. 227; *Starbuck v. Murray*, 5 Wend. 148, 156; *Shumway v. Stillman*, 6 Wend. 448, 453; *Dobson v. Pearce*, 12 N. Y. 164; *Kerr v. Kerr*, 41 N. Y. 272; *Rape v. Heaton*, 9 Wis. 328, 332; *Pollard v. Wegener*, 18 Wis. 569, 576; *Russell v. Perry*, 14 N. H. 152; *Norwood v. Cobb*, 15 Texas, 500; same case, 24 Texas, 551; *Hovan v. Wahrenberger*, 9 Texas, 313; *Price v. Ward*, 25 N. J. L. (1 Dutch.) 225; *Carleton v. Bickford*, 18 Gray, 591; *Aldrich v. Kinney*, 4 Conn. 880; *Miller v. Handy*, 40 Ill. 448; *Cooper v. Sunderland*, 8 Iowa, 114, 127; *Pollard v. Baldwin*, 22 Iowa, 328.

The decisions upon the question which we are now discussing are conflicting and contradictory, and of course they cannot all be good law. The case of *Hahn v. Kelley*, supra, is disapproved in the case of *Galpin v. Page*, 3 Sawyer, 94, 106, (this last decision following that of *Galpin v. Page*, 18 Wall. 350.) The case of *McDonald v. Leewright*, supra, is decided upon the sole ground that a sheriff's return cannot be impeached in any case, except in an action against the sheriff for a false return, which ground, as we have already seen, is wholly untenable in Kansas. The case of *Callen v. Ellison*, supra, seems to enunciate the doctrine that a judgment rendered upon an appearance by an attorney, cannot be impeached in a collateral proceeding by showing that such attorney had no authority to make any such appearance. The decision in the case last mentioned may perhaps not go quite to this extent. If it does not, then it is not applicable to this case; but if it does, then it will be found to be in conflict with the following decisions heretofore cited, to-wit: *Shelton v. Tiffin*, *Starbuck v. Murray*, *Shumway v. Stillman*, *Kerr v. Kerr*, *Price v. Ward*, and *Aldrich v. Kinney*. See also, *Bodurtha v. Goodrich*, 8 Gray, 508.

The decision in the Nebraska case of *Johnson v. Jones*, supra, relating to the impeachment of judgments for want of jurisdiction, is but little more than *dictum*, and very bad *dictum* too.

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The case itself would have been decided in precisely the same way that it was decided, even if the question of jurisdiction had not been raised. The effect of this decision, or rather *dictum*, is as follows: Where a judgment is rendered against a person who has never had any notice either of the action or of the judgment, he must, nevertheless, take notice thereof within the time "provided by law for appeal, review, rehearing, or impeachment by writ of error," and resort to such remedy, or he will be forever remediless. It is his own fault if he does not ascertain within such time that such judgment was rendered against him. He has no right to remain ignorant of the rendition of such judgment, and consequently to remain quiet and inactive. He has no right to wait until he receives actual notice of the judgment, by an attempt being made to enforce it against him; and if he does so wait, he cannot then maintain an action to have the judgment declared void, or to perpetually enjoin its enforcement.

The Michigan case of *Willcox v. Kassick*, *supra*, was an action of debt on a judgment from a sister state. The record upon its face showed jurisdiction, and the judgment appeared to be valid; and the court in that case held that such judgment could not be impeached for want of jurisdiction. There are other cases holding the same thing which we have not cited. They so hold upon the theory that a judgment from a sister state is just as good as a domestic judgment, and that a domestic judgment could not be so impeached. The theory that a judgment from a sister state is entitled to the same faith and credit as a domestic judgment, is unquestionably correct. It is sustained by all the authorities, from the decision in the case of *Mills v. Duryea*, 7 Cranch, 484, down to the present day. And of course, if a domestic judgment cannot be impeached collaterally, and by extrinsic evidence, a judgment from a sister state cannot be so impeached. But the authority is now overwhelming that a judgment from a sister state may be so impeached. (See cases cited in case of *Litowich v. Litowich*, ante, p. 451.) And hence the decision in the case of *Willcox v. Kassick* cannot be considered as very high authority

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for the doctrine that a domestic judgment cannot be impeached.

The cases of *Granger v. Clark*, and *Cook v. Darling*, supra, do not seem to have received much consideration from the courts that decided them; and the decision in the case of *Finneran v. Leonard*, supra, is founded on that in the case of *Cook v. Darling*. The case of *Cook v. Darling* makes a distinction between the records of courts of superior jurisdiction and courts of inferior jurisdiction—holding that a judgment of an inferior court may be impeached collaterally for want of jurisdiction, while a judgment of a superior court cannot be so impeached. The judgment sought to be impeached in the case at bar is a judgment of a court of inferior jurisdiction. The case of *Lightsey v. Harris*, supra, is very much like the case of *McDonald v. Leewright*, supra. The case of *Coit v. Haven*, supra, is like the case of *Cook v. Darling* in making a distinction between courts of superior and inferior jurisdiction.

Several of the cases cited as showing that judgments may be impeached collaterally for want of jurisdiction, are open to objections as to their exact applicability to the case at bar. But still it will be found in all of them that either the decision of the court itself, or the language of the judge in delivering the opinion of the court, is applicable. Of course, all decisions made by state courts concerning the impeachment of domestic judgments collaterally, and by extrinsic evidence, are exactly applicable to the present case, unless such decisions are controlled by local statutes. Also all decisions made by federal courts, in cases commenced in the same state in which the judgments sought to be so impeached were rendered, are clearly applicable. (This includes the decisions in the cases of *Elliott v. Piersoll*, *Hickey v. Stewart*, *Shelton v. Tiffin*, *Williamson v. Barry*, and *Webster v. Reid*, supra.) If this case had been commenced in the federal courts instead of in the state courts, as it was, the federal courts would undoubtedly have allowed the said judgment against said Jane Hicks Brown to be impeached. We also think that all decisions of state

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courts allowing judgments from other states to be impeached collaterally, and by extrinsic evidence, are applicable to this case. It is now settled beyond all controversy that judgments from sister states, wherever they can be used, are entitled to the same faith and credit as domestic judgments. That is, although an execution cannot be issued upon them directly, nor are they liens upon real estate directly, yet when they are sought to be used as evidence, or as the foundation for other actions, they are entitled to the same faith and credit as domestic judgments. Now, as nearly all courts hold that judgments from sister states may be impeached collaterally for want of jurisdiction, and by extrinsic evidence, it is substantially a holding that domestic judgments may also be impeached under like circumstances. Proceedings instituted for the purpose of destroying, impairing, or modifying the force or effect of a judgment for all cases, such as proceedings to reverse, vacate, set aside, declare void, suspend, modify, or perpetually enjoin a judgment, are direct proceedings. But a proceeding instituted for some other purpose, and in which the question of the force or effect of the judgment arises only incidentally, is a collateral proceeding. A judgment rendered with jurisdiction can never be impeached in a collateral proceeding; but a judgment rendered without jurisdiction may. In fact, a judgment rendered without jurisdiction is no judgment at all. A judgment cannot be rendered against any person until he has had his day in court, and until he has had an opportunity to be heard. To say that the record of a judgment can conclusively prove that any person was a party to the action in which it was rendered, and then to say that the judgment is conclusively valid because he was a party, is to reason illogically. It is begging the question. It is reasoning in a circle. That is, the judgment proves that he was a party, and being a party proves the validity of the judgment. There was no finding in this case by the court rendering the judgment that said Jane Hicks Brown was served with notice, or that she was in fact a party to the suit; but even a finding

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to that effect could not make any difference, for a court cannot make a finding against a person until after the court has obtained jurisdiction of such person.

In an action in the nature of ejectment, such as the present action is, the validity of a judgment under which either party claims title, is just as much in issue as the validity of any judgment in any action can be. But there is this difference: in the most of actions, where the validity of a judgment is put in issue, the pleadings must specifically show the issue. But in ejectment this is not necessary. In ejectment all that is necessary for the plaintiff to do is to allege in his pleading "that he has a legal or equitable estate" in the land in controversy, describing the same, and that he "is entitled to the possession thereof;" while all that is necessary for the defendant to do is simply to deny the plaintiff's allegations. And then everything is in issue that will sustain either title or defeat either title; and each side is bound to take notice thereof. Everything is in issue as much as though it was set out in the pleadings in the most elaborate detail, and with the greatest circumstantial particularity. Probably no action, except one to reverse, vacate, modify, suspend, or perpetually enjoin a judgment, can be said to be a direct attack upon such judgment. And if not, then ejectment cannot be a direct attack upon any judgment. But where the validity of a judgment is in issue in ejectment, the attack upon the judgment is as direct as it can be in any other action, except an action to reverse, vacate, modify, suspend or perpetually enjoin the judgment, and the parties are in law and by the nature of the action bound to take notice of this attack just as much as they would in any other action.

The judgment of the court below will be affirmed.

HORTON, C. J.: I concur in the foregoing decision, but as the question is one of very grave importance, I wish to add, that while it is not to be denied there are numerous decisions of most respectable courts sustaining another rule, in my judgment the conflicting decisions are based upon insufficient and

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unsatisfactory reasons. The prior decisions of this court have settled the law in this state to be, that an officer's return of service on original process may be impeached in a direct proceeding *before* and *after* judgment, where the return states facts (as in this case) which do not come within the personal knowledge of the officer. *Bond v. Wilson*, 8 Kas. 229; *Chambers v. Bridge Manufactory*, 16 Kas. 270; *Hanson v. Wolcott*, (ante, p. 207.) The new question now involved is, whether this principle shall be applied in actions in the nature of ejectment, where the plaintiff seeks to sustain his title by a sheriff's deed based upon a judgment rendered by a justice of the peace on default, when there was in fact (notwithstanding the return of the officer) no service of summons, nor any waiver thereof. The ablest of the opinions, holding adverse views, concede they violate all principles of natural justice, but attempt to fortify their forced conclusions on the plea of public policy. Now, in this state, it is unnecessary for a plaintiff, in an action to recover the possession of real property, to allege how his estate or ownership is derived. All he need do is to state and prove he has a legal or equitable estate in the property sued for. Likewise, the defendant can plead or set forth his defense in as general terms. He need only deny generally the plaintiff's title; and without allegations or notice of fraud in the execution of the contract, deed, or conveyance, on which the plaintiff relies, the defendant may offer evidence under his answer, and surprise and successfully destroy the title. Even tax deeds, valid upon their face, may be attacked and impeached by evidence *aliunde*, without the pleadings pointing out any defect. In a word, under a general denial, we have already held, that in actions of this nature the defendant may show, by any legal evidence which he may have, that he is the owner of the land in controversy. *Hall's Heirs v. Dodge*, 18 Kas. 277. If our code has authorized, upon pleadings of such general terms, evidence of so broad a quality to be presented, I see no reason to deny the right to impeach in this suit a judgment of the character that Bartlett obtained against Jane Hicks Brown before a justice of the

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peace in 1860. The fact that it is *prima facie* and presumptive evidence of its truth, is a sufficient advantage to the plaintiff resting upon it; and the party affected thereby, having no notice by the pleadings that it would be used to sustain any issue, would be, it seems to me, more greatly prejudiced by a denial of the right to controvert and disprove it, than the plaintiff would be if called upon to sustain the jurisdiction of the justice when that jurisdiction is attacked with the proof that Jane Hicks Brown was not within the state at the time of the pretended service. I see no valid reason for placing a defendant under this disadvantage against a judgment thus obtained. The fairness and the justice seem in favor of the right to impeach and annul the judgment.

Under the federal statutes, the plaintiff, being a citizen of another state, and the defendants citizens of Kansas, either party could have removed the suit before trial to the United States circuit court for this district. If the defendants had taken advantage of this statute authorizing such removals, under the decisions of the federal courts it seems to be settled that the pretended judgment could have been successfully impeached by the defendants in that court. *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Gaslight and Coke Co.*, 19 Wall. 58; *Earle v. Mc Veigh*, 1 Otto (U. S.) 508; *Shelton v. Tiffin*, 6 How. 168; *Webster v. Reid*, 11 How. 487; *Elliott v. Piersoll*, 1 Pet. 328. See also, *Pennoyer v. Neff*, Sup. Ct. of U. S., Feb., 1878, 6 Cent. L. J. 252.

If we now hold that the defendants cannot obtain the same rights under our practice in our own courts, as in the federal courts held in the state, or if we remit the defendants to other modes of redress than awarded them in the district court, we deprive our own courts of some authority and power, and restrict their procedure upon grounds of policy unknown to federal practice. We would thus tend to swell the litigation in the federal courts, whose extensive and encroaching jurisdiction is already a subject of complaint with some of the profession, and is viewed by many as periling, not only the importance, but the existence of our state courts. In my

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view, not only do the principles of natural justice, but likewise the true principles of policy, considering the provisions of our civil code and the prior decisions of this court, sustain the opinion of my learned brother.

BREWER, J.: I dissent from the views expressed by my brethren in this case. I think that as to all domestic judgments, where upon the face of the record everything is regular, the judgment rendered upon legal and sufficient service, it is conclusive as against any collateral attack. Public policy requires that judicial proceedings apparently valid should be held valid as against everything but a direct attack. Under the rule laid down by the court, a solemn judgment of any court, even a court of record and of general jurisdiction, may be blown to pieces by the testimony of a single interested witness in an action in which the pleadings give no notice of any question of the validity of the judgment. In any direct attack, the party claiming rights based upon the judgment has specific notice, and may prepare his testimony accordingly. In this very case, if the plaintiff had specific notice of the objection to the validity of the judgment, he might perhaps have shown by many witnesses that the return of the constable was in fact true. My brother Valentine has fully referred to the authorities and arguments, and I simply desire to express my dissent to the conclusions reached by him and the Chief Justice.

MISSOURI & KANSAS TRANSPORTATION CO. V. ALFRED PALMER.

1. **CASE-MADE**—*Must be Complete; Original to be Filed with Petition in Error.*
A case-made must be complete and perfect when settled, signed, and attested. To be available on review in error in the supreme court, the original case-made must be attached to and filed with the petition in error, and it must contain a statement of so much of the proceedings and evidence, or other matters of the district court, as may be necessary to present the errors complained of.
2. ——— A case-made cannot be supplemented and perfected in this court by attaching thereto certified copies of the pleadings and other proceedings of the district court neither referred to nor incorporated in the case-made. [*Allen v. Krueger*, 25-75; *Smith v. Moore*, 21-162, 163; *Cohen v. Trowbridge*, 6-388; *Hodgden v. Comm'rs*, 10-638; *Sullivan v. R. R.*, 17-503; *Thompson v. Williams*, 30-114.]
3. ——— *Pleadings; Issues.* In the absence of the pleadings in an action, or any statement of the issues in controversy, the supreme court cannot determine from an examination of the evidence and instructions preserved in a case-made, whether there is any material error in the rulings of the district court in receiving or rejecting testimony, or in directing the jury. [*Smith v. Moore*, 21-162, 163.]

Error from Cherokee District Court.

REPLEVIN, brought by the *Missouri & Kansas Transportation Co.*, against *Palmer*, as sheriff, to recover possession of a steam engine which had been taken by such sheriff upon an order of attachment against the property of one Thompson. Trial at October Term 1876. Judgment for defendant, and plaintiff brings the case here.

Ritter & Anderson, and *J. R. Hallowell*, for plaintiff.

Hill & Sallee, *W. C. Webb*, and *Cowley & Bennett*, for defendant.

The opinion of the court was delivered by

HORTON, C. J.: In this proceeding, an attempt is made to bring here for review certain alleged erroneous rulings of the district court of Cherokee county in receiving and rejecting evidence, and also in granting and refusing instructions on the trial of the action in that court. A jury was impaneled in the case, a general verdict given, and no special findings of

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fact were returned by the court, or jury. The evidence and instructions are preserved in a case-made; but neither the pleadings, verdict, judgment, motion for a new trial, nor any of the journal entries, are incorporated in it, referred to, or in any way made a part thereof. To it however, as presented to us, is attached a certified copy of all these records and papers.

1. Case-made; what it is, and its office. The case-made was presented, signed, and filed beyond the trial term, and therefore cannot be treated as a bill of exceptions. It is now chal-

lenged; and the question is fairly presented by the record, whether a case-made can be supplemented and completed by having added or attached to it certified copies of the records of the court below not embodied therein as a part of the same. Must the case-made, when settled and signed, be complete in itself, so as to fully present the errors complained of? Sec. 547 of the civil code provides, "that a party desiring to have any judgment or order of the district court, or a judge thereof, reversed by the supreme court, may make a case, containing a statement of so much of the proceedings and evidence, or other matters in the action, as may be necessary to present the errors complained of to the supreme court." And §1, laws of 1877, p. 248, further provides, that "in all actions hereafter instituted by petition in error in the supreme court, the plaintiff in error shall attach the original case-made, filed in the court below, or a certified transcript of the record of said court." A case-made is no part of the record of

A case-made is no part of the record.

the district court. Section 548 of the code provides that after a case-made is duly settled, signed, and attested, it shall be filed with the papers in the case; but it is nowhere provided that it shall become a part of the record. The provision as to a bill of exceptions is otherwise.

Bill of exceptions.

Sec. 303 of the code prescribes that after a bill of exceptions is allowed and signed it shall be filed with the pleadings as a part of the record, but not spread at large upon the journal. If a proceeding is prosecuted in this court to reverse an order or judgment of the district court or judge, where the decision objected to is entered on the record,

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and the grounds of objection appear in the entry, and the exceptions are properly noted, or where the decision is not contained in the record, or the grounds of objection do not sufficiently appear in the entry but are fully preserved in a bill of exceptions filed and made a part of the record, then a certified transcript of the record of the court below is to be attached to and filed with the petition in error. But where

such proceeding is founded on a case-made, the original case-made is to be filed with the petition in error; and there is no authority to attach or add to it any certified transcript, or the copies of any papers. It cannot be thus perfected. Not only does the statute fail to make a case-made a part of the record, but the section of the law of 1877, referred to, authorizes it to be taken from the files of the district court, and when thus removed from that jurisdiction, it is in no way subject to its control; and even a copy thereof cannot be obtained officially from its clerk in a transcript of the case, or otherwise. This is an additional argument showing that it is not regarded as a part of the records of the district court.

Aside from the specific manner of bringing cases here on error, it is evident from the language used in the code for making a case, that it was intended to have the case itself, in connection with the petition in error, present all that is necessary to be considered by the supreme court in reviewing alleged errors of the inferior court, when such supposed errors are sought to be reviewed on a case-made. The

case-made must contain "a statement of so much of the proceedings and evidence, or other matters in the action, as may be necessary to present the errors complained of to the supreme court." The language is comprehensive, and cannot be dwarfed to mean simply a bill of exceptions taken beyond the term, and settled in the presence of the parties. One object of a case-made was to reduce the size of the record, and thereby the costs of a review, by leaving out much of the immaterial matter that always incumbers a record brought to the court by a certified transcript. Unfortunately

2. Case-made,
not aided by
the record.

3. Issues must
be shown.

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this purpose is not much appreciated, judging from the records presented to us. Upon an examination of the case-made we find no statement therein of so much of the proceedings as is necessary to present the errors complained of. Certain evidence is stated as given and attempted to be given, and also certain instructions are set forth; but in the absence of the pleadings, or any statement of the issues between the parties, we cannot determine what evidence was material, or competent, or what instructions were relevant, or proper. We cannot go outside of the case-made and search for these matters in a transcript; nor can we consider any orders, motions, or proceedings *dehors* the case settled and signed. It should be complete without the necessity of support *aliunde*. The plaintiff in error has not sufficiently presented its case to obtain a review of the rulings of the district court; or rather, in its attempt to combine a case-made with a transcript of the record, it has pursued a practice unauthorized by the code, has failed to obtain any benefit from either, and has fallen between the two.

No error appearing in the case-made, the judgment of the court below will be affirmed.

All the Justices concurring.

J. C. KARR v. WM. C. HUDSON.

CASE-MADE; Irregular and Unauthenticated Paper. A paper, purporting to be a case-made, but not attested by the clerk of the district court, and not having the seal of the court attached thereto, and filed beyond the trial term, will not be reviewed by the supreme court for alleged errors, when challenged for want of the statutory authentication. [*Sullivan v. R. R.*, 17-503; *Pierce v. Myers*, 28-368; *Linton v. Frasier*, 29-30.]

Error from Labette District Court.

ASSAULT and battery. *Hudson* had judgment against *Karr*, at the February Term 1877 of the district court, for \$136 as and for his damages sustained by reason of certain injuries to

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his person inflicted by *Karr*. New trial refused. *Karr* brings the case here.

Cory & Kimball, for plaintiff in error.

A. H. Ayres, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: On the 10th of March 1877, the motion for a new trial in this action was overruled by the district court, and *Karr*, the defendant in the court below, was given thirty days in which to make a case for this court. What purports to be a "case-made," in the proceedings before us, is signed by the judge, and dated April 18th 1877. But the paper is not attested by the clerk, nor is the seal of the court attached. Hence the same is not authenticated as required by the law. (Sec. 1, ch. 114, Laws of 1871.) We cannot be unmindful of the behests of the law, nor have we any authority to dispense with the statutory provisions of authentication required to a case-made. The paper presented us is not sufficiently authenticated to constitute it a case-made. (*Hodgden v. Comm'rs of Ellsworth Co.*, 10 Kas. 687.)

Nor can we accept the case-made as a bill of exceptions. There is nothing in the record to show the paper was filed in term-time—nothing to show that the court was in session on April 18th; and the journal entries of the court, outside of said paper, make no mention of any bill of exceptions being tendered, or allowed, or filed. We cannot presume, in the absence of the proper evidence, and when the record shows that thirty days were given to make a case, that any bill of exceptions was taken, notwithstanding the paper is denominated both a case-made and a bill of exceptions. It is neither. Under such circumstances it is impossible for us to examine the action of the district court in refusing to suppress certain depositions, in admitting alleged incompetent evidence, and in directing the jury, as there is, in legal contemplation, no case-made, bill of exceptions, or other record here. The case will be dismissed.

All the Justices concurring.

PETER SHUMAKER *et al.* v. JOHN O'BRIEN.

1. **BILL OF EXCEPTIONS; *Its Object, and Office.*** The office of a bill of exceptions, and of a case-made, is very dissimilar. The object of the former is generally to bring upon the record for review a decision of the court upon a matter of law, which the record would not otherwise show, and it must be reduced to writing, allowed, signed, and filed at the term the decision complained of is made. After being signed, filed and made a part of the record of an action, it can be presented to the supreme court in the transcript of the case. [*Gallaher v. Southwood*, 1-143; *Hunt v. Spencer*, 20-129; *Whitney v. Harris*, 21-96, 97; *State v. Nickerson*, 30-547; *Piper v. Thompson*, 34-62.]
2. **CASE-MADE; *Its Object, and Office.*** The object of a case-made is to present to the supreme court, complete in itself, a statement of so much of the proceedings and evidence, or other matters in the action, as may be necessary to bring to the notice of this court the errors complained of. It must embrace and include *all* that is necessary for a full understanding of the questions submitted for decision, regardless of the fact whether the exceptions are entered of record. It may be settled, signed, and filed beyond the trial term, and in vacation, upon the order and within the time allowed by the trial court or judge. [*Morgan v. Chapple*, 10-216; *R. R. v. Wingfield*, 18-217; *Hunt v. Spencer*, 20-128; *Ingersoll v. Yates*, 21-91; *Parker v. S. M. Co.*, 24-31, 32; *Allen v. Krueger*, 25-75; *Ins. Co. v. Koons*, 26-215; *Dodd v. Abram*, 27-69; *Edmondson v. Beale*, 27-658; *Smith v. Moore*, 29-163.]

Error from Nemaha District Court.

ACTION by Shumaker and two others to recover back the purchase-money paid by them to *O'Brien* for a certain bull. The action was grounded upon alleged fraud and deception on the part of *O'Brien* at the time of the sale regarding the property sold. Trial at April Term 1876. A demurrer to the evidence was sustained, and judgment given against plaintiffs for costs. They now bring the case here.

R. C. Bassett, for plaintiffs.

J. E. Taylor, for defendant.

The opinion of the court was delivered by

HORTON, C. J.: At the April term of the district court for 1876, the defendant obtained a judgment for costs against the

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plaintiffs, and thereupon the plaintiffs obtained leave to make a case in sixty days. Afterward, the time was extended by consent of parties to September 4th 1876. Within said time, and with consent of the parties, a case was attempted to be made. The paper attached to the petition in error as a case-made was not attested by the clerk of the district court, nor is the seal of the court affixed thereto. Hence this paper is not authenticated as required by the statute to constitute it a case-made. (Sec. 1, ch. 114, Laws 1871; *Hodgden v. Comm'rs of Ellsworth Co.*, 10 Kas. 687; *Karr v. Hudson*, ante, p. 474.)

There is another serious defect with the so-called case-made, which, if duly authenticated, would render it impossible for us to review and pass upon the alleged errors. On the trial in the court below, after the evidence of the plaintiffs in that court had been introduced, the defendant presented his demurrer thereto, which was sustained. This ruling of the court is the only one sought to be presented here. All the evidence is preserved in the paper filed here as a case-made, but none of the pleadings are incorporated or referred to in such paper. A copy of the pleadings, certified to by the clerk of the district court, is annexed to the papers here, but being no part of the "case-made" must be disregarded. (*M. & K. Trans. Co. v. Palmer*, ante, p. 471.) The office of a bill of exceptions and the office of a case-made are very dissimilar. The object of the former is generally to bring upon the record for review a decision of the court upon a matter of law which the record would not otherwise show, in which case it must be reduced to writing, allowed, signed, and filed at the term the decision complained of is made. Nor is it correct practice to set out the pleadings in the action in the bill of exceptions; neither should the judgment, nor orders of the court be embraced in it. They tend to burden that record, and increase the expense of the transcript, without any benefit. The bill of exceptions is only a portion of the record, and when included in a transcript of the record presents proceedings here for examination and review. The purpose of a case-made is otherwise. The case may be settled, signed, and filed beyond

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the trial term, and in vacation, but it must be complete in itself, and not depend upon pleadings, nor orders of the court neither referred to nor incorporated therein. It is to contain matters of record, as well as proceedings not entered on the record. To comply with the statute, to present errors for review, it must embody a statement of so much of the issue, proceedings, and evidence, or other matters in the action, as may be necessary to bring to our notice, from an examination of the paper settled and authenticated as a case-made, the errors complained of. Again, one object, we know, of a case-made, an object not always appreciated by counsel, is to reduce the size of the record. It was thought that all matters immaterial to the question sought to have decided, might be left out, and only a short, concise statement of the question, and the facts upon which it arose, presented. But exactness is required. We must be informed in some way, of what is proposed for our examination. If but a single question, the record must show what that is, and that all which is necessary for a full understanding of it, and its bearings upon the case, is before us, otherwise great wrong might result. *Morgan v. Chapple*, 10 Kas. 216. In the absence of the pleadings and issues from the case-made we cannot determine that any material error was committed by the court below in sustaining the demurrer to the evidence of the plaintiffs. (*M. & K. Trans. Co. v. Palmer*, supra.) For the failure to have the case-made duly authenticated, the proceedings here must be dismissed. (*Karr v. Hudson*, supra.)

All the Justices concurring.

JOHN C. REISNER V. THE STATE OF KANSAS.

P. C. MCGILVRAY V. THE STATE OF KANSAS.

1. **REVIEWING QUESTIONS, in Criminal Actions; Appeal, Not Error, the Proper Proceeding.** In a criminal action for assault and battery, appealed from a justice's court to the district court, the district court adjudged, upon an acquittal of the defendant, that the prosecuting witness should pay the costs. No appeal was ever taken from the district court to the supreme court. But the prosecuting witness made a case for the supreme court under the provisions of the code of civil procedure, and brought the case to the supreme court on such "case-made" and on petition in error. No appearance was made in the supreme court by either the county attorney or the attorney-general. *Held*, That the case was not rightfully brought to the supreme court, and that the petition in error must therefore be dismissed.
2. **UNAUTHORIZED APPEARANCE, Does not Cure Error.** An appearance in the supreme court for the state by any person not authorized by law to appear for the state, would not cure the error, and confer jurisdiction. (And *querre*: Would an appearance by even the county attorney, or attorney-general, under such circumstances make any difference?)

Two cases, brought here by petition in error—one from the district court of Atchison county—the other from the district court of Brown county. The actions were criminal, not civil; and questions of practice only, as to the proper mode of bringing such cases here, are decided. The *Reisner* case was tried at the March Term 1877 of Atchison district court; that of *McGilvray* at the April Term 1877 of Brown district court. All necessary facts are stated in the opinion.

In the *Reisner* case, *S. H. Glenn* appeared for plaintiff in error. No appearance for The State.

In the *McGilvray* case, *James Falloon* appeared for plaintiff in error, and *Lacock & Mulhollen*, and *W. J. Richardson*, for The State.

The opinion of the court was delivered by

VALENTINE, J.: John C. Reisner, plaintiff in error, made complaint under oath before J. K. Fisher, a justice of the

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peace in the city and county of Atchison, charging one William Moore with the offense of "assault and battery." A warrant was issued. Moore was arrested, brought before the court, was tried by the court and *convicted*, and sentenced to pay a fine and costs. Moore took appeal, and afterward was tried by a jury in the district court upon the same charge, and therein the jury returned a verdict of "not guilty." And thereupon the county attorney filed his motion to assess the costs against Reisner, the prosecuting witness, for the reason "that the defendant (in the prosecution) had been discharged," which motion the court sustained, and did assess all the costs of prosecution against said Reisner, prosecuting witness and plaintiff in error, against his objection, and to which he duly excepted. No appeal was ever taken from the district court to the supreme court, but Reisner made a case for the supreme court under the provisions of the code of civil procedure, and brought the case to the supreme court on such "case-made" and on petition in error. No appearance has been made in this court by either the county attorney of Atchison county, or the attorney general. Indeed, no appearance has been made in this court for the state by any person. We therefore think that we have no jurisdiction to hear and determine the case upon its merits. The case is not a civil action. It is not an incident to a civil action; and it has no connection whatever to any civil action. It is really a part and portion of and an incident to the criminal action brought by The State of Kansas against William Moore. But in this particular phase of the case we should think that Reisner might be considered as the defendant, and The State of Kansas as the plaintiff. And if Reisner has any right to bring the case to this court, (and we are inclined to think he has,) he must bring it here, not on petition in error, as though it were a civil action, but on appeal, as all criminal actions are brought to this court. (Gen. Stat. 865, 866, § 281, et seq.) The petition in error in this case must be dismissed.

The case of McGilvray, plaintiff in error, against The State of Kansas, defendant in error, involves almost precisely the

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same preliminary question, before the merits can be examined, as the Reisner case above mentioned does, and therefore the McGilvray case must also be dismissed. About the only difference between the two cases is, that in the McGilvray case there has been an appearance in this court for the state, while in the other case there was no such appearance. But this appearance in the McGilvray case is not made by the county attorney, nor by the attorney general, nor by any other person authorized by law to make an appearance for the state, and therefore we do not think that such an appearance *alone* can have the effect to authorize an examination of the case upon its merits. But even if the appearance had been made by the county attorney, or the attorney general, it would still be doubtful whether the case could be heard and examined upon a "case-made" and on a petition in error where no appeal had been taken, and no transcript of the proceedings of the court below had been brought to the supreme court.

The petitions in error in both cases are dismissed.

All the Justices concurring.

THE STATE OF KANSAS V. JOHN CAMPBELL AND A. G. JONES.

1. **COSTS, IN CRIMINAL CASES; Prosecuting Witness, When Not Liable.** On complaint of B., made under section 253 of the crimes act, A. was arrested for a willful disturbance of the peace. On the trial before a justice, A. was convicted of the offense, and thereupon appealed the case to the district court. Afterward the county attorney, with consent of the prosecuting witness, and by leave of the court, entered a *nolle prosequi* in the case, and the defendant was discharged. *Held*, That B., the prosecuting witness, is not liable for costs. [*Heller v. Co. Comm'rs*, 23-130; *Comm'rs v. Ballinger*, 20-594; *Comm'rs v. Keirseey*, 28-43; *In re Stoneberger*, 31-639.]
2. ——— **When County Not Liable.** Costs are unknown to the common law, and are only given by statutory direction; and there being no provision of the statute requiring the county where the alleged offense is committed to pay the costs or fees in a criminal action of the character above stated, and disposed of as this one was, *held*, that the taxation of costs in this case to the county was erroneous.

31—19 Kas.

Appeal from Allen District Court.

THE only questions here relate to costs and fees of officers and witnesses in criminal actions for disturbing the peace; and all necessary facts and proceedings are stated in the opinion. The county attorney of Allen county, upon the request of the county board of said county, brings the case here by appeal taken in the name of *The State*.

Peter Bell, county attorney, for appellant.

The opinion of the court was delivered by

HORTON, C. J.: This case was originally commenced before a justice of the peace, under section 253 of the crimes act, (Gen. Stat. 873,) against John Campbell and two others. A. G. Jones was the prosecuting witness. The case was tried before the justice, and the defendant Campbell having been convicted, gave bond and took an appeal to the district court, where, after several continuances, the case was called for trial at the July term 1877. Campbell announced himself ready for trial. The county attorney having been of counsel for the defendant Campbell, the court appointed one J. C. Murray to prosecute on behalf of the state, who, with the consent of the prosecuting witness, Jones, and by leave of the court, entered a *nolle prosequi* over the objections of Campbell, and Campbell was thereupon discharged. The county attorney then filed a motion to tax the costs in said action to the prosecuting witness, for the following reasons:

"1st, That the action was dismissed by the state with the knowledge and consent of the prosecuting witness, when the defendant Campbell was present and demanding trial. 2d, That the prosecution was without probable cause. 3d, That the prosecution was malicious."

A copy of the motion was served on said prosecuting witness, Jones, and afterward the motion came on to be heard. The state appeared by the county attorney. The defendant Jones appeared by J. C. Murray and J. R. Goodin, his attorneys. A jury was waived, and the cause submitted to the

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court. The state offered to prove the truth of each and all the allegations contained in the motion. Jones, by his attorneys, objected to the introduction of any evidence in support of the motion, which objection the court sustained, and refused to allow the state to introduce any evidence, to which ruling of the court the state excepted, and reserved the point and question for the consideration of this court. Jones, by his attorneys, then moved the court to tax all the costs in the action of *The State v. Campbell*, and the costs of the first motion to tax costs, to Allen county, which motion the court sustained, and ordered and adjudged that all the costs in the case of *The State v. John Campbell*, and the costs of the motion to tax the costs to the prosecuting witness, be taxed to and be paid by Allen county; to which motion and judgment of the court the state excepted, and then and there reserved the question of the authority of the court to tax said costs to Allen county, and the liability of said county to pay the same, for the consideration of this court.

As to the first question reserved, we answer that the district court committed no error in refusing to hear the evidence on the motion of the county attorney to tax the costs in the action to the prosecuting witness. The prosecutor was not liable under any provision of the statute. This action was pending in the district court at the time of its dismissal, and section 13 of the act relating to fees, (Gen. Stat. 481,) has no application. That section relates to fees in proceedings before justices of the peace—not to actions in the district courts. Neither is the case presented to us within the letter of section 326 or section 327 of the criminal code, (Gen. Stat. 872,) to which we have been referred. The language of these provisions of the statute does not apply to this action, and we cannot extend them. (*The State v. Menhart*, 9 Kas. 98.)

As to the second question reserved by the state, our response is, that the court below erred in taxing any of the costs to Allen county. Costs are unknown to the common law. They are given only by statute, and may be changed, or taken away, at the will of the legislature. As there is no statute

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authorizing or requiring the payment of any costs in this case from the county treasury of Allen county, the district court exceeded its power and committed error in attempting to compel the county to pay the costs. The county was not liable for the same.

This construction of our statutes may work injustice to officers and other parties who might be entitled equitably to have their fees paid by the county, or the prosecutor, or in some way; but as we are not the law-making power, we are not at liberty to add to the statute, nor responsible for the omission to provide for the payment of the costs in such cases. This omission seems to have been intentional. Sections 311 and 312 of the criminal code of 1859, Comp. Laws 1862, p. 281, prescribed that the costs in criminal actions should be paid by the county in which the offense was committed, when the defendant was convicted and unable to pay them; and when the defendant was acquitted, the costs were to be paid by the county, unless the prosecutor was adjudged to pay them. Said section 312, relating to costs in cases of acquittal, was omitted in the revision of 1868, and no section of like import inserted in its place. But for the *proviso* in section 19 of the act relating to fees, (ch. 89, Gen. Stat. 488-4,) which restricts the operation of that section to cases in which there is a conviction, that section might have given sheriffs and clerks authority to obtain their fees of the county, when not paid by the defendant or the prosecuting witness. As said section 19 is thus limited, it cannot apply in this action, nor in cases of acquittals.

The judgment of the district court will be reversed, and the case remanded with instructions to overrule the motion of Jones to tax the costs to Allen county.

All the Justices concurring.

COMM'RS OF JOHNSON COUNTY V. GEO. W. WILSON.

LIABILITY OF COUNTY FOR COSTS, in Misdemeanor Cases. Under section 27 of the practice-act in misdemeanor cases before justices of the peace, (Gen. Stat. ch. 83,) the county is in no event liable for the fees of the justice or witnesses in any case whereof jurisdiction is given by that chapter to justices of the peace, in which the defendant or complainant is adjudged to pay the costs; and it makes no difference as to the county's non-liability whether the case end in the justice's court, or is appealed to and defendant convicted in the district court. [*State v. Campbell*, 19-481; C. L. 1881, ch. 39, §§ 13 and 19; S. L. 1885, ch. 127, § 2.]

Error from Johnson District Court.

At the March Term. 1876 of the district court, *Wilson* recovered a judgment against the *Board of County Commissioners* for \$28.05—of which \$26.55 was for fees earned in a certain criminal case tried before him as a justice of the peace, and \$1.50 was for fees as a witness on the part of the state in the same case upon the trial thereof in the district court. The *Board of County Comm'rs* brings the case here.

J. W. Green, county attorney, for plaintiff in error.

Geo. W. Wilson, defendant in error, for himself.

The opinion of the court was delivered by

BREWER, J.: This case was submitted upon an agreed statement of facts in the court below. From this agreed statement the following facts appear:

"Wilson, the defendant in error, was an acting justice of the peace in the city of Olathe, Johnson county, in 1874. On 23d June 1874, one Gurnee was arrested and brought before said Wilson for trial. The offense with which Gurnee was charged was one which Wilson as justice of the peace had jurisdiction to try. On the 30th of June Wilson proceeded to try the case, which resulted in the conviction of Gurnee, who was fined in the sum of twenty-five dollars and costs of prosecution, and was by the court committed to the jail of Johnson county until the sentence and judgment of the court should be complied with. From this judgment Gurnee appealed to the district court. In the district court a trial was duly had

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with a like result as in the justice's court, with this exception: Gurnee was fined in the sum of fifty dollars, instead of twenty-five. Gurnee then appealed to the supreme court, which court affirmed the judgment of the court below. The mandate of the supreme court was filed in the court below on the 8th of June 1875, and immediately thereupon, a motion was made by the county attorney asking that the judgment and sentence of the court should be carried into effect. Gurnee failed to pay the fine and costs adjudged against him, and he was thereupon committed to the jail of Johnson county. On the — day of June, Gurney made an application to the board of county commissioners to be released from confinement, basing his application upon chapter 117, laws of 1871. Satisfactory proof of Gurnee's inability to pay the fine and costs adjudged against him was produced before said commissioners, and upon the 9th of June 1875 he was released from jail by their order. Said order did not release nor did it attempt to release said Gurnee from the payment of said fine and costs. Wilson performed the services for which his bill was made out, and on the 24th of June 1875 the bill was presented to the commissioners for allowance, and rejected. Such claim was for fees as justice for services done at the instance of the prosecution in the trial before himself, and as witness on the part of the prosecution on the trial in the district court."

Was the county liable? That the county is not liable in the absence of a statute making it liable, is conceded; and also, that if the case had stopped with the justice, and not been appealed, it would not have been liable for any costs in that court. Sec. 27 of ch. 88, Gen. Stat., p. 884, expressly provides that—

"No costs shall be paid by the county in any case of misdemeanor of which a justice of the peace has jurisdiction under this act, when the complainant or defendant shall be adjudged to pay them."—(*Procedure Act in Misdemeanors*, § 27.)

A release by the county commissioners of the defendant from imprisonment would not under those circumstances have made the county liable. This does not seem to be questioned. But the contention of counsel is, that the appeal vacated the judgment of the justice, and divested him of jurisdiction; that thereafter the case was one in the district court; that section 28 of same act provides that the district court in ren-

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dering judgment shall also render judgment for the costs before the justice; and that then § 325 of ch. 82, Gen. Stat., p. 872, becomes applicable, which provides that—

“The costs incurred on the part of the prosecution shall be paid by the county in which the offense is committed, when the defendant shall be convicted and shall be unable to pay them.”
—(*Criminal Code*, § 325.)

We cannot concur with these views. Chap. 82 is the code of criminal procedure, applying to criminal proceedings generally. Some of its provisions in terms apply to certain courts, and some to others; some in their nature are only applicable to one class of courts, while others are equally applicable to all courts, and all criminal cases. Article 16 of this chapter, in which is found section 325, quoted *supra*, is entitled and refers to “costs in criminal cases.” Section 325 is general, and except as modified or limited by other legislation applies to all criminal cases. If there were no other legislation the county would doubtless be liable for the costs sued for in this case. But chapter 88 is subsequent legislation, having been approved nine days after chapter 82. It provides for proceedings in certain misdemeanors before justices of the peace, and gives to them exclusive jurisdiction thereof. And in said section 27, above quoted in full, it provides that no costs shall be paid by the county in *those cases* when the complainant or defendant is adjudged to pay them. It does not say, *no costs incurred in the justice's court*, but “no costs * * * in any case of misdemeanor of which a justice of the peace has jurisdiction under this act.” The exception to the general provision is not as to the court, but the class of cases. The county pays no costs in those cases, and not simply no costs in those courts. Section 27 is a limitation on section 325. Effect must be given to each if possible. They are *in pari materia*, and to be construed together. If they stood side by side in the same act there would seem little difficulty in arriving at the legislative intention. The one says substantially, “in *all cases*,” the other, in certain *specified cases*. The latter is a limitation upon, an exception to, the former. The contingency named in said

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section 27 arose in this case. The defendant was adjudged to pay the costs. He still remains adjudged to pay them. We think therefore that the county was not liable for any of the costs sued for.

Section 19 of the act relating to and fixing fees, (ch. 39, Gen. Stat. 483,) whatever effect it may have as to the claims of other officers, does not help the claimant in this case.

The judgment of the district court will be reversed, and the case remanded with instructions to render judgment in favor of the defendant, the plaintiff in error, for costs.

All the Justices concurring.

UNION PACIFIC RAILWAY COMPANY v. WILLIAM H. YOUNG.

1. NEGLIGENCE OF RAILWAY CORPORATION; *Personal Injuries of Servant*. In an action to recover damages for personal injuries by a brakeman in the employ of a railway company while in the discharge of his duties, where the testimony introduced on the trial under the pleadings tends to prove, that the plaintiff was injured through the negligence of the engineer of the company in charge of the locomotive of the train; that said engineer was an incompetent and unfit person to be a locomotive engineer; that the company was guilty of negligence in employing said engineer, and in retaining him in its employ after his unfitness had become known, or when by the exercise of ordinary care it would have been known; and thereon the jury find a verdict for the plaintiff against the railway company, and the trial court approves the same, and sufficient evidence is offered to sustain the verdict, *held*, that this court will not disturb the judgment on the claim of the railway company that the preponderance of the evidence proves the injury to the plaintiff was due solely to his own fault, or misfortune, growing out of his own errors of judgment. [*R. R. v. Henigh*, 23-357; *Speer v. R. R.*, 23-578.]
2. DAMAGES; *Excessive; When Verdict will not be set Aside*. In an action which has been pending in the courts for nearly nine years before the verdict, where the plaintiff seeks to recover for personal injuries resulting in the loss of a right hand at the wrist, and such plaintiff at the time of the in-

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jury was only twenty-five years of age, and engaged in an employment which has a regular system of promotions, and two juries have returned substantially the same amount of damages, and the verdict has been approved by the trial court, *held*, that a verdict of ten thousand dollars, under all the circumstances of the case, is not so flagrant as to compel a reviewing court to disturb the same solely on the ground of its being excessive. [*R. R. v. Moore*, 31-197; *R. R. v. Fox*, 31-599; *R. R. v. Brown*, 26-443; *R. R. v. Mackey*, 33-299; *R. R. v. Peavey*, 29-170; *R. R. v. Milliken*, 8-647.

Error from Leavenworth District Court.

At the March Term 1876 of the district court, *Young* recovered judgment against the *Railroad Company* for \$10,000, for the loss of his right hand, which was injured and crushed while he was trying to couple cars on defendant's railroad, at Lawrence, in September 1867. *Young* was a brakeman, in the employ of defendant company, and he alleges that the accident happened through the negligence of one Frank Crane, an engineer, who was wholly incompetent and unfit, and that the *Railroad Company* had knowledge of such incompetency and unfitness. The *Railroad Company* brings the case here on error.

J. P. Usher, and *C. E. Bretherton*, for plaintiff in error. An elaborate printed brief was filed by each counsel, and the case was also argued orally by Mr. *Usher*. The *Railroad Company* contended, that the main questions of law involved in the case are, that the burden of proof is upon the plaintiff to establish, 1st, that plaintiff was injured through the negligence of Crane, the engineer; 2d, that the plaintiff did not by his negligence contribute to his own injury; 3d, that Crane was an incompetent and unfit person to be a locomotive engineer; and 4th, that the company was guilty of culpable negligence either in employing him or retaining him in its employ. Upon the general question of negligence, counsel cited 59 N. Y. 366; 20 Mich. 128. The definition of negligence given by this court in the *Rollins case*, 5 Kas. 169, literally followed by trial courts as it was in this, has resulted in very great wrong. An instruction from the court, "but when the plaintiff's negligence

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is only slight, and that of the defendant is gross, such negligence on the part of the plaintiff will not prevent his recovery," conveys to the minds of the jury no definite idea of the true rule of law upon the subject, and leaves them to find a capricious verdict. Now this rule of law is not the rule of the federal courts, nor of the courts of any state except Illinois and Georgia, according to Justice Cole, in *O'Keefe's case*, 82 Iowa, 467. To those states, of course, must be added Kansas. Many, and among them the writer, regard it a great misfortune that this rule was adopted in this state; but since it has been, the rule of decisions in Illinois, from which it was borrowed, ought in common justice to be adopted here. The courts in that state habitually look into the evidence and determine from it whether the negligence of the plaintiff was such when compared with that of the defendant as to show that the injured party was not negligent and blamable, and if so, they hold he cannot recover. (65 Ill. 178; 52 Ill. 830; 75 Ill. 106.) The characterization of negligence by the term "gross," adds nothing; and the jury in this case no better understood what rule of law was intended to be given than if it had been given as above stated. The fact is, the rule is radically wrong. The courts in Illinois have found constant difficulty in its application. Repeatedly they find it necessary to carefully explore the testimony and weigh the evidence to determine whether the verdict is within their most inconvenient rule of law. (C. L. J., vol. 2, p. 84.) Again: The damages assessed by the jury are excessive. When the case was first here, (8 Kas. 658,) this court, upon full consideration, decided that \$9,000 was excessive damages for the loss of a hand. There was no proof magnifying the injury or changing the condition of the case in any respect from what it was before, and yet the verdict now is for \$10,000, and must have resulted from prejudice and passion, if not from malice.

Thomas P. Fenlon, and *Clough & Wheat*, for defendant in error, as to the liability of the Railroad Company for employing *Orane* without sufficient care, and retaining him in its employ

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after knowledge, and after being informed of his incompetency and unfitness, cited 10 Kas. 471; 14 Kas. 88; 18 Kas. 59, 62. As to the measure of damages, it was a question for the jury, with which this court has not under the evidence and rules of decision in relation to such matters anything to say. This is the second verdict; and we think it will not be of any use to attempt to convince twelve jurors that ten thousand dollars is too much, especially when that sum is considered in connection with the many years which have elapsed since the injury was inflicted. 17 Kas. 168 to 178.

The opinion of the court was delivered by

HORTON, C. J.: This action has been pending in the courts for nearly ten years, and the injury for which the damages were assessed occurred on the 19th of September 1867. The case was before this court at the July Term 1871, and is reported in 8 Kas. 658. On its return to the court below the parties filed new pleadings. This cause was tried the second time on 6th March 1876, and resulted in a verdict and judgment for the defendant in error for \$10,000. The railway company again invokes the aid of this court to reverse the judgment against it.

Young was in the employment of the railway company, and by reason of such employment it became his duty to couple the cars upon the trains on which he was employed; and at the Lawrence station, while attempting to couple the cars by setting an iron pin in the drawhead of one of the cars, his right hand dropped between the bumpers of the two cars he was trying to couple, and was crushed so that amputation at the wrist became necessary. The petition alleged that the injuries resulted wholly and entirely from the negligence, carelessness, and recklessness of the railway company and its engineer then having charge and control of the engine attached to the train; that said engineer, in backing his engine and the cars attached for the purpose of having the same connected to other cars on the track, and where Young was standing to fasten the cars together, so violently, recklessly

and negligently ran the engine and cars to, against and upon the cars where Young was, that he received the injury complained of; that the railway company was at said date informed and fully aware that the said engineer had been for a long time theretofore and was then totally incompetent to perform the duties of an engineer; that he was careless, negligent, and reckless; that the engineer was employed without reasonable inquiry either as to his fitness or competency to be or to act as such engineer, or to have control or power as such, and without reasonable diligence having been exercised to ascertain the fitness of said engineer to act in that capacity, and without reasonable grounds to believe he was competent for such service, and that the company continued him in its employment until after the happening of said wrongs and grievances without using reasonable diligence or care to know or ascertain or be informed of the fitness, care, knowledge, or skill of said engineer, or the want thereof on his part. Upon the trial the plaintiff in the court below offered evidence tending to prove that he was injured through the negligence of the engineer; that he did not by his negligence contribute to his own injury; that the engineer was an incompetent and unfit person to be a locomotive engineer, and that the company was guilty of negligence in employing him and retaining him in its employ.

That the evidence fully established the unfitness and incompetency of the engineer for the business intrusted to him, and that the company knew and ought to have known of such unfitness and incompetency, we do not think can be fairly questioned. The critical points in the case of the defendant in error were, in our view, whether the injury received was caused by the negligence of the engineer, and whether Young was guilty of contributory negligence. These questions however were properly submitted to the jury for their determination, upon instructions fully warranted by the previous decisions of this court, and from the verdict must have been decided adversely to the railway company; and as there was evidence introduced to sustain the same, we cannot interfere,

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although the preponderance might be opposed to the verdict. Notwithstanding the exhaustive and elaborate briefs presented by the counsel of the plaintiff in error in this court, no new questions are raised concerning the allegations of the petition, the objections to the testimony, or the instructions of the court; hence we do not feel justified in incorporating in this opinion the voluminous testimony given on the trial, or in reviewing law-points deemed settled by the adjudications of this court. We refer to the following cases as decisive of the material questions to which our attention has been called by the arguments of counsel upon the testimony and instructions: *Rollins v. U. P. Rly. Co.*, 5 Kas. 167; *K. P. Rly. Co. v. Milliken*, 8 Kas. 647; *Sawyer v. Sauer*, 10 Kas. 466; *K. P. Rly. Co. v. Pointer*, 14 Kas. 37; *K. P. Rly. Co. v. Salmon*, 14 Kas. 512; *K. P. Rly. Co. v. Kunkel*, 17 Kas. 145; *C. & R. I. Rld. Co. v. Doyle*, 18 Kas. 58.

The most serious matter in the case for our consideration is the objection raised against the verdict on the ground that it is excessive. In determining this objection, in addition to the many other elements that enter into the estimate of the real amount of damages sustained by the defendant in error, we are to consider the fact that he was only twenty-four or five years of age at the time of the amputation of his hand, that he was engaged in an employment in which there is a regular system of promotions, that many years elapsed between the injury and the verdict, and that two juries have decided substantially in favor of the sum of \$10,000. Again, the trial court, whose imperative duty it was to set aside the verdict, or reduce its amount, if the jury erred from prejudice or other cause, has approved the same, and added its sanction to the award. The question was one peculiarly proper for the jury to determine; and although the verdict is large, larger perhaps than any member of this court would, as a juror, have returned, we cannot, in view of all the circumstances, say that such damages are so excessive as to strike the mind at first blush as being the result of bias or prejudice. To interfere,

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we must say that the jury acted under some improper influence or bias in the matter. This we cannot say. If the defendant in error had obtained \$6,000 for his injury soon after the same occurred, this sum kept at seven per cent. interest per annum would have now exceeded the verdict. The first verdict was for \$9,000. This sum at seven per cent. interest during the time between the verdicts would have exceeded largely the second verdict; hence in fact the second verdict, comparing the time it was rendered, is really much less than the first one. The amount which the defendant in error earned per year at the time of the injury is not alone to be considered in the award to him of such compensation as shall net him in his present maimed condition a like income in the future, because the opportunities of promotion and the occupancy of a more lucrative position are also to be regarded. The yearly interest of the judgment at the rate of seven per cent. (and this is all that money will usually realize, even in our state with its high rates of interest, after deducting taxes,) will amount to \$700; and when there is taken into account the advancement of firemen, brakemen and station-keepers on railways from one position to another, till they oftentimes become conductors, superintendents, and managers of railways, with salaries ranging from \$1,200 to \$10,000 and upwards per annum, it is neither unreasonable nor imaginative to suppose that an attentive, intelligent, and energetic brakeman of twenty-five would in time earn a much larger sum per annum than \$700 in a higher position if the possibilities of the future had not been forever closed to him by the loss of his right hand. The trial judge had some opportunity to determine from the defendant in error while on the witness stand as to his capacity for business, and his general intelligence, which is denied to us; and considering all the facts in the case, we do not feel the liberty of saying that the verdict of the jury is so flagrant, or outrageously unjust, as to require of us, as a reviewing court, to set it aside and grant a new trial solely for excessive damages.

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VALENTINE, J.: I concur in the foregoing opinion of the Chief Justice. While I think that the verdict of the jury awards excessive damages, yet I do not think that the excess is so great that it alone, without any other error or irregularity in the proceedings of the court below, would authorize a reversal by this court of the decision and judgment of the court below.

But all that I wish to say is merely a few words with respect to negligence. Twice the very learned and senior counsel for the plaintiff in error has charged this court with adopting what he calls the rule or doctrine of "comparative negligence." The first time he so charged was in his oral argument on a motion for a re-hearing in the case of the *K. P. Rly. Co. v. Pointer*. (That case will be found reported in 14 Kas., 37 to 37.) The second time he so charged was in his oral argument in this case. Mr. Justice Brewer denied the charge on the first occasion; (14 Kas. 66;) and I shall deny it now. I do not think that there is anything in all the Kansas Reports furnishing the slightest foundation for such a charge. I do not think that any judge of this court has ever entertained the slightest inclination to adopt any such doctrine, and certainly no judge of this court has within the last nine years believed in any such doctrine. The counsel's supposed doctrine of "comparative negligence," as I understand him, is this: Where two parties are guilty of negligence contributing to the injury of one of them, the injured party may recover damages therefor from the other, provided his negligence is less than that of the other. Now it is generally true, that the party recovering damages for injuries resulting from negligence must himself have been guilty of less negligence than the other party. But this is not always true. A passenger on a railroad, who has exercised ordinary care, that is, that degree of care which an ordinarily prudent man would ordinarily exercise under like circumstances, might recover from the railroad company for injuries resulting from negligence, although both parties were

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guilty of negligence, and his slightly the greatest; for in such a case the railroad company is bound to exercise great or extraordinary care, and is liable for very slight negligence; while the passenger is bound to exercise only ordinary care, and his action can be defeated only by a showing that he was guilty of ordinary negligence. Slight negligence on his part in such a case would not defeat his right to recover. And generally, the mere fact that the plaintiff has been guilty of less negligence than the defendant will not authorize a recovery on his part. Take the present case for instance, and suppose that the railroad company was guilty of slight negligence only: the plaintiff would not then have any right to recover, even if he were not guilty of any negligence at all; for in this class of cases a railroad company is liable only for ordinary negligence, and not for slight negligence. Or suppose that the plaintiff himself was guilty of ordinary negligence contributing to the injury: then he could not recover even if the negligence of the railroad company was greater than his; for in this class of cases, and indeed in almost every class of cases, and indeed in almost every case, the plaintiff must have exercised ordinary care, and not have been guilty of ordinary negligence, or he cannot recover. There are we suppose a few exceptions where a person who has himself not exercised ordinary care may nevertheless recover, but these exceptions are very few. In the present case it was the duty of both the plaintiff and the defendant to exercise ordinary care, and be free from ordinary negligence; and neither was bound to exercise great or extraordinary care; and neither would have lost anything by being guilty of merely slight negligence. Slight negligence is merely the failure to exercise great or extraordinary care; and such negligence would not in a case of this kind make the defendant liable, or prevent the plaintiff from recovering. All negligence consists merely in the failure to exercise care and diligence; and there are infinite shades or degrees of negligence, as well as of care and diligence. Sir William Jones says: "There are infinite shades of *default*, or *neglect*,

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from the slightest inattention or momentary absence of mind to the most reprehensible supineness and stupidity." The courts however cannot recognize all of these infinite shades or degrees of negligence, but only a few of them. And the division lines between even these few cannot be very definitely located. This court has recognized three and possibly more degrees: slight, ordinary and gross, and possibly, very slight, and gross amounting to wantonness. Some courts, in theory, refuse to recognize any degrees of negligence, although in practice they all unquestionably recognize degrees. It would be extremely absurd not to do so. But the word "negligence" does not always mean the same thing, under all circumstances, in all cases, and to all persons. In its most extensive sense it means every neglect and default, and every conceivable omission of care and diligence. In this sense, the failure to exercise the most extraordinary care, the "utmost" care, is negligence as well as the grossest and most reprehensible omission of duty. But ordinarily we use the word in a more limited sense. Ordinarily when we use the word "negligence" without any qualifying word or words, we mean ordinary negligence. This is most universally so when we use the word with respect to plaintiffs; for it is almost universally the case that ordinary negligence on the part of a plaintiff will defeat his recovery. Probably also, in a majority of cases, when we use the word with respect to defendants we mean ordinary negligence; for probably in a majority of cases ordinary negligence would render the defendant liable. But ordinarily, when we speak of negligence with respect to defendants, we mean culpable negligence; and culpable negligence may in one case be slight negligence, in another case ordinary, and in another case gross. Thus in an action by a passenger against a railroad company, the word "negligence," as applied to the railroad company, would mean merely slight negligence; for in such a case the slightest negligence on the part of the company would make the company responsible and would be considered as culpable negligence. In an action

by an employé of a railroad company against the company, as in the present case, if we should speak of the negligence of the company we would mean ordinary negligence, for in such a case that would be the kind or degree of negligence which would render the company liable. And in an action against a railroad company by a person who was at the time of the injury a wrongdoer, and a trespasser upon the rights of the company, if we should speak of the negligence of the company we would mean gross negligence, or gross negligence amounting to wantonness, for in such a case no mere ordinary negligence would render the company liable. All courts, I think, in practice recognize degrees or distinctions in negligence such as the foregoing; but generally those courts which do not recognize degrees of negligence in theory, say that all negligence less than culpable negligence, or less than that degree which would in any particular case render the defendant liable, or prevent the plaintiff from recovering, is not negligence at all, and all negligence greater than that degree which would in any particular case render the defendant liable, or prevent the plaintiff from recovering, is merely negligence with a vituperative epithet. A great majority of the courts however in this country recognize degrees of negligence both in theory and in practice. And it is not strange that they should do so; for no court, however great it may be, can abolish the world as it actually exists, or abrogate human transactions as they actually occur; but all courts must take things as they find them. Degrees of negligence exist in the very nature of things, and it is foolish to attempt to wholly ignore them. To say that slight negligence can have no existence in fact, and then to say that a carrier of passengers may be held liable for slight negligence, is not altogether logical. It is virtually to say that a carrier of passengers might be held liable for something which could not have any existence. The fact is, that slight negligence may have an existence; and in some cases it is material and substantial negligence, and in other cases it is not. The three degrees of negligence usually

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recognized are designated by the words "slight," "ordinary," and "gross;" and these are pretty clearly defined in Shearman & Redfield's work on Negligence, (see § 18.) There are also other degrees or kinds of negligence sometimes recognized, which are designated or defined by other words or phrases. But with all the various modes and ways of designating the various kinds and degrees of negligence, probably no one ever supposed that "slight negligence" meant "ordinary negligence," or anything else but "slight negligence." Probably no jury ever supposed that any court meant ordinary negligence, or anything else but slight negligence, when the court used the words "slight negligence." There is nothing in the present case to show that the jury misunderstood the language of the court below with regard to negligence; and I do not think that the jury could have been misled by any such language. Indeed, I do not think that the plaintiff in error has anything to complain of except the amount of the verdict; and I do not think that even that, considered by itself, as it must be at this time, is so extravagant or exorbitant as to justify this court in overturning both the verdict of the jury and the decision and judgment of the court below. In this our brother Brewer differs with the Chief Justice and myself, and I believe this is the only difference of opinion in this case. Upon this question I believe now just as I did when the case was formerly before us. (8 Kas. 658.) But at that time there was a fatal error which required a reversal, and I do not think that there is any such error in the case now.

The judgment will be affirmed.

BREWER, J.: I am unable to concur with my brethren in affirming the judgment in this case. To my mind the amount given by the jury is so largely in excess of any fair compensation for the injury as to call imperatively upon this court to interfere and set the verdict aside. I expressed my views in this respect fully in the opinion written when the case was here before, and when the verdict was one thousand dollars less

than the present, and it is unnecessary to repeat them. The facts that great length of time has since elapsed, and that another jury has come to the same conclusion, are in my judgment no sufficient reasons for change. There is nothing in the record to show that the company is responsible for the delay. For aught that appears, the very magnitude of the plaintiff's claim has been the only thing standing in the way of settlement, and if he had at the first demanded only a fair compensation for his injury it would have been paid without delay and without suit. Is it right to punish the company for not submitting to and paying an exorbitant claim, by mulcting it in a larger sum, until it is shown that the company refused to pay what was fair and right? Lapse of time furnishes no just ground for sustaining a verdict which otherwise would be an outrage. And while the opinion of a second jury is entitled to respect, and carries with it some weight, sufficient no doubt to support an award a few hundred dollars in excess of what would seem a fair compensation, yet when the amount is double or treble the sum which ought to be expected from even a large sympathy for the sufferer, and a large dislike to the corporation, a second verdict only makes plainer the necessity for judicial interference. If ten thousand dollars damages for the loss of the hand of a common laborer can be sustained, what limit can be placed when the injuries are such as sometimes occur in railroad accidents? I think the judgment should be reversed.

By the Court: Judgment affirmed.

[NOTE.—A petition for a rehearing of this case was filed on the part of the railroad company, on the 22d of January 1878, and was argued by *J. P. Usher* in support of the motion, and *Thomas P. Fenlon* in opposition. The motion was denied.]

JUSTUS A. BROOKS v. RICHARD WRIGHT.

APPEAL, from Justices's Judgment, after Jury Trial; Amount of Defendant's Claim. Where, in answer to plaintiff's bill of particulars claiming \$14, defendant files a bill which contains, first, a denial of plaintiff's bill except as afterward admitted, next an admission that two dollars thereof is correct, then an allegation that plaintiff is indebted to defendant in the sum of twenty-one dollars, and then stating, separately, the items of such indebtedness, which, added, amount to \$22.15, and closes with a prayer for judgment of \$21 against the plaintiff, *held*, that taking the entire bill together the defendant must be considered as claiming over twenty dollars, and that therefore the parties are not, by a jury trial in the justice's court, barred of the right to appeal from the judgment.

Error from Labette District Court.

JUDGMENT was given by a justice of the peace in favor of *Wright*, defendant, for \$3.55, from which he appealed to the district court, claiming that such judgment was too small. *Brooks*, plaintiff, filed a motion in the district court to dismiss the appeal. The district court, at November Term 1876, overruled the motion to dismiss, and *Brooks* brings the case here.

Johnson & Davis, and *G. W. Fox*, for plaintiff, contended that, as there was a jury trial before the justice, and neither party had claimed in his bill of particulars more than twenty dollars, the case was not appealable. (Gen. Stat. 802, § 182; Laws of 1870, p. 185, § 10.) The right to appeal does not depend upon the amount of the claim, but the real amount found due when ascertained from the evidence in the case. Gen. Stat. 775, §§ 2, 8; 14 Ill. 898. Again, the defendant's claim is neither a set-off nor a counter-claim, but is for supposed damages arising *ex-delicto*, and hence not the subject of set-off.

L. C. True, for defendant, maintained, that if either party claimed in his bill of particulars a sum exceeding \$20, the case was appealable. The defendant did claim \$21 in his bill, but admitted that \$2 of the plaintiff's claim was just. The plaintiff by his failure to reply, denied the whole \$21, thus requiring the defendant (who only expected final judgment for \$19)

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to prove and have it adjudged that the plaintiff owed him \$21. How could he prove this if he had not claimed it? But plaintiff mistakes the law. The right of appeal depends expressly upon the amount claimed in the bill of particulars, and not upon the amount found due when ascertained by the evidence as claimed by plaintiff's counsel. Justices Act, § 120; Laws of 1870, p. 185, § 10. Again: While it is true that the defendant's cause of action rested originally in tort, being for damages from trespassing animals, yet an examination of his bill of particulars will show that it is now for ascertained damages which the plaintiff *agreed to pay*. As pleaded, it arises upon contract, and is introduced in an action founded on contract, coming clearly within the statute authorizing set-offs. (Civil code, § 98.)

The opinion of the court was delivered by

BREWER, J.: Plaintiff brought his action before a justice of the peace. Trial by jury. Verdict and judgment for plaintiff. Defendant appealed to the district court. Plaintiff moved to dismiss the appeal, on the ground that no appeal lies from the judgment of a justice where the case is tried by a jury and neither party claims in his bill of particulars a sum exceeding twenty dollars, (Laws of 1870, p. 185, § 10.) This motion was overruled, and this is the alleged error.

Plaintiff unquestionably claimed but fourteen dollars, and the question turns on the construction to be given to the defendant's bill of particulars. Defendant in his bill first denied plaintiff's claim, except as afterward admitted, then admitted two dollars of plaintiff's account to be correct. It then goes on to say that defendant, for his cause of action, alleges that plaintiff is indebted to him in the sum of twenty-one dollars for damages done to him by trespassing animals of the plaintiff, and that the exact date of these trespasses he is unable to give; that on 15th October 1874, the damages so done amounted to \$2.65, and that plaintiff then promised to pay the same; that between 15th October 1874 and 10th April 1876, the damages done amounted to \$19.50, and that plain-

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tiff promised to pay the same. Then followed a prayer for judgment for twenty-one dollars, and that whatever amount might be found due plaintiff from the defendant might be set off by an equal amount of defendant's claim, and judgment entered for the balance. Now it is insisted that this shows simply a claim for \$19, the difference between the \$21 for which judgment was asked and the amount admitted to be due the plaintiff. Taking the whole of defendant's bill together we think this construction cannot be sustained. True, the defendant says at one place that the plaintiff is indebted to him in the sum of \$21, but when he comes to state the items of indebtedness he gives \$2.65 as one amount and \$19.50 as another. These amounts added make \$22.15; and deducting the \$2 admitted to be due plaintiff, would leave \$20.15 as the amount which, if defendant's bill of particulars was proved to be true, he would be entitled to recover. His prayer is for \$21; but with the admissions in the bill this was \$0.85 more than he could recover. If therefore we look at the mere terms of his claim, he claims over \$20. If we take the sum of the items of his bill, and deduct the amount of his admission, we still find over \$20 alleged to be due. And the general allegation of indebtedness may fairly be taken as qualified by the specified items of indebtedness, or as indicating the amount claimed to be due therefor over and above the amount admitted to be due the plaintiff. There is no propriety in straining a point, or in ignoring any portion of the defendant's bill, to bar him from a hearing in the district court.

The ruling of the district court will be affirmed.

All the Justices concurring.

THE STATE OF KANSAS V. ARCHIE O'LAUGHLIN *et al.*

DEDICATION OF HIGHWAY; Disability of Land-Owner. An Indian, under disability to convey his lands without the consent of the secretary of the interior, cannot of himself make a valid dedication of a portion of said lands to the public for use as a highway; nor can any dedication be presumed as against him by any user of the public of the highway, or from his acts and conduct in reference thereto. [*Smith v. Smith*, 34-301.]

Appeal from Johnson District Court.

A CRIMINAL complaint was made by one James Ham before a justice of the peace, charging *Archie O'Laughlin* and *Wm. Ferguson* with willfully and maliciously obstructing a highway, commonly called the "Santa Fé Road," at the points where said road crosses the south and east lines of the southwest quarter of section 3, township 14, range 24, in Johnson county. The action was brought under sec. 17, ch. 108, laws of 1874. A trial was had, verdict and judgment for the state, and appellants appealed to the district court. The cause came on for trial at the June Term 1877 of the district court. The appellants pleaded not guilty. Verdict, guilty. Motion for a new trial overruled, and appellants were adjudged to pay a fine and the costs of the prosecution, and to stand committed to the county jail until paid. From this conviction and sentence defendants appeal, and bring the case here for review.

J. W. Green, and *John McKoin*, for appellants.

Willard Davis, attorney-general, for The State.

The opinion of the court was delivered by

BREWER, J.: Appellants were convicted of obstructing a highway, and from such conviction have prosecuted this appeal. The principal question is, whether there was a legal highway at the point of obstruction—for that the defendants put up a fence across what had for a long time been a traveled road, was not disputed. The fact of a dedication of the high-

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way was sought to be established, not by proof of an express written grant, but by evidence of facts and circumstances from which a jury might infer a dedication; and to this matter nearly all the testimony and instructions were directed.

The highway in question is what is familiarly known in Kansas history as the old Santa Fé road, and has in its general course and direction been used as a highway ever since 1832. During all these years it has crossed the quarter-section, the fencing of which is the wrong now complained of. The quarter-section was a part of the Shawnee reservation, and was included in the 200,000 acres ceded by the United States to the Shawnee Indians by the treaty of 1854. (10 U. S. Stat. at Large, 1053.) It was patented to Nancy Griffin, a member of the tribe, by patent of date 28th December 1859, which patent contained the following restriction—"that the said tracts shall never be conveyed by the grantee, or her heirs, without the consent of the secretary of the interior for the time-being." She conveyed, by approved deed, June 16th 1863, since which time the title has passed through several hands. The court at the instance of the state gave several instructions upon the general subject of the dedication of highways, and the kind and quantity of proof necessary to establish such dedication, which appear to state the law correctly. The defendants on the other hand asked an instruction to the effect, that an Indian, under disability to convey without the consent of the secretary of the interior, had not the power to dedicate a highway, and that no presumption of a dedication by such Indian would arise from its use as a highway. This instruction was refused. And in this refusal we think the court erred. A want of power to dedicate, is conclusive against all evidence of dedication. Proof of user by the public, and of the acts and conduct of the owner, is received as evidence of a dedication by the owner. It may be sufficient to establish such dedication, though never considered equal to a written conveyance by the owner. It is simply in lieu of and as a substitute for such conveyance. But if the owner has not power to convey, the written conveyance would be

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void; and *a fortiori*, that which is a mere substitute for and inferior to the conveyance, must be wholly void.

In *Watkins v. Peck*, 13 New Hamp. 360, it is said, that "it would be absurd to presume a grant where it was clear that no such grant could have existed." In *Reimer v. Stuber*, 20 Penn. St. 453, it was decided, that "no presumption of a grant arises from the adverse enjoyment of an easement against a minor or *feme covert*." In the case of *Melvin v. Whitney*, 13 Pick. 184, the time of minority of an owner was excluded in computing the time necessary to create a highway by prescription. In *Lowell v. Daniels*, 2 Gray, 168, it appeared that a woman during coverture executed a deed of her lands, dating the same as of a time before marriage, and signing thereto her maiden name. The title thereafter passed to a *bona fide* purchaser, and still she was held not estopped to avoid the deed. In delivering the opinion, Gray, J., uses this language: "We think a married woman cannot do indirectly what she cannot do directly; cannot do by acts *in pais* what she cannot do by deed; cannot do wrongfully what she cannot do rightfully. She cannot by her own act enlarge her legal capacity to convey an estate." In 2 Washburn on Real Property, p. 48, § 26, the law is thus stated: "Another circumstance essential in acquiring an easement in land, is, that the land during the time of the easement being acquired should be in the possession and occupation of some one as owner of the inheritance who is not under any disability to resist the use, and who may be presumed to have made a grant of such easement from his having been, at the time, of capacity to make it. If therefore the servient estate, during a part or all of the time belongs to a minor, an insane person, or *feme covert* married before the user began, it would prevent the easement being acquired." See also Angell on Highways, § 184; *Post v. Pearsall*, 20 Wend. 111; *Bayou v. Mann*, 59 Ill. 492; *Todd v. P. Ft. W. & C. Rld. Co.*, 19 Ohio St. 514.

The principle underlying these authorities seems to us conclusive here. Suppose Nancy Griffin had executed a written grant of the highway, it would have been void. She could

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convey nothing without the consent of the secretary of the interior. If her conveyance actually made passed nothing, then it were useless to offer testimony to prove such a conveyance, or facts from which one might be presumed. It may be said that a valid transfer of her title might be obtained by her deed with the official approval of the secretary. So can a valid title to the property of a minor, or insane person, through judicial proceedings. Yet this possibility of acquiring title in no way affects the personal disability to convey, or opens the door to a presumption of a conveyance. There must be official action to support a conveyance. Official action is matter of record, and a record is its own witness. It follows therefore that no presumption of a dedication could arise from user by the public during the time the title was in Nancy Griffin, or from her acts and conduct in respect to such user.

For this error, and without inquiring as to the other matters discussed in the briefs, the judgment of the district court will be reversed, and the case remanded for a new trial.

All the Justices concurring.

THE STATE OF KANSAS V. CHARLES HOWARD.

1. **ROBBERY, Does Not Necessarily Include Grand Larceny.** The defendant was charged with the offense of robbery in the first degree. The jury found the defendant guilty as charged. There was not sufficient evidence to sustain a verdict for robbery in the first degree. The court overruled defendant's motion for a new trial, and sentenced the defendant for grand larceny. *Held*, That the court committed error; that the court should have granted the new trial; that the offense of robbery in the first degree does not necessarily include grand larceny, and that said verdict does not necessarily establish the fact that the defendant was guilty of grand larceny. [*State v. Buffington*, 20-616.]

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2. **CONVICT—Incompetent as Witness in Criminal Case.** A person convicted of grand larceny, and sentenced to imprisonment in the penitentiary, is not a competent witness in a criminal case while the sentence remains unrevoked, and such person not pardoned.

Appeal from Leavenworth District Court.

FROM a judgment and conviction rendered at the May Term 1877 of the the district court, *Howard* appeals. The subjoined opinion states all necessary facts.

C. F. W. Dassler, for appellant.

Taylor & Gillpatrick, for The State.

The opinion of the court was delivered by

VALENTINE, J.: This was a criminal prosecution under section 73 of the act relating to crimes and punishments, (Gen. Stat. 331,) for robbery in the first degree. The jury found the following verdict, to-wit: "We the jury find the defendant guilty as charged." The defendant moved for a new trial, upon various grounds. The court in overruling the motion for a new trial used the following language:

"While the evidence in the case would not sustain the charge of robbery in the first degree, there not being evidence of violence, putting in fear, etc., yet, as it would, in the opinion of the court, sustain a verdict of grand larceny, the defendant could not be prejudiced in his rights by the court rendering a judgment for grand larceny."

The court then, after overruling the motion for a new trial, and after other proper preliminary proceedings were had, rendered the following judgment:

"It is now, by the court here, considered, that said defendant is guilty of grand larceny, and the punishment is assessed at confinement and hard labor in the penitentiary of the state of Kansas for the period of three years."

All the rulings and decisions of the court below were properly excepted to, and the defendant now brings the case to this court on appeal.

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The court below evidently erred in overruling said motion for a new trial, in finding the defendant guilty of grand larceny, and in rendering said judgment against the defendant.

1. Robbery, does not necessarily include grand larceny. The verdict of the jury evidently was intended to be a verdict for robbery in the first degree. But

the court below finds that the evidence would not sustain such a verdict; and therefore the court below very properly refused to render a judgment upon such verdict punishing the defendant as for robbery in the first degree. But what should the court have done? We think it should have granted the defendant a new trial as asked for by him. The offense of robbery in the first degree does not necessarily include grand larceny. The taking of one cent forcibly, may constitute robbery in the first degree, as well as the taking of a thousand dollars, or any other amount. In the present case the defendant was charged with taking bank bills of various denominations, from one dollar to fifty. Now if he had taken one of said bills of the denomination of one dollar, he would have been guilty of robbery in the first degree just as much as though he had taken all the bills charged in the information, and the jury should have found him so guilty. But he would not have been guilty of grand larceny. The verdict of the jury does not therefore establish the fact that the defendant was guilty of grand larceny. A finding that the defendant was guilty of grand larceny is not necessarily included in the verdict. And the court had no right to find the defendant guilty of grand larceny, or of any other offense. That belonged to the jury.

The court below also erred in permitting one Scruggs to testify as a witness, over the objections of the defendant. Scruggs

2. Convict, when incompetent as witness. had formerly been convicted of grand larceny, and sentenced to imprisonment therefor in the penitentiary for two years. And there was nothing showing that the sentence had ever been set aside, or that Scruggs had been pardoned. Scruggs was incompetent as a witness. The

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code of civil procedure with reference to the competency of witnesses does not apply in criminal cases.

The judgment of the court below will be reversed.

All the Justices concurring.

DEAN S. KELLEY v. A. H. DAVIS *et al.*

ERRORS, UNLESS PRESERVED IN THE RECORD, Will Not be Reviewed. A party seeking a review of a judgment or decree of the district court, must properly preserve and bring upon record the errors complained of, or such supposed errors will not be considered by an appellate court. [*Kupfer v. Sponhorst*, 1-75; *Shelton v. Dunn*, 6-123; *Moore v. McIntosh*, 6-39; *Haight v. Schuck*, 6-192; *Winson v. Cole*, 10-620; *McIntosh v. Comm'rs*, 13-171; *Jenks v. Sch. Dist.*, 18-356; *Pfeiffer v. Un. Ex. Ch.*, 20-100; *Lucas v. Surr*, 21-432; *State v. Stewart*, 24-250.]

Error from Linn District Court.

TWO ACTIONS for the partition of real property were brought by *Davis* against *Kelley* and several other parties. Partition was duly made, and the district court in confirming the same allowed an attorney-fee to the plaintiff, taxed the same as part of the costs, and adjudged it to be a lien upon the lands set off to the parties respectively. *Kelley* complains of such action, and brings the case here on error for review.

Dean S. Kelley, plaintiff in error, for himself.

James D. Snoddy, for defendants in error.

The opinion of the court was delivered by

HORTON, C. J.: In both of these cases an attempt is made to present certain alleged errors upon matters which are not necessarily of record in the district court; and neither the testimony introduced on the trial in the court below, nor the proceedings had there, are preserved by a bill of exceptions, nor a case-made, and hence upon the authority of *Winsor v. Cole*, 10 Kas. 620, and many other decisions of this court similar in principle, we cannot determine the questions sought to be presented, and the judgments of the district court must be affirmed.

All the Justices concurring.

WM. E. HAXTON v. M. R. HARRIS, County Treasurer, &c.

1. **COUNTY TREASURER, Not to Purchase at Tax Sale.** A county treasurer cannot, either directly or indirectly, become a purchaser at a tax sale conducted by himself.
2. ——— **Lien for Taxes.** Such a purchase, if attempted, is invalid, and the sale may be set aside at the instance of the owner; but such invalid sale does not in the absence of express statutory authority operate as a payment of the taxes and a discharge of the tax-lien upon the property.
3. ——— **Forfeiture of Money, Illegally Paid.** The treasurer has no claim for the money paid into the treasury on such attempted purchase, but the money so paid is forfeited to the public for the benefit of the public, and not to the lot-owner, or for his individual benefit. [*Harris v. Drought*, 24-526; *Bels v. Bird*, 31-143.]

Error from Franklin District Court.

INJUNCTION, brought by *Haxton* to restrain *Harris* as county treasurer from selling six certain city lots for unpaid taxes. The *Board of County Commissioners* of Franklin county was joined as a co-defendant. *Haxton* purchased the lands from one Daniel Baldwin, the former owner, in March 1875. The taxes for the alleged non-payment of which the county treasurer had advertised the lands for sale were those assessed in and for the years 1872 and 1873. A former county treasurer in 1878 had illegally withheld the lands from tax sale, and had illegally issued a pretended tax-sale certificate to one Fisk for the taxes of 1872, which sale-certificate in 1874, in an action wherein said Baldwin was plaintiff and said Fisk and others were defendants, was by the district court adjudged void, and its surrender and cancellation ordered. Other facts appear in the opinion, *infra*. The district court, at the March Term 1876, refused the injunction prayed for, and *Haxton*, plaintiff, brings the case here on error.

Benson & Parkinson, and *McClure & Humphrey*, for plaintiff.
H. C. Mechem, for defendants.

The opinion of the court was delivered by

BREWER, J.: The facts in this case are briefly these: In 1872 the taxes on the lots described in the petition were not paid. Upon the record it appeared that at the sale in 1873, for non-payment of such taxes, the lots were sold to one Calvin Fisk, and the certificate of sale issued to him, and by him indorsed. The taxes of 1878 were afterward charged up on the sale-certificate. As a matter of fact, Fisk did not buy, had no interest in the sale-certificate, and indorsed merely as a matter of accommodation, and the issue of the certificate was merely a cover for a private speculation of the treasurer, who was the party actually paying the money into the treasury. In 1874 certain proceedings were had, in which, at the instance of the then owner of the lots, the sale-certificate was adjudged void. In August 1875, on return of such certificate the money was refunded by the then treasurer. Such treasurer was in 1878 the deputy of the treasurer who engaged in this speculation, and the party who conducted the business of the office, and therefore cognizant of the facts of the speculation. In March 1875 the plaintiff became the owner of the lots by purchase. In July 1875, the treasurer advertised these lots for sale (to be sold 7th September 1875) as lots which the treasurer had unavoidably omitted or failed to sell at prior tax sales. The plaintiff thereupon brought this action to restrain such sale. The district court decided against him, and he now brings the ruling here for review.

Two things are clear, first, that the owner of the lots has never paid the taxes of 1872 and 1878; and second, that the treasurer took nothing by his attempted purchase. It is generally true, that one cannot be seller and buyer at the same time. "No man can serve two masters." And a treasurer cannot be a purchaser either directly or indirectly at tax sales conducted by himself. (Cooley on Taxation, §41, and cases cited.) The difficult question is: To what extent may the owner profit by the treasurer's

1. County treasurer cannot purchase at tax sale.

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wrong? The plaintiff contends that the treasurer not only takes nothing by his attempted purchase, but also forfeits the money he paid on such purchase, and that he, the owner, has a right to have the money paid as purchase-money appropriated to the satisfaction and payment of his taxes; in other words, that the treasurer's wrong should inure, not to the benefit of the public, but to that of himself, the lot-owner. But how has the wrong of the treasurer injured the lot-owner? If he had paid the taxes at the time they were due, no sale would have been attempted. His default made the opportunity. Being in default, a sale was imperative. If the treasurer had not ventured on this speculation, a sale would have been had to an individual, or to the county, and in either event interest would have begun to run on the taxes. But the sale to the treasurer being void, no interest has run on the delinquent taxes, and to that extent at least the lot-owner has been benefited by the wrongful conduct of the treasurer. The burden of taxes was never made larger by anything the treasurer did. It may be said that, possibly at the sale, if open and free, some one might have bid less than the entire property. This is doubtless true, and therefore the lot-owner is wronged, and the sale void. But in fact such a result seldom if ever happens at our tax sales, and if it did, in no way is the amount of the tax reduced. And is not the wrong fully remedied so far as the lot-owner is concerned when the sale is set aside? He has the same opportunity for payment of his taxes, without interest or costs, as before the attempted purchase. If he fails still to pay, and the lot is again sold, he has the same length of time in which to redeem that he would have had if the first sale had been valid. He stands in all respects, and as to all rights and liabilities, as he stood at the time of such illegal purchase. Wherein then has he, more than any other individual, special claim to appropriate the money wrongfully paid by the treasurer into the county funds? Unquestionably that money so paid by the treasurer is forfeited. He cannot recover it from the county, and the subsequent payment in this case by the present treasurer was

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without warrant of law. But if forfeited, why not forfeited to the benefit of the entire public? As a general rule, forfeitures inure to the benefit either of the public, or of the party in whose hands the thing forfeited is at the time of the forfeiture; and in this case that was the county.

Again, at the time of the attempted sale the county had a lien for taxes. The treasurer paid so much for the purpose of purchasing that lien. Public policy forbade such a sale; the lien never passed to the treasurer. Did it not remain with the county? and why cannot the county still enforce it against the property? Grant, that by reason of the wrong the law will never aid the treasurer in recovering the money, and that the county may claim it as forfeited: by what right does the lot-owner claim that it is forfeited for his benefit any more than for the benefit of all the tax-payers? Does not the ordinary rule of sales obtain, that where an attempted sale fails the purchaser may recover the consideration, or the seller retains it because the law will not help the wrong-doer? And if the seller retains it, he does so as his own property, and not as that of some third party.

Still again: There was no payment of taxes in the strict sense of the term. The treasurer attempted to buy a tax-lien from the county. He never assumed to act as the agent of the owner, or to discharge the obligations of the property for the taxes. His purchase failed; but in the absence of express statutory authority can anything more be said than that the purchase failed? By failing to purchase, does he become an agent to pay? A. attempts to purchase of B. a mortgage-lien which the latter holds on the property of C. For want of authority his purchase fails. Is the mortgage paid? or does it still remain in B.'s hands? And by what right can the courts consider A. an agent of C., and his attempted purchase for his own benefit a payment of the lien for C.'s benefit? *Everett v. Beebe*, 37 Iowa, 452, is a case somewhat in point. That was an action by the owner against the holder of a tax deed. The deed was held invalid, upon the same principle that the sale herein was adjudged void, be-

2. Lien on lands
for taxes.

2. Forfeiture of
money illegally
paid as taxes.

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cause the treasurer was interested in the purchase at the tax sale; yet the owner was required to pay the holder of the tax deed the amount he would have had to pay the county in the first instance, that is, the taxes, without interest or costs. Though the sale was invalid because the treasurer could not directly or indirectly purchase, yet the wrongful act of the treasurer in the sale did not operate in behalf of the owner to pay the taxes. The same principle controls this case. The tax-lien in behalf of the county has not been destroyed, and the taxes have not been paid, and are a valid charge against the property.

This disposes of the case, and compels an affirmance of the judgment.

VALENTINE, J., concurring.

HORTON, C. J.: I cannot concur in the opinion of the court, and shall briefly give my reasons therefor. From the record, these facts, uncontradicted, appear: J. P. Harris was the county treasurer of Franklin county in 1872 and 1873, and until July 1874. Milo R. Harris, one of the defendants in error, was his deputy. The taxes on the lots in controversy for 1872 were not paid at the tax sales of May 1873, and were then delinquent; the lots were duly advertised to be sold at that time for the taxes, but were not sold or offered for sale. After these tax sales were adjourned, the deputy treasurer made out a certificate of sale of the premises to one Calvin Fisk, without Fisk's knowledge, and in his absence. In the winter of 1873-4, J. P. Harris had Mr. Fisk indorse in blank this tax certificate, with a number of others. At the tax sales of 1874, G. W. Hamblin, who was present to bid on this property, asked the deputy treasurer why these lots were not offered for sale, and received from him the answer, that, "the taxes had been paid by Calvin Fisk." Witness then saw Fisk, and Fisk informed him he had not bought the lots, nor paid the taxes. Witness gave the information to the deputy treasurer, but could obtain no satisfaction. The lots were never

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sold for the taxes of 1872, or 1873, but the taxes were all paid for these years by the treasurer, Harris, and the proper proportions of them were placed in the treasurer's books to the credit of the different funds, viz., state, county, city, school, etc. By the means detailed, the county treasurer sought to acquire a tax title to himself of the premises. He was detected in his improper practices, and defeated in accomplishing his purpose. On the 12th of November 1874, the tax certificate, wrongfully issued after the sales in 1873 had closed, was declared null and void. On the 10th July 1875, Milo R. Harris as county treasurer re-charged the taxes on the lots, and placed them upon the books as lands *unavoidably omitted* from the tax sales, and advertised the same for sale, to be sold on 7th of September 1875; and afterward, on 16th August 1875, Milo R. Harris, then county treasurer and the former deputy treasurer, refunded to J. P. Harris the moneys paid by him when county treasurer for the taxes of 1872 and 1873 on the lots, and this was done without the knowledge or consent of plaintiff in error.

In my opinion the sale for the alleged taxes should have been perpetually enjoined by the district court, and the judgment refusing the injunction should be reversed. There was not within the purview of the law any *unavoidable omission or failure* to sell the lots for unpaid taxes of either 1872 or 1873. The treasurer for his own benefit intentionally failed to make either sale. Not only was free competition prevented, but no sale was allowed, so that not only did the treasurer put himself in a position as committing a fraud upon the law, but he went further and issued a tax certificate without the semblance of a sale. He acted upon the determination that no other person than himself should by any contingency obtain a tax certificate on the premises. Such conduct is strongly offensive to the judicial mind, and, to use a mild term, is highly censurable. Upon the payment of the taxes of 1872 and 1873, by the county treasurer, and the crediting of the proper funds with the amounts due respectively to each on the books of the office, *all liens* for the taxes of said years were fully discharged.

There had been a voluntary payment of all the taxes, with full knowledge of the facts in the case. The money had been duly received, the owner of the property made no objection; and before the attempt was made to re-charge the taxes on the premises the same were sold, on March 22d 1875, to an innocent purchaser. Under this view, the refunding of the taxes on August 16th 1875, to J. P. Harris, was without authority of law, and in no way militates against the position I take, that the taxes having once been paid there could be no legal re-charging of them on the lots, nor any tax sale for the same. The treasurer who refunded the money was a participant in all the transactions, and was bound in law to know the consequences of such a diversion of the public moneys. The taxes having been voluntarily paid, the books having been duly credited therewith, the lien therefor having been discharged, and there having been no *unavoidable omission* to sell the lots for any unpaid taxes, the county treasurer had no legal authority to re-charge the taxes of 1872 and 1873, in 1875, and the advertisement of a sale of the premises for the taxes already paid was beyond his power, and the proposed sale illegal and void.

WESTERN UNION TELEGRAPH CO. v. DANIEL RICH.

1. CASE-MADE; "*Skeleton Case*." In determining the validity of a skeleton "case-made," the same general rules apply as in case of a skeleton bill of exceptions. [*R. R. v. Wagner*, 19-385.]
2. RIGHT-OF-WAY OF RAILROAD; *Use for Telegraph Line*. A railroad company may for its own use in operating its road, construct a telegraph line over and along its right-of-way, and in so doing cut down, if necessary, trees standing upon its right-of-way, without subjecting itself to any additional claim of the original land-owner for compensation.
3. ——— *Damages; Additional Burden*. If such line of telegraph is built by the railroad company and another party at their joint expense, and

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for their joint use, the latter is only responsible to the land-owner for the damages caused by the additional burden, if any there be, cast upon the easement by its use of the telegraph line.

Error from Lyon District Court.

TRESPASS, brought by *Rich*. Trial at the September Term 1875 of the district court. Verdict and judgment for plaintiff, and the *Telegraph Company*, defendant, brings the case here. All necessary facts appear in the subjoined opinion.

Ross Burns, and *J. G. Waters*, for plaintiff in error.

Randolph & Sedgwick, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: Rich sued the telegraph company in the Lyon county district court to recover \$435, treble the value of trees and vines belonging to Rich, and on his land, and alleged to have been cut down and destroyed by the agents and employes of the telegraph company. There was a trial by jury, and a verdict returned of \$270, which judgment the telegraph company asks to be reviewed. Rich has filed a motion to strike out portions of the case-made filed in this court, for the reason that in the original case-made, as signed by the judge, the clerk

is instructed to insert the documents referred to, instead of setting them out at length. In other words, it is claimed that only a skeleton case-made was ever signed and settled by the trial judge. We think the same general rules apply to a skeleton case-made as to a skeleton bill of exceptions, though doubtful matters would be resolved more readily in favor of the validity of a case-made than of a bill of exceptions, for the former can only be signed after it had been submitted to and examined by the opposite party, while the latter may be allowed and signed in the absence and without the knowledge of the opponent. Hence there is a sort of assent on both sides to the preparation of the case-made in such a form, and to the after-insertion by the clerk of the documents referred to. For the rules applicable to these skel-

1. Skeleton case-made.

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eton records, see the opinion in the case of *A. & N. Rld. Co. v. Wagner*, recently decided, (*ante*, p. 385.)

In the case-made before us some documents were so identified as to leave no room for doubt, and were properly transcribed in the copy of the case-made. The petition, for example, the other pleadings, the verdict, the motion for a new trial, all of which were identified not merely by their names, but by the dates of their filing. On the other hand, there were some matters not so identified. Thus, the charge of the court appears in the record before us, but the original case-made does not contain it, but says simply "Here copy the court's instructions." Whether these were given orally, or in writing, whence the clerk was to obtain them, whether from the files of the court, his own recollection, the minutes of the judge, or a stenographer's report, the original case-made does not disclose. From nothing now before us can we say that the charge as copied into the record is properly there, or was authenticated by the judge as the one given on the trial.

We need not pursue this inquiry as to each of the matters simply referred to in the original case-made, for we discover an error which compels a reversal independent of them. The testimony was mostly written out in the original case-made. The pleadings were properly incorporated, so that we have before us the issues and the evidence, or at least enough to disclose the pertinency of the ruling we shall consider. It appears that the trees were on or close by the right-of-way of the A. T. & S. F. Railroad, and were cut down to make room for some telegraph poles and prevent interference with the telegraph wire. This line of telegraph was, it was claimed by plaintiff, built and owned by the defendant, and the trees cut down by its employes. On the other hand the defendant sought to prove that it was built by the defendant and the railroad company, under an arrangement for its joint use by the two companies. A witness was called, and the defendant offered to prove by him that the line of telegraph was built jointly by defendant and the railroad company for the use of the railroad company in the moving of

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of railroad;
extent of use
by railway
company.

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its trains, and the transaction of its business, that it was a part of and necessary to its business, and was built upon and over the right-of-way of the railroad company; but the court refused to receive the testimony, and the defendant excepted. In this we think the court erred. A telegraph line, if not indispensable to a railroad, tends so much to facilitate its business, and to the speedy and safe running of its trains, that the railroad company has a right to build it, to use its right-of-way therefor, and to remove all obstructions thereon, to its fullest and most uninterrupted and beneficial use. Although it may have but an easement in the land, and that easement limited to its use for railroad purposes, yet a telegraph is so convenient if not indispensable, that it may cut down every tree and bush on the right-of-way if necessary for the most constant and efficient use of a telegraph line built by it over and upon such right-of-way, just as it may dig away a hill, or fill up a ravine, for the sake of a water tank or a station-house. (*St. Jos. & D. C. Rld. Co. v. Dryden*, 11 Kas. 186.) By so doing it gives the adjacent land-owner no claim for damages. Such use is contemplated in the original condemnation; and the damages resulting therefrom are part of the damages included in the assessment therefor. In short, the railroad company may use its right-of-way not merely for its track, but for any other building or erection which reasonably tends to facilitate its business of transporting freight and passengers, and by such use in no manner transcends the purposes and ex-

a. Telegraph
line; no bur-
den, no dam-
ages.

tent of the easement, or exposes itself to any claim for additional damages to the original land-owner.

So that if the railroad company had built this line by itself, and independent of the defendant, and in so doing had only cut down trees upon its right-of-way, it is clear that the plaintiff would have had no cause of action therefor. Does the fact, that it took a partner in the construction and use of the telegraph, expose it or such partner to any liability to the land-owner for the full value of trees cut down upon its right-of-way? We think not. If the railroad company could build by itself without liability, it did not assume liability by build-

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ing with another. Whatever it could do and would have done for its own use and benefit, and was so done, was, so far as the land-owner is concerned, *damnum absque injuria*, no matter who bore the expense; or perhaps more correctly, it was damages already paid for. We do not question that every additional burden cast upon the land outside of the purpose and scope of the original easement, no matter in whose behalf, gives to the land-owner new claim for compensation. But such compensation is limited to the extent of the additional burden. *Hatch v. C. & I. Rld. Co.*, 18 Ohio St. 92; *L. M. & C. Rld. Co. v. Dayton*, 23 Ohio St. 510; *State v. Maine*, 27 Conn. 641. Of course, if the trees were not upon the right-of-way, it is immaterial whether the defendant built the line alone or jointly with the railroad company, for in the latter case either would be responsible for the entire damages. We cannot of course pass upon this question of fact, for we cannot tell what the testimony if admitted would have disclosed. It is enough that the testimony offered ought to have been admitted, and then the jury instructed that, if the facts were as defendant sought to prove them to be, the defendant was liable for only the damages caused by the additional burden, if any, its use of the telegraph cast upon the land.

The judgment will be reversed, and the case remanded for a new trial.

All the Justices concurring.

Clark v. Clark.

THOMAS J. CLARK v. SARAH J. CLARK.

MISNOMER; When Action May be Maintained in Assumed Name. S. J. B., a married woman, deserted her husband in Indiana, and eloped with one T. J. C. and took up her residence with him in this state, and assumed his surname, and was introduced by him as his wife in the community in which they lived, and by his acts and statements she became known in Kansas by her assumed name only.¹ Thereafter, while known and called S. J. C., she brought an action against said T. J. C. to recover the sum of \$1,000, for money borrowed of her after she had assumed the name of C. The pleadings and testimony show she was known as S. J. C. as well as S. J. B. *Held*, That, notwithstanding the action was brought in the name of S. J. C., instead of S. J. B., and notwithstanding the plea of misnomer, the district court did not err in rendering judgment in her favor for the amount found due.

Error from Wilson District Court.

SARAH J. CLARK, as plaintiff, recovered judgment against *Thomas J. Clark*, defendant, for \$1,000, and costs, at the May Term 1876 of the district court, and defendant brings the case here on error. The facts are fully stated in the opinion.

G. P. Smith, and *Cates & Keplinger*, for plaintiff in error, contended, that a plaintiff should know his own name, and for all purposes of pleading must be presumed to know it—and cited 4 Bac. Abr. 10, 20; Taylor, (N. C.) 148; 4 South Car. 32; 1 Bosanquet & Puller. While the crime of adultery would be no bar to a recovery by a woman in her real name, still such crime, and cohabitation with her paramour, cannot confer upon her the right to bring suit against him in *his* name, and not her own name.

J. W. Sutherland, and *Sterry & Sedgwick*, for defendant in error, maintained, that the rule of the common law, that a misnomer of either plaintiff or defendant, might abate an action, had its foundation in the proposition that the record of every action should, of itself, disclose a complete bar to a simi-

Brief of Defendant in Error.

lar action between the same parties, and that as the record could only fix the identity of the parties by giving the names by which they were known it was the right of each party to insist on such identification by the record. At the time this rule came into existence the reason for it was much greater than now, as parties in interest could not testify. If we are correct as to the reason for the rule, then it seems to us that as the reason for the rule does not possibly exist in the case at bar, it must be held that the rule itself cannot exist as to the facts in this case. The record in the case so completely identifies the defendant in error that it cannot possibly be said that it would not, of itself, be a complete bar to any future action for the same cause of action against plaintiff in error by the defendant in error, under the name of Brown. And besides this, it seems to us that it cannot successfully be denied that a person has a perfect legal right to call himself by any name he chooses, and so long as such name identifies him by reason of his being thus known in the community in which he resides, he would have a perfect right to sue and be sued by such name. The answer of the plaintiff in error, in order to correctly set forth the defense sought to be set forth by it, had to show not only that defendant in error's name was Brown, but that *she was known and called by such name*. The reply took issue on this and alleged that she was as well known where she resided by the name of Clark, as she was by the name of Brown, and the jury found such allegations to be true. Not only that, but the jury also found that the plaintiff in error gave her the name of Clark where they resided, and made the contract sued upon while she was known by such name. It does seem to us that when a person by his own acts and procurement fixes the identification of another person, so far as the name is concerned, in a community where they both resided by another and different name from that by which such other person was formerly known, he will be estopped in a suit by such other person against him under the new name upon a contract entered into while such other person was known by such new name from denying, for the purpose of

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abating the suit, that such new name properly identifies such other person. 1 Ohio, 61; 3 Caines, 219; 2 Me. 820; 2 Miles, 855.

The opinion of the court was delivered by

HORTON, C. J.: In the court below Sarah J. Clark brought her action against Thomas J. Clark to recover the sum of \$1,000 for money had and received. Thomas J. Clark answered in the nature of a plea in abatement, "that said Sarah J. Clark was named, known, and called Sarah J. Brown," and asked for judgment. To this answer, the defendant in error replied that the plaintiff in error "gave her the name of Clark, and caused her to be known by that name in the community where they lived, and where she resided at the commencement of the action." From the findings of fact returned by the jury, it appears that prior to the institution of the suit, the plaintiff in error, a married man, and the defendant in error, a married woman, eloped together from their respective homes in Indiana, and came to Neodesha, Wilson county, in this state; that at the time of such elopement the defendant in error was the wife of a man named Brown, and she herself was known by the name of Sarah J. Brown. On their arrival at Neodesha, and upon their taking up their residence there, the plaintiff in error introduced the defendant in error to the community in which they had taken up their residence as his wife, and then and there caused her to be known by the name of Sarah J. Clark, and from that time on she was known by that name, and no other, in the community where they both resided; that the said defendant in error was thus known by her assumed name of Sarah J. Clark at the time the money sued for was obtained, and so continued to be known and called.

Under the pleadings and the facts in the case, the court below committed no error in rendering judgment for the defendant in error. The real party in interest brought the action; and the record sufficiently identifies such party so far as her name is concerned as to disclose a complete bar to a

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similar action between the same parties. She was known only in Kansas by the name of Sarah J. Clark; the plaintiff in error assisted to make her known by that name by his own acts and statements; she was so called when the plaintiff in error obtained the money, and had no other name in the community in which she lived. As to the length of time she has lived in Kansas, the record is silent. The weight of authority of the American cases is in favor of the conclusion we have reached, and in support of our view we refer to *Goodenow v. Tappan*, 1 Ohio, 61; *Cooper v. Burr*, 45 Barb. 9; *Petition of John Snook to change his name to John Pike*, 2 Hilt. C. P. 566.

The judgment of the district court will be affirmed.

All the Justices concurring.

SCHOOL DISTRICT NO. 67 v. JAMES S. VEDDER.

WRITTEN INSTRUMENTS; Variance, Between Description, and Proof. In an action brought before a justice of the peace against a school district upon an order of such district for \$50, issued and dated March 3d 1874, and payable to F. or order, and the only description of the plaintiff's cause of action contained in the summons served in the case is, that judgment is claimed on a certain school-district order of said district, dated December 4th 1874, for \$50, with interest at the rate of seven per cent. per annum from date of said order, and there is no appearance on the part of the school district, it is error to render judgment on the return of such summons for \$50 with interest from 3d March 1874. [*Wooster v. McKinley*, 1-317; *Wilton T. Co. v. Humphrey*, 15-372.]

Error from Washington District Court.

THE district court, at the August Term 1876, affirmed a judgment previously rendered in favor of *Vedder* by a justice of the peace. *School District No. 67*, of Washington county, defendant before the justice, brings the case here on error. All necessary facts are stated in the subjoined opinion.

J. W. Rector, for plaintiff in error.

A. M. Hallowell, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: This was an action brought originally before a justice of the peace to recover \$50, with interest at the rate of seven per cent. from March 3d 1874, on an order of said school district No. 67, issued and payable to one "F. K. Fisk, or order." The order was dated 3d March 1874. Vedder, defendant in error, (plaintiff below,) was the owner of the order at the institution of the action. The only manner in which the plaintiff's cause of action is described in the summons issued and served in the case was, by stating that judgment was claimed "on a certain school-district order of said district dated December 4th 1874, for the sum of \$50 with interest at the rate of 7 per cent. per annum from date of said order." There was no appearance by the school district in the justice's court, and judgment was rendered on 13th May 1876—the same being the return-day of the summons—for \$57.42, being the amount of the order with interest from March 3d 1874. Thereafter the school district prosecuted its proceeding in error in the district court of Washington county to reverse said judgment, and the said court having affirmed the same, the case has been brought here for review.

The judgment of the district court was erroneous. The 11th section of procedure before justices in civil cases provides, among other things, that the summons "must describe the plaintiff's cause of action in such general terms as to apprise the defendant of the nature of the claim against him." (Gen. Stat. 777.) In this case there was not only an omission to describe the cause of action correctly, but the description was of a character to mislead the defendant, as to what order the suit was brought upon. There was a variance between the bill of particulars and the process notifying the defendant of the suit. In actions upon orders of this kind, *the date* is an

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important element in the description. If more than one order had been issued by the school district to the same payee of the like sum, the only mode of ascertaining the precise order sued on would have been by its date. Nor can it be urged in support of the proceedings of the justice that the summons was correct, and the bill of particulars wrong, as the order copied in the record is dated "March 8d 1874," and the judgment was taken for the face of the order, with interest from March 8d 1874, and not from December 4th, as stated in the summons. In other words, judgment was rendered for interest on the order for nine months more time than the defendant was notified of by the summons. The proceedings of justices should be treated with great liberality and indulgence, and the public welfare does not require their proceedings to conform to the same strictness as the superior courts; but in matters pertaining to the process by which they obtain jurisdiction of a party defendant, the provisions of the statute should at least be substantially complied with. Had the date of the order been omitted in the summons, and no greater judgment taken than stated therein, no irregularity would have existed in the proceedings.

The judgment of the district court will be reversed.

All the Justices concurring.

BARCLAY HOCKETT V. R. R. TURNER.

1. **ERROR OCCURRING AT THE TRIAL, Not Reviewable Until Final Judgment.** Errors occurring during the progress of a trial are not reviewable in an appellate court until after a final decision in the trial court.
2. ——— So where objection is made to the introduction of certain testimony offered by plaintiff on account of an alleged defect in his pleadings, and such objection is sustained, and thereupon the plaintiff asks and obtains leave to amend his pleadings to cover the alleged defect, and does so amend them, and thereupon on motion of defendant the jury is discharged and the case continued for trial to the next term, *held*, that even though the court erred in holding the pleadings defective, and the testimony admissible, the error cannot be corrected by proceedings in error to reverse the ruling, or to set aside the order of continuance. [*Brown v. Kimble*, 5-80; *Smith v. Moore*, 21-161; *Paul v. Whitstone*, 28-635.]

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3. **DISCRETION OF COURT; Costs of Term.** The taxing of the costs of the term to the party whose action necessitates a continuance, is not only largely in the discretion of the court, but it is proper as a general rule to tax them to such party.

Error from Cowley District Court.

QUESTIONS of practice only are decided in this case, and all necessary facts and proceedings are fully stated in the opinion. The order complained of was made at the May Term 1877 of the district court, and *Hockett*, plaintiff, brings the case here.

Pryor, Kager & Pryor, for plaintiff.

E. S. Torrence, for defendant.

The opinion of the court was delivered by

BREWER, J.: Plaintiff in error challenges the correctness of an order of the district court taxing, upon a continuance, the costs of the term against him. The facts briefly are these: The case stood for trial upon petition, answer, and reply. A jury was impaneled, plaintiff introduced testimony in support of his petition, and then, before resting in chief, offered testimony to prove the new matters alleged in his reply. To this the defendant objected, and the court sustained the objection. Plaintiff then asked leave to amend his petition by adding to it allegations of the new matter theretofore only alleged in the reply. Leave was granted, and the petition so amended. Defendant then asked for leave to file an amended answer, and for a continuance to the next term, and thereupon, without any showing, the court ordered a continuance, and taxed the costs of the term to the plaintiff. Was this error? Whether the court decided correctly in ruling out the offered testimony, is a question not now the proper subject of inquiry, for errors occurring during the progress of a trial can be inquired into only after a final decision. When a court rules out offered testimony on the ground that it is inadmissible under the pleadings, the party may abide by the ruling, and after judgment bring the question here for review, or he may seek leave to amend his pleadings to conform to the ruling. Here the plain-

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tiff chose the latter course. He asked and obtained leave to amend; and of course therefore waived any right to relief he might have had if he had pursued the other course.

The other errors alleged occur in the matter of amendments of pleadings, continuances, and taxation of costs thereon, and these matters, as we have repeatedly decided, are largely within the discretion of the trial court, and unless it is apparent that such discretion has been abused, there is no ground for reversal. It is seldom, if ever, wrong to tax the costs of the term against the party whose fault necessitates the continuance. Gen. Stat. p. 655, §§139, 142; page 746, §588; *Davis v. Wilson*, 11 Kas. 74; *Bliss v. Carlson*, 17 Kas. 325; *Wands v. School District*, ante, p. 204.

We have not noticed the objections made to the validity of the case-made, or to the manner in which the exceptions have been preserved, for upon the facts as stated we are compelled to affirm the judgment.

All the Justices concurring.

ATCHISON & NEBRASKA RAILROAD CO. v. SAMUEL HARPER.

1. **PROOF OF VALUE; Indirect and Comparative Evidence, Inadmissible.** In an action brought by the owner of a colt, under the provisions of ch. 94, laws of 1874, to recover damages from a railroad company for wounding the animal on the line of its road, where the plaintiff has other and better evidence at hand as to the value of the colt for which damages are claimed, it is error to allow proof, against the objections of the railroad company, that the injured colt compared in appearance with the colts of other persons, and against like objections to admit proof of the value of such other colts to fix and determine the value of the colt injured by the railroad company.
2. **STOCK LAW OF 1874.** The decision in *K. P. Rly. Co. v. Mower*, 16 Kas. 573. that ch. 94 of the laws of 1874, relating to the killing or wounding of stock by railroads, is constitutional and valid, considered, and affirmed. [*R. R. v. Mower*, 16-573, and cases cited; *R. R. v. Gabbert*, 34-132.]

24-19 Kas.

Error from Doniphan District Court.

THIS action was commenced by *Harper* in a justice's court, alleging in a bill of particulars, "that the *Railroad Company* was owner of a line of railroad over S. $\frac{1}{4}$ of S.W. $\frac{1}{4}$ of section 81, T. 8, R. 21," onto which the plaintiff's colt wandered for want of a fence, without the owner's fault, and was there killed; that demand for payment had been made, and asking judgment for \$40, the value of the colt, and \$25 fee for the plaintiff's attorney. On appeal to the district court, and trial therein at September Term 1876, *Harper* had judgment, and the *Railroad Company* brings the case here.

W. W. Guthrie, for plaintiff in error, contended, that it was not competent evidence to allow one witness to testify to comparative value of animals, and then to allow another to testify the actual value of colts other than plaintiff's. Such case does not come within the rule of hypothetical cases put to scientific witnesses.

2. Plaintiff tried this case upon the theory that he should recover upon the showing, that he owned a colt, his private property, and defendant owned a railroad, its private property, and his land and defendant's land being inclosed in a joint inclosure, into which plaintiff had turned his colt on his land, and defendant was working its locomotive on its land, and without any fault on its part, its locomotive had accidentally killed his colt while trespassing on defendant's land, for not only the value of the colt but for \$25 additional, because the value of the colt was not paid when he asked for it, and obtained judgment thereon. Unless railroad corporations have been outlawed by the act of 1874, such judgment is flatly in the face of the decision of this court in *Baker v. Robbins*, 9 Kas. 303; *U. P. Rly. Co. v. Rollins*, 5 Kas. 174, 182-187; *Caulkins v. Mathews*, 5 Kas. 191, 199. The fee-simple owners (as admitted by petition as to defendant's land, and on trial as to plaintiff's land,) fenced in common, and thereby each owner undertook to take care of his own land, and his own stock; and as said

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in the *Rollins case*, p. 188, neither land-owner is liable to the other except for wanton injuries, which is held in the *Baker-Robbins case* to exist where each owner allows his stock to trespass on the other's land. The partition-fence laws of this state are still in full force unless repealed by implication (as to railroad companies only,) by act of 1874; and such repeal even as to railroad companies is forbidden by the constitution, § 16, art. 2. But the stock act of 1874 does not attempt to cover this kind of cases; it only requires protection to be given to wandering stock which is authorized to wander, or to make good the injuries. It does not apply to lands not the subject of fencing; (49 Mo. 199; 18 Kas. 462;) nor, for same reason, to stock not subject to be fenced against. Can the owners of hogs recover, under such act, for hogs which the owners have allowed to wander upon a railroad track, or have passed under a three-board fence put up by the railroad company, and been killed?

8. We think that this court erred in deciding the case of *K. P. Rly. Co. v. Mower*, 16 Kas. 578, misapplied the true principles governing in such case, and certainly to the extent of sustaining such judgment for attorney-fees additional to the actual value of injury claimed. Since that decision, the supreme court of Nebraska in *A. & N. Rld. Co. v. Baty*, Oct. 1877, under a similar constitution, on a like statute, has decided that statute unconstitutional. This court holds the imposition of the payment of a sum in excess of actual injury, to be a "police regulation"—the Nebraska court, "a penalty." Can such imposition, "as a part of the police power of the state," be other than a penalty? Is not the payment of "an attorney-fee," (whether any attorney was in fact employed, or not,) a penalty for the failure to perform the terms of such "act?" Where such terms have been complied with, such payment (fine) is not imposed. All the cases cited in 16 Kas. 577, sustain the law upon that ground. Cooley Const. Lim., p. 580, says that the liability can exist only by express statute. And see, 25 Ill. 143; 49 Mo. 440; 20 Wis. 254. The Kansas act of 1874 is obnoxious to the well-settled rule that, "It may be considered

a well-settled rule in respect to the operation of the laws, that corporate companies and natural persons are placed precisely on the same ground, and this is the true ground, and the only one, upon which equal rights and just liabilities and duties can be fairly based." To destroy any other property in like manner, costs no penalty. To *unjustly* prosecute a suit, costs no fine of \$25; while to *unsuccessfully* defend a case under this statute, costs such penalty, with or without an attorney as apology therefor. Such legislation is more than a tub thrown to the so-called "granger whale," for if sustained, will continue to roll faster, crushing every principle of equality and justice in its track. Cities vote bonds to induce railroads, and when built, repudiate their payment. Individuals borrow money, and contract to pay an attorney-fee on foreclosure, and before the debts mature, legislation is invoked to prevent collection. We submit that the attorney-fee is a penalty which cannot be sustained, unless this court is prepared to say, in the language of the Nebraska case, above cited, that "the legislature may apply the same principle to simple debt, and therefore if upon demand by the creditor the debtor fails to pay within a certain time, he may, by legislative decree, be compelled to pay double, treble, or a hundred times the amount of the debt, according as the legislature may decree by legislative enactment."

W. D. Webb, for defendant in error, submitted, 1st, that the court below was justified in overruling the objection to the testimony of witness Tracy because the attorney for the plaintiff in error did not state any ground of objection to the testimony. (9 Kas. 627.) 2d, the same in regard to *Watkins'* testimony. But this testimony was admissible in any event. 21 Minn. 56.

The opinion of the court was delivered by

HORTON, C. J.: This was an action to recover from the railroad company damages for injuries to a colt owned by the defendant in error, together with a reasonable attorney-fee for

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the prosecution of the suit. The liability of the railroad company was based upon the provisions of ch. 94, laws of 1874, pp. 143, 144. Judgment was rendered for the defendant in error for \$40 as his damages, and \$25 as the attorney-fee.

Upon the trial in the district court, the following questions and answers were admitted against the objections and exceptions of the railroad company. From John Tracy, a witness produced by the defendant in error: "Did you know plaintiff's colt that was killed, and Mr. Snyder's colts? *Ans.*—I know all the colts." "How did the plaintiff's colt compare with Snyder's? *Ans.*—They are in appearance about the same kind of colts. I am not a good judge, but would call them about the same value." From John Watkins, also produced by the same party: "State what was the value of Snyder's colts last November, (the month Harper's colt was wounded.) *Ans.*—Snyder's colts were worth \$50 apiece. They were good colts. I offered that for them." There was error in permitting the witnesses Tracy and Watkins to thus testify. The policy of the law, independent of other reasons, requires that the best evidence within the control of the party introducing testimony should be produced. It was not claimed or asserted that direct proof of the value of the colt was wanting. On the other hand, the record shows that the plaintiff in the court below had other persons attending the trial in his behalf, who knew the value of the colt in question, and were competent witnesses in the case. The only purpose of submitting the testimony quoted, must have been to increase the actual value of the colt, prior to its injuries, by comparative or indirect evidence, and thus to obtain damages in excess of its real worth. Such testimony, if permitted in cases of this character, where as a general rule the sympathy of the jury is with the party suing, and against the corporation, would furnish an imaginary rather than an actual basis for recovery, and would naturally tend to the giving of excessive damages. If the competency of such testimony was indorsed by this court, in all similar cases hereafter, instead of proving the known or true value of animals wounded or killed by the agents or cars of railroad companies,

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counsel seeking to recover large damages, to prove values, would introduce witnesses to show by their evidence the appearance of the animals wounded or killed with other like animals of great value, and supplement such proof with the testimony of the values of the other animals. Such proof is deceptive, and certainly liable to mislead a jury. In the absence of any necessity of adopting proof of this kind, the courts should not allow its admission.

Again, the law is well settled that all evidence should be confined to the points at issue. The attention of the jury should not be distracted by immaterial or irrelevant matters. The reasons why this rule should be maintained are obvious. If not enforced, trials would be injuriously prolonged, the real issues obscured, and verdicts taken on side issues. In the case at bar, one of the questions at issue was the value of Harper's colt in November 1874. Instead of being directed closely to this issue, the minds of the jury were diverted by the evidence of Tracy and Watkins to Snyder's colts and their value. If one witness could testify concerning the value of Snyder's colts, then many others could likewise have been introduced for the same purpose, and the result would be greatly unfavorable to the corporation against which the damages were claimed. The evidence offered and objected to was unnecessarily circuitous, was calculated to distract the jury from the real issues, was seemingly designed to prejudice the rights of the plaintiff in error, was not the best evidence at hand, and should have been rejected. The counsel for the defendant in error suggests that, admitting the inadmissibility of the testimony, the court was justified in its rulings, as the attorney of the plaintiff in error on the trial did not state the reasons for his various objections. As a general rule this of course should be done, and we refer to the many decisions of this court in support of the reasonableness of the rule; but in this case the evidence was so improper, its incompetency so obvious and incurable, we think the objections sufficiently definite for the plaintiff in error to avail itself of the error of the court.

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As to the other questions presented by the counsel for plaintiff in error, we need only say that they have been settled by the adjudications of this court adverse to the positions maintained in his brief, and we do not feel inclined to reopen the discussion concerning them. See *K. P. Rly. Co. v. Mower*, 16 Kas. 573; *Hopkins v. K. P. Rly. Co.*, 18 Kas. 462.

For the error in admitting incompetent testimony, the judgment of the district court will be reversed.

All the Justices concurring.

KANSAS PACIFIC RAILWAY Co. v. E. L. BALL.

STOCK-KILLING ACT OF 1874; Demand of Payment. To sustain an action under ch. 94 of the laws of 1874, against a railroad company, for the killing of stock, there must be proof of a demand in accordance with the provisions of section two of said act. [*R. R. v. Mower*, 16-573; *R. R. v. Gabbert*, 34-132.]

Error from Shawnee District Court.

BALL had judgment for \$135 and costs, at the May Term 1875 of the district court, D. B., judge *pro tem.*, presiding, and the *Railway Company* brings the case here. All necessary facts appear in the opinion.

Charles Monroe, for plaintiff in error.

F. G. Hentig, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: The only questions in this case are, whether under the stock-killing law of 1874 proof of demand is essential to a recovery, and if so whether there was such proof. The first question must be answered in the affirmative, and

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the second in the negative. The statute is a stringent one, and imposes new burdens upon railroad corporations; and he who would avail himself of its benefits ought to bring himself clearly within its terms. The language of the second section is, "In case such railroad company shall fail for thirty days after demand to pay the full value," etc., "such owner may sue and recover the full value," etc., "together with a reasonable attorney-fee." And the third section specifies upon whom the demand may be made. Nor is it a fair construction of the statute to hold, that the first section renders the company liable for the value, and that the steps prescribed in the second section may be disregarded unless attorney-fees are sought to be recovered in addition to the value. The whole act should be construed together, and the conditions of liability prescribed in one section applied to the entire relief obtainable under the act. *McNaught v. C. & N. W. Rld. Co.*, 30 Iowa, 886; *Cole v. C. & N. W. Rld. Co.*, 38 Iowa, 811.

The only evidence tending to show a demand in this case is in the following testimony of the plaintiff:

"I am the plaintiff in this case, and had two mules killed by the Kansas Pacific Railway Company on Saturday, either the 23d or 24th of October. I called on Mr. Johnson, the railway agent, and he told me I had better get some one to appraise them. The section-boss selected Mr. Johnson, and I selected Mr. Entsminger, but they could not agree upon the price of the mules, and so called on Mr. Payne, and they placed the value at \$135 for the two."

Now under a statute like this, imposing an additional burden, and conditioning that burden upon a demand, it seems to us there should be proof of a direct demand. (See cases cited, *supra*.) And while of course slight evidence will sustain the finding of a court, or the verdict of a jury, yet in this evidence we see no allusion to a demand. All that appears is, that the plaintiff counseled with an agent of the company, and was advised as to the course he should pursue. It does not appear directly or inferentially that the plaintiff demanded payment. If the fact existed, the witness was present, and the proof was easy. The omission of such proof was fatal.

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The motion for a new trial, and the petition in error, allege that the finding and judgment were contrary to law. The party must rest his case upon this statute, for there is in his bill of particulars no allegation of negligence, and no evidence of any negligence except in the omission to fence.

The judgment will be reversed, and the case remanded for a new trial.

All the Justices concurring.

THE STATE OF KANSAS V. MICHAEL COUGHLIN *et al.*

SURETIES OF THE PEACE; *Jurisdiction; When Written Complaint is Necessary.*

Except in cases of affray, threats, or other misconduct in his presence, a magistrate has no power under the statute to require any one to give bonds to keep the peace, unless a written complaint be first made and filed. [*Jennings v. State*, 13-90; *State v. Spaulding*, 24-4; *Wagstaff v. Schipfel*, 27-456; *State v. Bailey*, 32-89, 90.]

Appeal from Leavenworth District Court.

THE district court, at the December Term 1877, adjudged and required *Michael Coughlin*, *James Coughlin*, and *Bridget Coughlin*, to enter into a recognizance in the sum of \$250, to appear before that court within one year from the date of the order, to keep the peace, and to pay the costs. From such decision and order said parties appeal to this court. All necessary facts are stated in the opinion.

Thomas P. Fenlon, for appellants.

Joseph W. Taylor, county attorney, for The State.

The opinion of the court was delivered by

BREWER, J.: Defendants were bound over to keep the peace, and now challenge the judgment of the court for want of jurisdiction. The facts are these: One of the defendants

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filed an affidavit with a justice of the peace, charging Robert and Susan Edmonds with an assault with intent to kill. Upon the examination of that charge the justice bound the defendants in that action over to keep the peace, and taxed half the costs against them. He also, without any written or other complaint against the defendants and appellants here, required them to enter into bonds to keep the peace, and taxed the other half of the costs against them. According to the transcript from his docket this order was made, not upon threats, or affray, in his presence, but upon the testimony of witnesses. Upon the hearing in the district court that court made a similar order. From this order these defendants appeal.

Had the district court jurisdiction to make this order? We think not. Except in cases of threats, or affray, in the presence of the magistrate, as provided in section 18 of the code of criminal procedure, a written complaint is necessary to give the magistrate jurisdiction. Where a defendant is arrested upon one charge he may be bound over for another, and in such case no new complaint is absolutely essential. *Redmond v. The State*, 12 Kas. 172. But these defendants were never arrested upon any charge. They were present simply as witnesses; and a magistrate has no power to require one who is simply a witness, and guilty of no misconduct in his presence, and against whom no written complaint is filed, to give bonds to keep the peace. The provision in section 16 of the criminal code, concerning "cases where there is no complaint," refers to those in which the magistrate required a bond to keep the peace on account of misconduct in his presence, and does not give to magistrate or court power to dispense with a written complaint in other cases. Counsel for the state contends that as the magistrate is by the statute required to transmit only the recognizance to the district court, and as that in this case was in proper form, the district court acquired jurisdiction whether the magistrate had any or not. We cannot assent to that proposition. If the magistrate had no jurisdiction, the recognizance was void, and the district

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court by it acquired no jurisdiction. A transcript of the justice's docket was duly filed in the clerk's office with the recognition, and objection was seasonably taken to any proceeding against these defendants without a written complaint.

For this error the judgment must be reversed, and the case remanded with instructions to discharge these defendants.

All the Justices concurring.

KANSAS PACIFIC RAILWAY CO. v. LEWIS DUNMEYER.

1. BREACH OF COVENANT; *Variance Between Allegation and Proof.* In an action of covenant upon a warranty to recover back the purchase-money expressed in the deed of conveyance of the real estate, *held*, that under an allegation in the petition that the plaintiff was "ousted and dispossessed of the premises by due course of law," it was inadmissible to prove a constructive eviction by the purchase of a paramount title hostilely asserted by the party holding it, as the variance between the allegation and proof is fatal.
2. ——— While the general rule is, that the grantee must make the most of the title he has acquired, and yield possession only to a hostile assertion of a paramount title by suit to recover the land, or in pursuance of a demand for the possession under a claim thereto, or upon a distinct hostile assertion of title, yet, where the title to the land in controversy is in the United States, and liable to entry and settlement under the homestead laws of the government to all who possess the proper qualification, that of itself is such a hostile assertion of the paramount title as will authorize the grantee to voluntarily submit to it. [*R. R. v. Young*, 8-658; *R. R. v. Dunmeyer*, 24-725.]

Error from Saline District Court.

ACTION by *Dunmeyer*, for breach of covenant of possession. Trial at the May Term 1876, and judgment for plaintiff. The *Railway Company*, defendant, brings the case here. All necessary facts are stated in the opinion, *infra*.

J. P. Usher, and *Charles Monroe*, for plaintiff in error, contending that an allegation that "eviction was by due course of

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law," was not sustained by a proof of constructive eviction, cited Rawle on Cov. 249; 5 Iowa, 89; 17 Ill. 185; 11 N. H. 74; 51 Ind. 519. A party cannot allege one thing, and prove its equivalent by proving a different thing: 4 Sandf. 665; 8 Kas. 568.

The opinion of the court was delivered by

Horton, C. J.: On the 11th of November 1875 an action was commenced in the court below by Lewis Dunmeyer against the K. P. Rly. Co., to recover damages because, by a deed dated 12th November 1870 the railway company sold and conveyed to the said Dunmeyer certain real estate, described as the W. $\frac{1}{4}$ of the S.E. $\frac{1}{4}$, and the E. $\frac{1}{4}$ of the S.W. $\frac{1}{4}$ of section 25, in township 18 south, range 2 west of 6th P. M., Kansas, and covenanted therein to warrant and defend "the possession of the said premises" to the said Dunmeyer, but after the execution of said deed the railway company did not and would not "defend said premises and the possession thereof, but on the contrary, said company had not at the date of such deed a good title, as the paramount title thereof was in the United States, by virtue of which paramount title said Dunmeyer was afterward, on the 16th of October 1871, ousted and dispossessed of the said premises by *due course of law*." The consideration of the deed was \$200. The case was tried to a jury, but after the introduction of all the evidence, the court refused to give to the jury any instructions, and directed them to find a verdict for the plaintiff for \$200, with interest from the date of the deed from the railway company to Dunmeyer. Judgment was rendered for \$277.72 for Dunmeyer, and various errors are assigned as grounds for a reversal of the same. We need only notice two of them.

It is alleged that there was a fatal variance between the allegations of the petition and the proof to support the same, and that said Dunmeyer proved no eviction. Upon these points, the evidence was substantially as follows: A patent was offered on the part of the plaintiff in the court below to the

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premises in controversy from the United States to one G. B. Dunmeyer, of the date of 25th March 1875. After which Lewis Dunmeyer testified as follows:

"I am the plaintiff in this action. I own part of the land in controversy—one eighty of it; Samuel Crowell owns the other eighty. I bought it from Gabe Dunmeyer last spring. It is part of the same land that I had bought before from the railroad company. I hold possession under my deed from Gabe, and not under my deed from the railroad company."

Cross-Examination: "Gabe Dunmeyer is my son. I paid him about \$900 for this land, counting interest and all. Don't think I paid him in money; it was the same as money; I held notes of his for money that I had lent him, and I gave him those notes. Mr. Geis and I bought this land together, of Mr. Miller. * * * But Mr. Geis acted for me. Afterward Gabe bought Mr. Geis' share. I had money belonging to Gabe, and paid Geis for him. This money that I paid to Geis is no part of the consideration of the deed from Gabe to me. When the deed was made to me by the railway company, I was in Pennsylvania. Gabe came out and went onto this land the spring after the deed to me was made. The way Gabe came to go on this land, Gabe had determined to go to Kansas, and had no place to go to, and I told him that Mr. Geis and I had bought it, and if Mr. Geis was willing, he could go out and live on it, and he did so; there was a house on it. When I bought I took possession. I never broke any. I was out here every year. This land is about twenty rods from the Kansas Pacific railroad track. When I bought the eighty acres of Gabe I bought his interest also in the deed from the Kansas Pacific Railway Company, or his claim against the said company, on account of the failure of title, and I then settled with him for it."

And G. B. Dunmeyer testified as follows:

"I am the one who got the patent for the land. I contested it with the railroad company before the land-office here. C. A. Hiller appeared in that contest as attorney for the railroad company. I was told it was government land, at the land-office, and other parties were talking of taking it, and I went and homesteaded it to save it. I paid \$200 for the land, and the fees, \$19.50, at the land-office. I mean, that is what I paid the government to get the land. When I sold the eighty acres

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to my father, Lewis Dunmeyer, I also sold him in the trade, my right against the Kansas Pacific Railway Company in the deed from the Railway Company. They had deeded the land to my father, but I owned one-half of the land, and paid one-half of the money for the land. There was no agreement or understanding between me and my father that I should go on and homestead this land in order to defraud the railroad company. I homesteaded because I was informed at the land-office that it was government land, and the railroad company had no right to it. I homesteaded it to save the land. * * * I sold half of this land to my father, Lewis Dunmeyer, over a year ago. He paid me for it in notes of mine that he held, for money borrowed; think he paid me some money. I bought half of this land from John Geis, before I made homestead entry; paid him \$560 for it. Lewis Dunmeyer paid it for me. John Geis told me he would deed the whole of it to my father, and he would make a deed to me, but never did. Think my father paid me \$460, or \$560, for the eighty he bought of me. The money he paid to John Geis for me was no part of this consideration. When I first went onto this land Mr. Geis and my father told me that they had bought it, and that there was a house on it, and I could go and live in it, which I did. I told Mr. Geis if I liked it I would buy it from him, and afterward did so."

This evidence does not sustain the allegation in the petition, that said Lewis Dunmeyer was ousted and dispossessed of the premises by *due course of law*. The words, "by due course of law," are synonymous with "due process of law," or, "the law of the land;" and the general definition thereof is, "law in its regular course of administration, through courts of justice;" and, while not always necessarily confined to judicial proceedings, (as, for instance, the collection of taxes is held to be within the phrase "by due process of law,") yet these words have such a signification when used to designate the kind of an eviction, or ouster, from real estate by which a party is dispossessed, as to preclude thereunder proof of a constructive eviction resulting from the purchase of a paramount title when hostilely asserted by the party holding it. As the petition alleged an ouster by due course of law, and as an issue was joined thereon, the evidence should have supported the allega-

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tion. It does not. An eviction, or ouster, was not pleaded in general terms, but a particular kind of an eviction was alleged, and the plaintiff in the court below should have been confined in his testimony to his pleading. He was not authorized to prove a different eviction. A party cannot allege one thing, and, to support the same, prove a state of facts dissimilar thereto, and of which the opposing party had no notice. The particular allegation as to the ouster by due course of law was not sustained; and the court erred in its rulings as to the admission of evidence, and the rendition of the judgment. *Garvey v. Fowler*, 4 Sandf. 665; *U. P. Rly. Co. v. Young*, 8 Kas. 658.

The eviction proved in the case was sufficient, if the pleadings had authorized the introduction of the evidence. Under the railway title, Lewis and G. B. Dunmeyer were joint-owners of the premises. After G. B. Dunmeyer had gone into actual possession, he was informed that it was government land, and that other parties were talking of taking it. He homesteaded it, to save the land. The railway company had no title to the premises, and never had; they were public lands, subject to homestead-entry and settlement. G. B. Dunmeyer complied with the provisions of the United States laws, and obtained the patent. While thus in possession under title derived direct from the government, defendant in error purchased of said G. B. Dunmeyer the outstanding paramount title. While it is true, that under the covenant of warranty, as usually expressed, a purchaser cannot as a general rule buy in any paramount claim, and elect to consider himself evicted to the extent of the purchase-money of such claim, yet where the title to the land in controversy is in the United States, and liable to entry and settlement under the provisions of the homestead law, that of itself is such a hostile assertion of the paramount title as would authorize the purchaser to voluntarily submit to it. *McGary v. Hastings*, 39 Cal. 360. We have considered the facts tending to prove a constructive eviction to prevent this point again being a subject of difference in event of an amendment to the petition and a new trial.

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The judgment of the district court will be reversed, and case remanded for a new trial.

All the Justices concurring.

THE STATE OF KANSAS V. SAMUEL ASHMORE.

APPEAL IN CRIMINAL CASES; Jurisdiction; Service of Notice. In the absence of any notice of appeal, required by section 285, General Statutes, 866, the supreme court has no jurisdiction to review the rulings and judgment of a district court in a criminal case. [In addition to cases cited in opinion, see *McLean v. State*, 28-372; *State v. Feissedre*, 30-210; *In re Chambers*, 30-450; *State v. Feissedre*, 30-476.]

Appeal from Osage District Court.

ASHMORE was charged by information, in the district court of Shawnee county, with having feloniously shot and killed his wife. The alleged offense was committed in November 1872, and the information charged murder in the first degree. Upon *Ashmore's* application the case was sent to Osage county for trial, and was there tried at the November Term 1874. *Ashmore* was found guilty of murder in the first degree, and was sentenced to suffer the penalty of death, and was committed to the state penitentiary until such time as the governor by his warrant should fix for carrying such sentence into execution. The sentence was pronounced on the 7th of January 1875. On the 14th of May 1877, *Ashmore*, by his counsel, filed in this court a transcript of the record as upon appeal from such judgment and sentence. Said transcript is certified by the clerk of the district court under date of 9th January 1877.

G. C. Clemens, for appellant.

Willard Davis, attorney-general, for The State.

The opinion of the court was delivered by

HORTON, C. J.: The attorney-general, representing the state, objects to any consideration of this case upon the alleged errors, on the ground that the case is not properly before this court upon appeal, or otherwise; *first*, because no notice of appeal appears in the transcript; *second*, because the appeal was not taken within two years after the judgment was rendered.

The first objection is fatal to the jurisdiction of this court; and however much we might desire to pass upon the questions presented by the counsel for the convict, we cannot, within the provisions of law, assume any authority over the judgment rendered in the district court. Sec. 285, criminal code, (Gen. Stat. 866,) is identical with section 268, Comp. Laws, 275; and said last section was fully considered and construed in *Carr v. The State*, 1 Kas. 331. In that case it was held, "the service of the notice of appeal on the clerk, and the appellee, or attorney, constitutes the appeal; and upon that alone the jurisdiction of this court to review the judgment and decision of the court below rests. It is therefore an important part of the record, and it should appear in the transcript filed, that this court may see and its records show it has jurisdiction." See also, *The State v. King*, 1 Kas. 466; *The State v. Brandon*, 6 Kas. 243; *The State v. Baird*, 9 Kas. 60; *The State v. Boyle*, 10 Kas. 113; *Neitzel v. City of Concordia*, 14 Kas. 446. These authorities are decisive, upon the objection made by the learned attorney-general; and the proceedings in this case in this court must be dismissed.

All the Justices concurring.

16—29 Kas.

THE STATE OF KANSAS V. WM. H. EMMERT *et al.*

1. SCHOOL LANDS, *Sold on Contract; Failure to Pay; Forfeiture.* If a purchaser of school lands fails to pay the interest or principal at the time the same becomes due, such failure *ipso facto* works a forfeiture; and the interest of the purchaser in the land instantly and absolutely ceases. [*Ewing v. Baldwin*, 24-87; *Baker v. Newland*, 25-83; *Newland v. Baker*, 26-344; *Comm'r v. Baldwin*, 29-540; *Reynolds v. Reynolds*, 30-98, 97.]
2. ——— *Judicial Determination of Forfeiture, Not Necessary.* Section 16 of article 14, chapter 122, laws of 1876, is a legislative declaration of forfeiture in advance, and no judicial determination is necessary to establish such forfeiture. [*Neer v. Williams*, 27-86, 87.]

Error from Allen District Court.

ACTION on school-land contract executed by *Wm. H. Emmert*, and *R. A. McCulloch*, on the purchase by them of certain school lands in Allen county. The contract was executed on the 14th of August 1871, and was for the purchase of forty acres, at the price of \$4.50 per acre. By the terms of the contract ten per cent. of the purchase-money was payable in advance, and the residue in ten equal annual installments, with interest at the rate of ten per cent. per annum. On the 14th of August 1876 there was due from *Emmert & McCulloch* on said contract the sum of \$90, (principal and interest;) and said sum remaining unpaid, the county attorney, in April 1877, brought suit on said bond. The averments and prayer of the petition, and the proceedings in the district court, are sufficiently stated in the opinion. The district court, at the June Term 1877, gave judgment in favor of defendants for costs, and *The State* brings the case here on error.

Peter Bell, county-attorney, for *The State*.

G. P. Smith, for defendants in error.

The opinion of the court was delivered by

BREWSTER, J.: This action was brought by the county attorney of Allen county in favor of the state, for the purpose of having a judicial finding of fact that the conditions of the

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bond or contract of purchase given by the defendants as required by law (see sec. 7, article 14, ch. 122, laws of 1876,) for the purchase of a certain tract of school land therein named and described had not been complied with, and that the defendants have forfeited their interest in said land by reason of said purchase, together with the money paid thereon, to the state; and asking that the court adjudge a forfeiture of said land and money paid to the state, and a restoration of said land to the state, unless the defendants pay the amount due on said contract of purchase, and costs of suit, within ten days from the entry of judgment. Said bond is set up and made a part of the petition. The defendants demurred to the petition, setting forth several grounds, but the only ground presented by counsel, or considered by the court, was, "that the petition did not state facts sufficient to constitute a cause of action in favor of the state against the defendants." The district court sustained the demurrer, and the plaintiff brings the case to this court for review.

This case involves the construction of sections 7 and 16 of article 14 of ch. 122, laws of 1876, pages 282, 284. Said section 7 reads as follows:

"Any person purchasing said land shall pay to the treasurer of the county in which the same is situate, one-tenth of the amount of the purchase-money, taking therefor a receipt which he shall present to the county clerk, together *with a bond in double the amount* of the purchase-money unpaid, conditioned that he will not commit waste upon said land, and that he will pay the balance of said purchase-money in ten years, and interest thereon at ten per cent. per annum, as the same becomes due; *provided*, that the purchaser may pay the balance of the purchase-money at any time, or in installments of not less than twenty-five dollars each."

Section 16 reads as follows:

"Any purchaser failing to pay the annual interest when the same becomes due, or the balance of the purchase-money when it becomes due, shall forfeit all right to the land from the time of said failure of payment, and the county attorney shall proceed to eject him from said premises, if in possession."

On the one hand it is claimed, that this last section is a legislative declaration of forfeiture in advance, and that, if the purchaser fails to make payment at the stipulated time, *ipso facto* the land is absolutely forfeited; and on the other, that it is optional whether to claim a forfeiture, or to waive it and proceed upon the bond to collect the purchase-money; and that the county attorney, as the legal representative of the state in this behalf, may make the election, and that as the power of election exists there is absolutely no forfeiture until after the election and a judicial determination. Much is said in the arguments as to the comparative advantages and cost to the state school fund of these respective constructions of the statute; but such considerations as these are principally for the legislature, and not for the courts. It cannot be doubted that the legislature has the power to adopt either course. It can make the forfeiture absolute upon the mere fact of non-payment, or it may leave the matter open for further decision, and retain an election to pursue its remedy upon the bond, or obtain a judicial declaration of a forfeiture. It is not therefore a question of power, but one of construction. What did the legislature intend? and what is the fair import of the language used? It seems to us clear that there is a legislative declaration of forfeiture in advance, and that upon the happening of the event the forfeiture occurs, and no judicial proceeding is necessary to determine it. The language of the statute is clear, positive, and peremptory. "Any purchaser failing * * * shall forfeit." And the duty cast upon the county attorney is equally clear and positive, not to seek a judicial determination of the forfeiture, not to foreclose any equitable mortgage, or to collect the bond, but to eject the purchaser if in possession. And ejectment implies full title in the plaintiff, and no rights in the defendant. It implies a forfeiture already existing, and not one to be declared. The authorities support this view. In *Borland v. Lewis*, 43 Cal. 569, which was ejectment for swamp lands purchased of the state, it appeared that the sixth section of the act providing for the sale of such lands read, that "if any person or persons purchasing lands * * shall fail

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or neglect to pay the principal and interest, * * * or shall fail and neglect to pay the interest, * * * such neglect or failure shall work a forfeiture of such lands, and the same shall be re-sold as if no purchase had been made." And the court held that a failure to pay *ipso facto* worked a forfeiture. In the case of the *O. R. Co. v. O. B. & F. V. R. Co.*, 45 Cal. 365, the court, reviewing several authorities, decided, that "when a forfeiture is declared by statute the title to the thing forfeited immediately vests in the state, upon the commission of the offense, or the happening of the event, for which the forfeiture is declared." In *Conklin v. Hawthorne*, 29 Wis. 476, which also arose upon a purchase of swamp lands from the state, the court uses this language: "The certificate contains a provision that in case of the non-payment of any interest on the unpaid purchase-money within the time prescribed by law, the certificate, from the time of such failure, shall be utterly void and of no effect. This provision is doubtless in strict accordance with the law in that behalf. There was such failure by Tracy to pay interest, by means whereof the certificate became *utterly void and of no effect*." See also *Kennedy v. Strong*, 14 Johns. 129; *Fountain v. Phoenix Ins. Co.*, 11 Johns. 293; *Bennett v. Art Union*, 5 Sandf. 614; *N. Y. H. & N. Rld. Co. v. B. H. & E. Rld. Co.*, 36 Conn. 166; *Wilkins v. Despard*, 5 Term Rep. 112; *U. S. v. Grundy*, 3 Cranch, 337. This last case is also cited by counsel for the state as sustaining their construction of the statute, but we think its authority is entirely on the other side. In it C. J. Marshall says: "Where a forfeiture is given by statute, the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately, or on the performance of some particular act, as shall be the will of the legislature. This must depend upon the construction of the statute." Construing the statute there, the decision was adverse to the forfeiture *ipso facto*. But that statute expressly provided for an alternative. "There shall be a forfeiture of the ship, or of the value thereof, to be recovered with costs of suit of the person by whom such oath shall have been made." That

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alternative clearly gave an election, and until the election was made the court properly held that there was no forfeiture.

But here the statute gives no alternative. A forfeiture is positively declared. But one thing is forfeited. And a single duty is imposed upon the county attorney in case of such forfeiture. The cases cited by the state, and upon which counsel chiefly rely, are not in point. *Schulenberg v. Harriman*, 21 Wall. 44, to which our especial attention is called, simply decides, that "no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee but the grantor, or his heirs or successors, and if they do not see fit to assert their right to enforce a forfeiture on that ground the title remains unimpaired in the grantee." But here the condition is precedent, and not subsequent, and no estate in fee ever passed. Of similar import are most of the other authorities cited.

We see no error in the ruling of the district court, and the judgment must be affirmed.

All the Justices concurring.

ELIZABETH BECK V. BIRDSALL & FRANTZ.

LANDLORD AND TENANT; *Payment of Rent in Advance, Gives no Lien on Leased Premises.* Where a tenant, under a written lease, pays rent in advance for certain real estate by making improvements thereon, and is to occupy the premises until the rent shall equal the cost of the improvements, and fails to take advantage of the statutory enactment relating to liens for mechanics and others, and no express lien is created by the lease, and the tenant is wrongfully evicted by his landlord before the expiration of the time for which the rent has thus been received, the tenant has no lien for the rent so paid in advance on the leased real estate which can be enforced by a foreclosure and sale of the premises.

Error from Lyon District Court.

THE district court, at the March Term 1876, gave judgment in favor of *M. Birdsall* and *J. W. Frantz*, plaintiffs, and defendant *Beck* brings the case here. The facts fully appear in the opinion.

Ruggles, Scott & Lynn, for plaintiff in error.

Gillett & Forde, for defendants in error.

The opinion of the court was delivered by

HORTON, C. J.: *Birdsall & Frantz*, on June 14th 1870, made and executed with Paul Beck, the husband of Elizabeth Beck, a written contract, or lease, of which the following is a copy:

Statement of facts.

"This article of agreement, made this 14th of June 1870, by and between Paul Beck, of the first part, and Marshall Birdsall and J. W. Frantz, of the second part, witnesseth: That said parties of the second part, for and in consideration of the matters and things hereinafter mentioned, agree to erect on lots Nos. 78 and 75 on Mechanics street, in the late town, now city of Emporia, Lyon county, Kansas, a wooden building, 40 feet long north-and-south, by 20 feet wide east-and-west, fronting on Fifth avenue; said building to immediately join the Buckeye House on the east, to be two stories high, each story to be of the same height as the corresponding ones of the Buckeye House, said building to be placed on a good stone foundation; the studding are to be sixteen inches apart, the weather boarding to be one foot wide and one inch thick, and to be joined by an inch groove; to be plastered or ceiled on the inside, at the option of the parties of the second part; the flue of said building to be made of brick, and to commence at least 12 inches below the second floor. And the said party of the first part, in consideration of the faithful performance of the stipulations hereinbefore mentioned, agrees that the said parties of the second part shall have the use of the said building and the Buckeye House from the time the materials for said building are on said premises until the first day of October 1871, at the annual rent of six hundred dollars, and from the first day of October 1871, thereafter, at a rent to be agreed upon between

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the parties, until said rent shall amount to the costs of the building. If the rent, after the first day of October 1871, cannot be agreed upon between the parties, it shall be left to three disinterested business men of Emporia, and whatever rent they or any two of them shall agree upon, that rent shall be paid; and in the event it is left to third parties, they are to fix the rent for the old building (Buckeye House) only, it being a part of this agreement that no rent shall be paid upon the new building until the rent of the old building amounts to the cost of the new, after which it is to be considered as belonging to the party of the first part, and the parties of the second part are thereafter to have the use of said two buildings so long as they may desire to use them for a hotel, the rent to be determined in the same manner for the two buildings as above stipulated for the one after the first day of October 1871.

"In order that there may be no misunderstanding concerning the cost of said building, the parties of the second part agree to furnish to the said party of the first part all the bills of the carpenters, lumber-dealers, masons, painters, and all others who may furnish material for said building or aid in the construction of the same.

"It is further agreed that if the said party of the second part cut any doors or windows in the walls of the Buckeye House, they will fill them up with same material that came therefrom, and leave it in all respects as they found it, provided the said party of the first part so desires; and in no case shall there be more than two doors cut through said walls. And it is further agreed that while said parties occupy said premises there shall not be more than one stove used in the building hereby agreed to be built; and in all respects are to use said premises in a careful and husband-like manner, and shall be responsible for all waste, natural wear and tear, damages by fire, and inevitable accidents excepted.

"Witness our hands at Emporia, the day and year first above written."

Under the lease, Birdsall and Frantz went into possession, and fully completed the new building according to the terms of the contract. Paul Beck had suffered the premises to be sold for taxes prior to the date of this contract, to-wit, at the May sale of taxes 1867, and P. B. Plumb had bid off the prop-

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erty described in the lease, and had obtained tax-deeds to himself on the 10th of May 1870. On May 6th 1872, said Plumb commenced a suit against Birdsall, Frantz, and Paul Beck, to recover, under his tax deeds, the possession of the premises. Paul Beck, wishing to redeem the premises from such tax deeds and tax liens, procured, through the advances of money by one Henry Wright and in the name of said Wright, a quitclaim deed of the premises; but the suit of ejectment was continued in the court in the name of Plumb, after the transfer of his interest, at the instance of said Wright acting in collusion with Paul Beck. Birdsall and Frantz failed to defend in the action because they were informed by Paul Beck that the case was settled. On the 5th of March 1873 judgment was rendered in favor of Plumb in the ejectment suit, and ten days afterward Birdsall and Frantz were evicted from the premises under the judgment. Wright then took possession of the premises, and remained therein to November 17th 1875, when he had a settlement with said Paul Beck, and Wright, at the instance of Paul Beck, executed a quitclaim deed of the premises to the plaintiff in error, Elizabeth Beck, without any consideration from her, and she having full knowledge of the transactions of her husband in the matter. Thereupon Paul Beck and wife took actual possession of the premises, and claimed to occupy them as a homestead. At the time Birdsall and Frantz were evicted there was unpaid, for improvements made by them on the premises, \$905.54; or, to be more accurate, at the time of the eviction they were entitled to the continued possession of the premises under the lease, until the rental of the premises amounted, after said date, to \$905.54. Paul Beck's connection with the fraudulent judgment in ejectment, and his participation through Wright in the wrongful eviction of his tenants, were not discovered by Birdsall and Frantz until after November 17th 1875; and in January following they commenced their action in the court below to have the balance of the expenses of the improvements remaining unpaid at the time of their eviction decreed a lien upon the leased premises, and the premises sold to sat-

isfy the same. The case was tried to the court without a jury, and conclusions of fact were found substantially conforming to the foregoing statement, and thereon the court held that the defendants in error, by reason of the said written contract, had a valid and subsisting lien upon that part of the premises described as follows, 105 feet off from the west end of lots Nos. 78 and 75, on Mechanics street, for the sum of \$905.54, together with interest, amounting in the aggregate to \$1,095.63, and were entitled to a decree of foreclosure of the lien and a sale of the premises to pay the same.

Upon consideration of the arguments *pro* and *con*, and construing the written agreement, we can only interpret it as a lease, requiring and providing that the rent is to be paid in improvements on the premises. No other relation is created by the written instrument between the parties thereto than landlord and tenants. That the rent is to be paid in work, labor, and materials, in the construction of a wooden building on the lots, instead of money, does not change the character of the lease, excepting as between the parties. Such tenants were entitled to the actual possession of the real estate until the rents equaled the costs of the improvements. With this view, the only question that is necessary for us to consider is, whether Birdsall and Frantz, having taken possession of the premises under the lease, and while thus occupying the same, having made improvements thereon to be paid for in the rents of the premises, were entitled to a lien on the real estate for the cost of the improvements, after having been wrongfully evicted by their landlord before the rents amounted to the cost of the improvements. No lien is created by express terms in the lease; no attempt is made to support a lien upon the statutory enactment relating to mechanics and materialmen, or upon the provisions of the law favoring occupying claimants. But it is urged that, as the defendants in error acted *bona fide*, and under a written contract, and there has been a substantial benefit conferred on the owner of the premises, *ex æquo et bono*, he ought to pay for such benefit, and that equity will interfere and sustain a lien for such improvements.

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To adopt the language of the counsel for the plaintiff in error, rent paid in improvements is no more sacred than rent paid in money. Certainly no recognized principle of equity can be pointed out supporting the proposition that because a tenant who has paid his rent in advance has been evicted by the wrongful act of his landlord he has a lien on the premises for the rent. If the contract had provided that Birdsall and Frantz were to pay \$1,000 in money as rent in advance for the premises, which sum should be used by Paul Beck for the erection of the wooden building named in the lease, and after the rent had been paid, and the building erected by Beck, would it seriously be contended that the tenants had a lien on the premises for the rent so paid? Yet, as the construction of the building was the rent or recompense for the possession of such premises, it is immaterial whether in this case the tenants made the improvements themselves, or furnished the money to their landlord with which they were made. In neither case does any lien exist therefor solely in pursuance of the contract and possession, nor either. Assuming the contract made Birdsall and Frantz the sole owners of the wooden building erected by them, still such a construction would not confer any lien in their favor upon the lots on which the building was constructed, or authorize a lien on the lots to be foreclosed to pay for the cost of the same, notwithstanding a breach of the contract by Paul Beck. In view of the very broad and comprehensive provisions of our statutes relating to occupying claimants, and securing liens to mechanics and others, as well as the general policy of the real-estate law of Kansas to discountenance secret trusts, to require everything concerning the title to or rights in land to be in writing, and to simplify the means of securing liens, it is very questionable if any lien exists in this state upon real estate unsupported by either written agreement or statutory enactment.

But the defendants in error are not remediless. Paul Beck is liable in damages. If he is execution-proof, then under proper legal proceedings Birdsall and Frantz could obtain possession again of the premises, and occupy them until the

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lease was fully complied with. A court of equity would "wipe out as with a sponge" the fraudulent judgment obtained, and all contracts and deeds made at the instance of Paul Beck to defraud his tenants and to further his tainted transactions. If the defendants in error cannot be fully compensated by other legal proceedings than the one instituted by them in the district court, and are the victims of the wrongful actions of a dishonest landlord, we are not justified, because their case is a hard one, in making the bad precedent that rent paid in advance, whether in cash, labor, material, or barter, is a lien upon the leased real estate for which the property at the instance of the tenant can be sold under a decree foreclosing the lien.

The conclusion of law of the court below was erroneous, and the judgment must be reversed, as the defendants in error had neither any statutory nor equitable lien capable of being enforced by an action. Upon the conclusions of fact found by the district court, the judgment below will be reversed, and the case remanded with instructions to enter judgment for costs in favor of Elizabeth Beck, the plaintiff in error.

All the Justices concurring.

CHARLES F. WINTER v. JOHN SASS.

1. VERDICT; *Conflicting Testimony*. The finding of the jury upon the conflicting evidence as to the acts in this case, will not be disturbed by this court. [*R. R. v. Young*, 21-532; *Johnson v. Leggett*, 28-591; *R. R. v. Chase*, 11-48; *Ins. Co. v. Berry*, 8-160; *Mitchell v. Tolley*, 4-177.]
2. CONVICT; *Competent Witness in Civil Action*. A convict in the state penitentiary is a competent witness in a civil action or proceeding. [*State v. Howard*, 19-508.]
3. EVIDENCE; *Anonymous Letter, When Competent*. In an action brought by S. against W. to recover moneys of the former alleged to have been

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stolen by the latter, an anonymous letter, received through the office by S., and admitted to have been written by W., and written in consequence mainly, as the latter stated in his testimony, of his hearing that S. was charging him with the larceny, was admitted in evidence. *Held*, No error, although the letter was principally filled with mere matters of abuse, and contained no direct notice of the charge, and only one expression which seems, and that not clearly, to have any reference to it.

4. ATTORNEY; *Should Confine his Argument to Matters in Evidence.* A counsel in his argument to the jury should confine himself in his statements of fact to the matters in evidence. If he travel outside the case, and assert to be facts matters not in evidence, he is guilty of misconduct for which he may be punished personally. [*State v. Comstock*, 20-855.]
5. — Sometimes also the interests of justice require that the verdict returned in his client's favor shall be set aside on account thereof. But there is no absolute rule to this effect. All that can be safely laid down is, that whenever in the exercise of a sound discretion it appears to the court that the jury may have been influenced as to the verdict by such intrinsic matters, however thoughtlessly and innocently uttered, or that the statements were made by counsel in a conscious and defiant disregard of his duty, then the verdict should be set aside. [*Perkins v. Ermel*, 2-325; *State v. Yordi*, 30-225; *State v. Martin*, 31-354.]

Error from Leavenworth District Court.

ACTION by *Sass* to recover the amount of certain money alleged to have been stolen by *Winter*, and interest thereon. Trial at the September Term 1876. Verdict and judgment for plaintiff. New trial refused, and *Winter* brings the case here. The principal facts are stated in the opinion, *infra*.

One of the grounds set forth in the motion for a new trial was, that Olmstead, one of the jurors, had declared before the trial that "he was satisfied as to the guilt of *Winter*, and that no evidence would change his mind." As against this ground for a new trial it was shown that when examined upon his *voir dire*, as to his competency as a juror, Olmstead stated that "he had heard the case talked of, and had from outside statements formed an opinion, but that such opinion would not affect his trial of the case, or require evidence to remove it." It was also claimed that the testimony of Thomas Carney, a witness for *Sass*, was incompetent. *Winter* had given testimony tending to show that he had an abundance of property and

money—that in 1864 he engaged in selling groceries in Leavenworth, which was a good business until about 1868 or 1869—that his profits had been large, enabling him to accumulate money, and build houses, and conduct two stores. Carney's testimony was introduced to show, that "after the fall of Richmond, in April 1865, there was a great decline in groceries, and that such decline had been going on since;" and on a cross-examination the witness stated that "the decline affected retail dealers as well as wholesale merchants, and a man could not make much on a declining market."

E. Stillings, for plaintiff in error, contended that the court erred in admitting the testimony of Grebe. Section 319 of the civil code provides that the interest of a witness, or his conviction of a crime, shall not disqualify him, but only go to the credibility of the witness. Does this merely remove the common-law disability of persons who have served out their sentence, or was it intended to be used (as it was used in this case) to allow penitentiary convicts to be escorted to our courts by the warden of the penitentiary to give their evidence under the controlling restraints imposed by such custody? What shall we construe §§ 300 and 301 of the crimes act to mean? Grebe could not have made the most simple contract and been bound by it; and yet it was held by the court that he was capable of assuming the obligations of an oath, and under the restraint under which he was acting could incur all the penalties of perjury. It is true that § 835 of the civil code provides for taking the testimony of persons in prison; but is this to be construed to remove the civil death declared to be the condition of one serving his time in the penitentiary? Can he incur the penalties of perjury while in that penitentiary? It ought not to be, and it seems to me ought not to be so construed. The different sections can all be construed to stand together, by construing the one applicable to persons confined in prisons in the different counties in the state, to apply to such prisoners as are confined in jails, etc. It was certainly not intended to impart the duty on the warden of the penitentiary to take the

convicts to the different courts of his county to give testimony. 1 Bur. Law Dic. 219.

2. A paper claimed to be a letter was offered by Sass and read in evidence over the objection of the defendant. What bearing that paper had on the question as to who committed the robbery, no person has ever yet been able to tell, and yet it was introduced, read to the jury, and made the instrument to obtain a verdict simply by an inflammatory appeal to the jury; which ignored all logical argument and reason. When it was introduced and read, no proof had been made which in any manner connected it with the matter of the robbery, and no evidence was ever introduced to show the least connection; and the only thing which had any bearing to show how it was to be used to prove or disprove the matter in issue was the copious drafts of counsel on his imagination in his closing argument to the jury. Has it come to this, that when a man is accused of robbery, his guilt may be proved by evidence which shows that at some time in his life he used opprobrious expressions toward the party robbed, whether he had cause to use them or not? And yet the court by allowing that paper to be read to the jury as evidence to prove that Winter was guilty of the robbery, has said that such evidence may prove the greatest of crimes.

3. The statements of the counsel to the jury of what a former jury had done on less evidence than that before them, in his closing argument, were wholly unwarranted, and are an abuse of his privilege as counsel, which should always set aside a verdict, and especially in such a case as this. I know it is said that the counsel took it back; but every person knows that in taking it back the sting which had been made is made doubly poisonous. As a question of practice, and for the future high standing which the bar of this state should maintain, I ask of this court that it set its seal of condemnation on such proceedings. I refer the court on this branch of the case to Cent. Law Jour., Nov. 2, 1877, p. 378; 66 Me.; 41 N. H. 817.

4. The court should have granted a new trial on account of the bias of one of the jurors.

5. The testimony of witness Carney was clearly incompetent. The opinion of a wholesale merchant, given in evidence, to prove what was made or lost by the defendant ten years before the loss of this money, when he knew nothing about the business in which Winter was engaged, or what he was doing, is carrying expert testimony too far.

H. T. Green, for defendant in error: Counsel for Winter contends that the court erred in admitting the testimony of Grebe, and then proceeds to point out the several sections of the code, which show that in a civil action the interest of a witness, or his conviction of a crime, shall not disqualify him, but only go to the credibility of the witness. It is not necessary for us to contend that in a criminal action he might be competent. The legislature has fixed the rule in civil actions, and the language of the statute is, we think, too plain to be construed away. And while §§ 800 and 801 of the crimes act do render Grebe incapable of making a contract, it does not, and never did, follow that persons incapacitated to contract, are excluded from giving testimony, for a large class of persons such as children, and at common law married women, and many others, in this and in other countries, whose contracts were void, have notwithstanding been sworn, and whose testimony has always been received. (8 Kas. 608, 117.) But Grebe is called as a witness—brought from the penitentiary by the warden under a habeas corpus *ad testificandum*. Two of the attorneys for Winter had, a short time before the trial, called at the penitentiary. One of these attorneys for Winter was also attorney for Grebe, and was called into Winter's case after the pleadings were settled and after the first trial. These attorneys heard Grebe swear, "I would have made the same statement before my sentence, but Mr. Fitzwilliam said I should not do it"—and no effort is made by such attorney to contradict Grebe. Grebe must have told the truth. If, in the conversation between Grebe and that attorney, Winter was not implicated, then the attorneys for Winter would in justice to their client, have informed the jury, under oath, that Winter

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was not one of the parties talked of when Grebe wanted to tell all about the robbery. We think the court did not err in admitting Grebe's testimony. The evidence of an accomplice is to be received against the accused, and if it is uncorroborated in any material particular it is the duty of the judge to warn the jury that it is unsafe to convict upon such evidence, though they have a legal right to do so. Stephens' Digest of Ev. 139; 1 Ph. Ev. 93, 101; T. E. §§887, 891; 2 Russell Crimes, 960. Whatever weight the jury gave to Grebe's testimony, is quite another thing. 15 Kas. 547; 17 Kas. 167.

2. Winter wrote an anonymous letter, without date, to Sass, the authorship of which he had denied; but without allusion to that letter, while on the witness stand, he was given pen and requested to write, which he did, and, after he had written a few words in German which were in the letter, it was shown to him, and the identity of the writing compelled him to admit the authorship. This letter was written by a person who had for years been professing friendship for Sass; had invited him and his aged wife to his house; had returned visits; had used Sass's money when he could borrow it, and now, in his deep affliction Winter writes this letter, which must speak for itself. It was proper to show the malignity of Winter's feelings toward this man of seventy-three years who had lost the earnings of his life. It shows Winter capable of engaging in the meanest of occupations, that of writing anonymous letters, and when on oath in the police court he denied its authorship; but after his handwriting was obtained, admitted it, but said he did not send it, while Sass swears it came through the mail.

3. Plaintiff in error complains of an inflammatory argument made by attorney for Sass in the close. He did object while it was going on, and wants a verdict set aside because thereof; wants the supreme court to review an argument before a jury. I do not know how to reply to that point in the brief of the plaintiff in error, except to refer to *Fry v. Bennett*, 3 Bosw. (N. Y.) 200, where the plaintiff's counsel was indulging in the denunciation of the defendant on an assumption of facts not

proven, to which an objection was interposed, whereupon the court responded, "I will say to the jury whatever is proper to be said at the end of the matter," and thereupon the defendant excepted to the refusal of the court to stop the plaintiff's counsel, and a new trial was refused. In the case at bar, in the argument, counsel stated to the jury, that a former jury had, on less evidence, found a verdict for his client, and so forth. The attorneys for Winter stopped the argument, called the attention of the court to what was said, read an instruction which would be asked, and the court gave the instruction to the jury. After all the interruption, retraction of what was said, and instruction of the court, will a reviewing court presume that the jury disregarded the instruction of the court below? The presumption is, that the sworn officers or jurors have done their duty, and have obeyed the instructions of the court. 1 Cliff. 524.

4. The verdict should not be disturbed because Olmstead was one of the twelve jurors. A new trial will not be granted where a party fails to avail himself of the means of ascertaining whether the juror is impartial or not, or could have challenged him. 84 Conn. 280; 8 Iowa, 477; 5 Ind. 122. In this case the attorney not only knew the juror, but heard him say he had formed an opinion before the jury was impaneled, but failed to avail themselves of the right to challenge him for cause. Their complaint comes too late. Nor was there error in admitting the testimony of Carney.

The opinion of the court was delivered by

BREWER, J.: On the 17th of January 1875, \$2,601 were stolen from defendant in error, and this action was brought to recover that sum, and interest, from the plaintiff in error as one of the parties alleged to have committed the larceny. Two juries upon successive trials found in favor of the plaintiff Sass, and from the judgment rendered upon the last verdict this proceeding in error has been brought.

The first matter to which our attention has been directed by

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counsel, and upon which special stress has been laid, is, the sufficiency of the testimony to sustain the verdict.

1. Verdict, upon
conflicting
testimony.

We have examined the testimony, which is very voluminous, and do not think the claim of counsel can be sustained. One Grebe, admitting his own participation in the larceny, swears positively that Winter planned it, actually took the money, and subsequently gave him seven hundred dollars as his share of the proceeds. Winter denies this *in toto*. Outside of these two principal witnesses there is a mass of circumstantial testimony, some tending to implicate and some to exculpate Winter. It would be a useless labor to attempt to enumerate all the circumstances. Among them may be noticed, that few knew that Sass had any money, and still fewer (not more than three or four, and among these Winter,) where he kept it; that it was taken by some one who knew where it was kept, for the thief entered the house, went to the bureau-drawer, and took it from under some clothes, without searching or disturbing anything else; that it was taken on Sunday evening, when Sass and his wife were at Winter's, about two blocks off, playing cards; that while so playing Mrs. Winter excused herself to put the children to bed, and Winter went out and was absent about half an hour, and upon his return, and the resumption of the cards, neither Winter nor his wife seemed able to keep any track of the game; that immediately after the larceny was discovered, which was on the return of Sass to his home about 10 o'clock that evening, Winter was notified, and for some days was very officious throwing suspicions on different parties, some of whose houses he induced Sass to have searched, finally suggesting to Sass that Mrs. Sass must have taken it. Again, the thief entered the house through the back door, pressing the door until a screw which held the catch of the bolt gave way. A short time before, Winter had taken a knife and gone to the back door on pretense of fastening the screws, and had cautioned Sass and his wife about the care they should take of their money. Again: One of the pieces of money stolen was

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a gold dollar which had been used as a breast-pin, and while the pin was gone the catch to which the pin was fastened still remained. On the search of Winter's house some weeks after a similar gold dollar was seen by one of the policemen. Then there was an anonymous and abusive letter sent by Winter to Sass, and contradictory statements of Winter. All this made a mass of testimony, tending strongly to corroborate the positive testimony of Grebe. We do not mean that none of this testimony was contradicted. Much of it was positively denied by Winter and others, so that after all, the case must have turned upon the credibility of the various witnesses. As written down upon paper, it seems to us that the plaintiff's testimony proved his case, and as the jury found in his favor we suppose they must have believed his witnesses. And we cannot say that they were not warranted in so doing.

A second error alleged is, in admitting the testimony of the witness Grebe. At the time of the trial Grebe was a convict in the penitentiary, serving out his sentence for the larceny of this very money. The statute is clear.

2. Convict, when competent witness.

Section 319 of the code provides, that, "No person shall be disqualified as a witness in any civil action * * * , or by reason of his conviction of a crime; but such * * * conviction may be shown for the purpose of affecting his credibility." And section 335 provides for the examination of any person confined in prison.

Another objection is made to the admission of the anonymous letter heretofore noticed. It was admitted to be in Winter's handwriting, and Sass testified that he received it through the mail, and Winter that it was written

3. Anonymous letter: evidence.

some six or seven weeks after the larceny. The objection made is as to its relevancy. Prior to the time of writing the letter, as Winter testifies, he had heard that Sass was charging him with the larceny, and had also sent in a bill for some tailoring which was some ten or twelve dollars too large. Thereupon, and because of these two matters, he wrote the letter. It commences, as translated —

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"You old monster of men. As I am so far free from you, so at least you cannot make a double charge against me, so will I recall your black soul."

It continues for several sentences in a similarly abusive strain. Now it seems to us that the ruling of the court must be sustained, and upon this principle, that where a charge is made against a man his reply to that charge is admissible against him in a subsequent action based upon that charge. Suppose Sass, meeting Winter, had personally charged him with the larceny. It would clearly be competent to prove what Winter said in reply, although it were simply a torrent of abuse, and with no direct reference to the charge. So here, Winter testifies that this letter was written partly on account of the excessive bill, but more because he had heard of the charge of larceny made by Sass against him. Instead of going to him personally, he writes him this anonymous letter. And while there is no more direct reference to the charge of the larceny than in the words quoted, it seems to us that the letter was competent as Winter's reply to the charge, and as part of his conduct with reference thereto.

So far as the accusation against the juror is concerned, it is not sustained by the proof.

The testimony of Thomas Carney does not seem to have been of sufficient moment, even if outside the scope of legitimate inquiry, to justify a reversal of the judgment.

The remaining error complained of involves the action of the counsel for the plaintiff in his closing argument to the jury. He stated to the jury that a former jury had, on less evidence, found for the plaintiff, and when the other side objected to this statement he reiterated it, and said that the records of the court disclosed this fact. After this however he stated that he recalled the remarks, and wished the jury not to consider the same. And the court at the instance of the defendant gave this instruction:

⁴ Attorney: latitude, in argument to jury.

"The jury have no business to consider the fact what the

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jury on a former trial of this case did, or the fact that the court set aside the finding of that jury. This case must now be determined on the facts of the case as appear by the evidence here."

Ought the verdict for this irregularity to be set aside? We doubt not that many cases may arise in which the misconduct of counsel, in going outside of the evidence in his argument, may be such as to compel a reversal. No one can doubt the impropriety of such conduct. In doubtful cases it may be that which turns the scale, and determines the verdict. And a court, especially a trial court, should be exceedingly careful to restrain such misconduct, and punish the offender personally, and by setting aside every verdict which it has reason to believe has been affected thereby. But to hold that every such misconduct should be visited by a reversal of the judgment, would be unjustifiable rigor, and oft-times doing as much or greater wrong than the misconduct itself. Who does not know that in the excitement of an argument there occasionally fall from the lips of counsel statements of matters not in evidence? Familiar with all the facts and history of the case, it is not strange that he sometimes refers to facts not proven. Should the client suffer by loss of his verdict, for every such offense of his counsel? Clearly there would be no justice in that. All that can safely be laid down is, that whenever in the exercise of a sound discretion it appears to the court that the jury may have been influenced as to their verdict by such extrinsic matters, however thoughtlessly or innocently uttered, or that the statements were made by counsel in a conscious and defiant disregard of his duty, then the verdict should be set aside. In this case the trial court overruled the motion to set aside the verdict. Doubtless it appeared to it that there was no intentional wrong, and that the matter was not of itself sufficient to have influenced the minds of the jury; and with that we concur.

Two juries have passed upon the question of fact, each in the same way; and as it is principally a question of fact, and

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the weighing of conflicting and contradictory testimony, that conclusion ought to stand unless it is clearly and palpably wrong.

The judgment will be affirmed.

All the Justices concurring.

JOSEPH BROWN v. A. H. HOLMES.

1. **DEFAULT; DILIGENCE; *Leave to Answer; Terms.*** Where through mistake or inadvertence a party is in default of an answer to a petition, he should (if he desires to answer) promptly apply to the opposite party, or to the judge of the court, for leave to file an answer, and not wait until the court convenes to make his application. Where the opposite party does not consent that an answer may be filed, diligence must be shown, merits must appear, and terms may be imposed; but the court or judge cannot act oppressively or arbitrarily on the question of granting leave to answer. [*Spradley v. Ins. Co.*, 5-155; *Haight v. Schuck*, 6-192; *Johnson v. Laughlin*, 7-359; *McCulloch v. Dodge*, 8-476.]
2. **DISCRETION OF COURT; *Abuse of; Refusal of Leave to Answer.*** In an action to recover a personal judgment on three promissory notes for an amount in excess of \$2,000, where the summons recites the answer-day as December 6th, and bears an indorsement on the back by the clerk that the answer-day is December 16th, and the copy served also contains this indorsement, and the defendant being misled thereby delays to December 10th to consult an attorney in regard to filing an answer for him in the action, and then is first advised that he is in default, and that his answer was due December 6th, and before judgment is taken in the action, and at the first term of the court thereafter, makes his application to set aside the default, and for leave to file his answer, and shows he was misled by the erroneous indorsement on the copy of the summons served, and presents an affidavit of merits to the effect that he never executed and delivered the notes alleged in the petition, and the court arbitrarily overrules the motion and proceeds to render judgment on default against said defendant, *held*, that there is such an abuse of discretion on the part of the district court as to require, upon review, its ruling to be reversed. [*Spradley v. Ins. Co.*, 5-155.]

Error from Lyon District Court.

ALL necessary facts and proceedings appear in the subjoined opinion. Judgment was given in favor of *Holmes*, and *Brown*, defendant, brings the case here.

Gillett & Forde, for plaintiff in error.

E. W. Cunningham, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: The only question presented by the record is, whether there was an abuse of discretion by the district court in refusing to allow the plaintiff in error to file an answer out of time. The facts were substantially these: The defendant in error commenced his action in the court below to recover upon three promissory notes, secured by a mortgage on real estate. The amount in controversy was in excess of \$2,000. In the summons issued by the clerk the answer-day was stated as December 6th, but the clerk indorsed on the back of the summons that the answer-day was December 16th. The plaintiff in error failed to consult any attorney in the matter until the 10th of December, and upon applying to one to file an answer for him before the 16th, first understood that the answer-day was December 6th. This was in 1878. At the March term 1874, and being the first court held after the answer-day, and before judgment in the case, the plaintiff in error made application to the district court to set aside the default, and for leave to answer. An affidavit of merits was filed, to the effect that "said Brown was informed by counsel and verily believed he had a valid defense to the petition, and that one of his defenses, among others, was that he never executed and delivered the notes alleged in plaintiff's petition, and that this defense was true," and also made the showing as to his being misled by the wrong indorsement on the back of the summons. The court overruled the application, and gave judgment upon the notes,

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decreed a sale of the mortgaged premises, and rendered a personal judgment for any deficiency.

The ruling of the district court was such an abuse of discretion as to call for the intervention of this court. It is true, greater diligence might have been exercised by the plaintiff in error, as his counsel should have applied at once for leave to file an answer, after having ascertained the default, and not have waited till the court convened to make the application. But as the plaintiff in error was evidently misled by the incorrect indorsement of the summons, and as his affidavit of merits showed a defense, the court below should have allowed the motion. While the permission to parties in default to file pleadings rests in the sound discretion of the courts to which applications are made, the courts cannot act oppressively or arbitrarily thereon. Of course, terms may be imposed, diligence must be shown, and merits must appear. Here the defendant was misled by the summons served, the cause had not been called for trial, a large sum was involved, and a complete defense stated. An answer should have been allowed.

1. Leave to answer; diligence.

2. Discretion of court; abuse.

The counsel for the defendant in error suggests that the affidavit of merits was adroitly worded, to convey one idea with words that meant another than an honest purpose to set forth a good and valid defense. This does not appear; and we cannot assume that any attorney would be guilty of the bad faith of having his client make oath that he never executed and delivered the notes sued on, simply to take an advantage of a clerical error in dotting an *i* or crossing a *t*. Again, this counsel suggests that the plaintiff in error should have accepted the order of the court, that leave would be given to file an answer if the applicant would swear he did not owe Holmes the amount sued for, or would present his answer sworn to. Nothing of this character is contained in the record, and if any such order was made or suggested, it has been omitted from the transcript brought to this court. We can only pass upon the record as certified to us, when that purports to be a full and

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complete copy of all the proceedings, and no omissions are suggested.

The judgment rendered will be set aside, and the order of the district court overruling the application of the plaintiff in error to file an answer in the case, will be reversed.

All the Justices concurring.

H. W. HUBBARD v. JOHN W. CRAWFORD.

1. *COUNTY OFFICER; Holding Over, After Term, Until Qualification of Successor.* All county officers elected for a full term, (except county commissioners,) hold for two years and until their successors shall be qualified. So, where the register of deeds elect fails or omits to qualify until several months after the commencement of the term for which he was chosen, (although waiting for a proper official canvass to be made of the votes cast at the election under which he claims,) the incumbent whose two-years term has expired but acts in accordance with his constitutional right in holding over until the officer elect duly qualifies.
2. ——— *Fees of Office, Where Officer Elect Fails to Qualify.* Where H. was the duly elected and acting register of deeds, and C. was elected his successor at the general election in November 1873, but failed to qualify till September 23d 1874, and there was no canvass of the votes or declaration of the result of the election of November 1873 till said September 23d, H., the incumbent, had the right to hold the office until C. qualified, and C. is not entitled to any of the fees or emoluments of the office for the time during which the former held over.

Error from Harvey District Court.

ALL necessary facts appear in the subjoined opinion. *Crawford* had judgment at the September Term 1876 of the district court, and *Hubbard* brings the case here.

C. S. Bowman, for plaintiff in error.

C. C. Nichols, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.: This was an action brought in the court below by Crawford against Hubbard upon the latter's official bond as register of deeds of Harvey county, to recover the fees and emoluments of the said office from 12th January to 28d September 1874. The case was tried by the court, a jury having been waived. The court stated in writing the conclusions of fact found, separately from the conclusions of law. The court released the sureties on the official bond, but rendered judgment in favor of Crawford for \$347.25.

The counsel for defendant in error objects to the consideration of the case-made, and asks for a dismissal of the proceedings here for the reason that said case-made was prematurely filed before the time had arrived for the defendant in error to submit amendments. The suggestion against the case-made is pertinent and forcible, and we cannot consider any part of the proceedings therein embodied. But anticipating this result, the counsel for plaintiff in error has sufficiently protected the interests of his client by also attaching to the petition in error a certified transcript of the record of the district court. And thus we have properly before us for review, the pleadings in the case, the conclusions of fact and of law, the motion for a new trial, the exceptions taken to said conclusions of law, the judgment, and journal entries. We shall disregard the case-made and confine ourselves to the certified transcript of the proceedings of the court below.

The facts in the case are substantially these: Prior to 12th January 1874, Hubbard was the duly elected, qualified, and acting register of deeds of Harvey county; at the general election in November 1878, Crawford was a candidate for said office, and received the largest number of votes therefor; the board of county commissioners of Harvey county failed and refused to canvass the votes cast for said candidate at that election at their meeting held on Friday next following the election, and delayed their canvass of the votes till September 28d 1874; Crawford never filed his oath of office, nor his official

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bond, until after the canvass of the votes on September 23d 1874; the fees and emoluments of the office received by Hubbard from January 12th to September 24th, were \$600, and during this time the value of Hubbard's labor and services rendered in attending to the duties of the office were \$300; as soon as Crawford received his certificate of election, and had qualified, Hubbard turned over to him the office and its papers, books and records; Hubbard neither requested, solicited, nor persuaded the board of county commissioners of Harvey county not to canvass the votes. As a conclusion of law, the court below held, that although Crawford was not duly qualified as register of deeds till September 23d 1874, he was entitled to the fees and emoluments of the office from January 12th to September 24th, less \$300, the value of Hubbard's services in discharging its duties.

The main question at issue is, whether Hubbard, the prior incumbent, or Crawford, was entitled to the fees and emoluments of the office of register of deeds of Harvey county for the time during which the former held over. The question is one of easy solution. Express provision is made by the constitution of this state, that all county officers shall hold their offices until their successors shall be qualified. (Art. 9, section 3.) A register of deeds is a county officer, and before he can enter upon the duties of his office must execute to the state of Kansas, and file with the county clerk of his county, a bond, in the penal sum of two thousand dollars, with two or more sufficient sureties, to be approved by said clerk, and must also within twenty days after receiving official notice of his election, or within twenty days after the commencement of the term for which he was elected, take and subscribe the oath of office prescribed by law, before some officer authorized to administer oaths, and deposit the same with his official bond, to be filed and preserved therewith. (Secs. 87, 173, ch. 25, Gen. Stat.) And the failure of a register of deeds to file his official oath and bond as required by law vacates his office. (*The State v. Matheny*, 7 Kas. 827; Gen. Stat., ch. 25, §179.) Hubbard was not an intruder in the office; he did nothing to delay a

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canvass of the votes, nothing to prevent a declaration of the result, nothing to hinder Crawford from taking the steps imposed and made preliminary to the exercise of the accustomed duties of the office. Crawford had no contest with Hubbard; and in fact the latter only acted in accordance with his constitutional right in holding over until Crawford was duly qualified. Under the conclusions of fact found, the court below erred in its conclusion of law, and in rendering judgment for the defendant in error. The law will not aid Crawford in compelling his predecessor in office to pay to him any part of the fees and emoluments received and earned by him prior to his qualification on Sept. 23d 1874. (See *Thompson v. Nicholson*, 12 Rob. (La.) 326; *Commonwealth v. Slifer*, 25 Penn. St. 23; *City of Philadelphia v. Given*, 60 Penn. St. 136.) Other questions are raised in the briefs of the counsel of plaintiff in error, but as the conclusion we have reached disposes of the case here, and will end the action in the court below, it is unnecessary to pass upon them.

It becomes our duty, upon the conclusions of fact, not only to reverse the judgment of the district court, but to remand the case with instructions to enter judgment for costs in favor of plaintiff in error, the defendant below. So ordered.

All the Justices concurring.

B. O'DRISCOLL V. FRANCES L. SOPER.

1. **SERVICE OF SUMMONS; Finding; Record Evidence.** A finding in the journal entry of a judgment of a court of record of due service of summons, is *prima facie* evidence thereof.
2. ——— Where this finding is in general terms, and the record discloses one service, and only one, the finding will be presumed to have reference to that service, and the validity of the judgment will turn upon the sufficiency of that service.
3. ——— But where the record discloses that in fact two summonses were issued and two services made, and the papers in the case including the summonses are all lost or destroyed, the *prima facie* evidence of service from the recital in the journal entry will not be overthrown by the fact that but one summons and one return are copied into the final record.
4. ——— The final record, the journal, and the appearance docket are each records of the court, and the silence of the former does not negative the existence of a fact shown by either of the two latter. . [*Rly. Co. v. Cheney*, 80-202; *Haynes v. Cowen*, 15-845; *Ornn v. Bank*, 16-341.]

Error from Doniphan District Court.

EJECTMENT, brought by *O'Driscoll* against *Soper*, to recover possession of lots 7 and 8, in block 28, in the original town of Troy. Plaintiff formerly owned the property, and claimed to be the owner in fee simple, and entitled to the possession. Defendant had been in possession nearly fifteen years, and claimed title under a sheriff's deed made upon a sale of said lots under a writ of execution issued upon a judgment rendered in favor of one Patrick and against *O'Driscoll* and one Dunning in 1859. The second trial was had at the September Term 1875 of the district court. Findings and judgment in favor of the defendant *Soper*, and plaintiff brings the case here.

Price & Heatley, W. D. Webb, and B. O'Driscoll, for plaintiff.
Albert Perry, for defendant.

The opinion of the court was delivered by

BREWER, J.: In this case the question is as to the validity of a judgment of the district court of Doniphan county, rendered

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in April 1859. The facts are these: The journal entry of the judgment recites, that the defendants were "duly summoned." The papers and files of that case were destroyed by fire. If there were no other testimony, the decisions in *Bixby v. Bailey*, 11 Kas. 365, and *Haynes v. Cowen*, 15 Kas. 645, would sustain the validity of the judgment. A finding and adjudication by a court of record of the fact of service, is *prima facie* evidence thereof. To overthrow this, the final record was offered, in which appears copied a summons with the officer's return of service upon one defendant only, and that not the defendant whose lots were afterward sold, and who is plaintiff in this case seeking to recover said lots. There were two defendants, and the finding of service and the judgment were against both. Upon this counsel invoke the aid of that rule which declares that where the record discloses service in a particular manner, no presumption can arise that other and different service was made. In other words, the record here discloses service upon one defendant, and no presumption can arise that service was also made on the other defendant; the record contains but the one summons, and the one service; and by the record the case must stand or fall. With the rule as above stated, in its general scope and effect, we are content. Where the record discloses service in one way, there is no presumption that service was afterward made in another and better way. The finding of due service in the journal entry of judgment, if simply a general finding, is limited and controlled by the service actually appearing in the record. But we are constrained to hold that in this case that rule is not conclusive, and that its operation is destroyed by other facts also appearing in the record. The final record copies but one summons, and one return of service. It is silent as to the existence of any other summons or return. It nowhere affirmatively states that only one summons was issued, and one return made, and in the return copied the officer making the service states his fees at \$2.60. Turning now to the appearance docket, a docket required by the statute to be kept, and as much a record of the court as the final record, we find noted the issue of two summonses, and the fees

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therefor charged, the filing of two summonses and the fees therefor, and the sheriff's fees thereon stated at \$5.20. True, the entries are not as full as the statute required, in that the names of the defendants summoned are not noted, nor the returns copied; but still, so far as they go they are evidence, and evidence of record. Again, as appears by the record, in October 1860, and before the sale to this defendant, O'Driscoll filed his motion to set aside a sale made by the sheriff under this judgment, and his motion was sustained. Still again: In September 1862, and after the sale to defendant, O'Driscoll again appeared by motion to retax costs. If we go outside the record, we find that O'Driscoll was a member of the Doniphan county bar at the time of the rendition of said judgment, and a resident of that county ever since, except during the war; that he was present at both sheriff's sales; that he requested the officer to sell certain lots first, and asked some gentlemen to purchase lots for their own benefit; that he never attempted to disturb the possession of the purchasers at such sale until just before the expiration of the fifteen-year statute of limitation, and though he knew of the existence of this judgment, and the proceedings under it, does not pretend to have discovered its invalidity for more than ten years after its rendition, and until after the files had been destroyed by fire. Again: One Boder who was deputy-clerk at the time the suit was commenced testified: "It was the custom, when I was deputy-clerk, and when the Patrick v. O'Driscoll case was commenced, to issue as many summonses as there were defendants in the case." He also testified: "I was present when the case was entered, and when the return was called for by the judge. Mr. Sidney Tennant, attorney, said it was all right, holding up two papers in his hand, and offering to read the returns; and the judge then said, it is all right; that is unnecessary. I was special deputy when the final record was made. The O'Driscoll summons could not be found. I think I had seen it sometime before."

Now whether or not the doctrine of equitable estoppel would have any effect in this case, as claimed by counsel, we shall not

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inquire. We shall consider no testimony or matters outside the record, except such as tends to prove the fact and contents of a lost instrument. Upon the record as it stands we hold the judgment valid. And we lay down these as correct propositions of law:

1st. The finding in the journal entry of a judgment of a court of record of due service of summons, is *prima facie* evidence thereof.

2d. Where this finding is in general terms, and the record discloses one service, and only one, the finding will be presumed to have reference to that service, and the validity of the judgment will be determined by the sufficiency of that service.

3d. But where the record discloses that in fact two summonses were issued, and two services made, and the papers in the case including the summonses are all lost or destroyed, the *prima facie* evidence of service from the recital in the journal entry will not be overthrown by the fact that but one summons and one return are copied into the final record.

4th. The final record, the journal and the appearance docket are each records of the court, and the silence of the former does not negative the existence of a fact shown by either of the two latter.

These propositions compel an affirmance of the judgment.

All the Justices concurring.

37—19 Kas.

CHESTER G. MICKEL v. THEODORE E. HICKS *et al*

1. **ADMINISTRATOR'S SALES of Real Property; Jurisdiction; Notice to Heirs.** Proceedings for the sale by an administrator of the real estate of the decedent are not proceedings *in rem*, but are, so far as the heirs are concerned, adversary; and notice to them is jurisdictional. [*Fudge v. Fudge*, 23-418.]
2. **SERVICE OF NOTICE; Finding of "Due Service."** A general finding or recital in a judgment or order of a court of record, of due service of process, or notice, is limited by and restricted to the process or notice, if any there be, actually found in the record; and the validity of the judgment or order will depend on the sufficiency of such process or notice and the service thereof.
3. **NOTICE PRESCRIBED BY STATUTE, Must be Given.** Where the statute provides that notice shall be given in such form and manner as the court shall prescribe, no mere constructive notice will be sufficient, unless made in the form and manner by the court prescribed. [*Fleming v. Bala*, 23-94.]
4. ——— **Construction of Record.** Where notice can only be given in a form and manner to be prescribed by the court, and where the record contains an order prescribing such form and manner, but the notice itself is lost or destroyed, it will be presumed that the only notice which was in fact given was one following the form and manner prescribed. [*Rly. Co. v. Cheney*, 30-202; *State v. Horn*, 34-561.]

Error from Chase District Court.

MICKEL, a minor, by Thomas Gordon, his guardian, brought ejectment against *Hicks* and wife, to recover possession of the N. $\frac{1}{4}$ of the N.E. $\frac{1}{4}$ of section 12, township 17, range 12 east, being eighty acres of land in Lyon county, and also to recover for the rents and profits of said lands for three years next before the commencement of the suit. Plaintiff claimed as owner in fee simple, as heir-at-law of Zilpha A. Mickel. *Hicks* admitted possession, and claimed title in fee simple under and in virtue of an administrator's sale and deed, made (pursuant to an order of the probate court of Lyon county) by Wm. H. Mickel as administrator of the estate of Zilpha A. Mickel, deceased. The action was commenced in the district court of Lyon county, and was there tried in March 1872, and was thereafter taken, upon change of venue, to Chase county,

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where a second trial was had at the October Term 1874. Findings and judgment in favor of defendants, and plaintiff brings the case here for review.

Gillett & Forde, for plaintiff.

Ruggles, Scott & Lynn, for defendants.

The opinion of the court was delivered by

BREWER, J.: The question in this case is, as to the validity of an administrator's sale. Its validity is challenged on two grounds: 1st, the insufficiency of the petition for the sale of the real estate; and 2d, the invalidity of the notice given of the application for order of sale. Passing by the first, we shall notice the second ground of attack. And here it may be remarked, that as these proceedings are attacked collaterally, a want of jurisdiction must be shown, and no mere matters of error are sufficient to invalidate the sale. This is conceded by counsel. Now as to the notice. Section 131 of the administrator's act of 1859, (Comp. Laws 1862, p. 531,) provides, that "when such petition (that is, the petition for the sale,) and such accounts, lists, and inventories shall be filed, the court shall order that all persons interested in the estate be notified thereof, and unless the contrary be shown on the first day of the *next term* of the court, an order will be made for the sale," etc. "Such notice shall be published for six weeks," etc., "or by ten handbills," etc., "*in the discretion of the probate court.*" On the records of the probate court appears this entry:

"IN PROBATE COURT OF LYON COUNTY, *January 2d, 1866, January Term.*

"In the matter of the estate of Zilpha A. Mickel, deceased, Wm. H. Mickel, administrator.

"Now comes said administrator, by Wm. T. Galliher, and files petition asking for an order to sell the real estate of said deceased to pay the debts of said estate. In consideration whereof, *it is ordered*, that all persons interested in said estate be notified by publication *six weeks in the Emporia News*," etc.; "that unless the contrary be shown on the first Monday in February of this term of court, an order will be made," etc.

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And on 5th February 1866, appears the following:

"Now comes the said administrator, and the petition for the sale of real estate of deceased to pay debts being for hearing, and no cause being shown why said petition should not be granted, after *due notice* of the proceedings thereof *given by publication*," etc., "and it appearing to the court that there is not sufficient personal property to pay the debts," etc., "a sale is ordered."

So that this notice was ordered by the court on the 2d of January 1866, at the January term, to be published in the Emporia News for six weeks, that unless the contrary appeared on the first Monday of February of the *same* term of court, the order for sale would be granted, etc. The first Monday of February was the 5th, and the day when the order of sale was made to the administrator, and under which he made this sale. Upon this counsel argue, that the statute required that the notice if published should be for six weeks, if by handbills they should be put up twenty days before the term at which the petition was to be presented, and it authorized the probate court in its discretion to cause notice to be given in either manner. The probate court exercised that discretion by ordering the publication in the Emporia News for six weeks. Having exercised that discretion, notice could be given only in the manner ordered, and the notice ordered was insufficient for two reasons: 1st, it was an impossibility for notice to be published for six weeks between January 2d and February 5th, less than five weeks of time actually intervening; and 2d, the notice was of an application to be made at the *same* when it should have been made at the *next* term. (Probate courts then as now held but four regular terms annually, commencing on the first Mondays of January, April, July, and October respectively.) To this it is replied, that very likely there is a mistake in the date of this order of publication—either that the journal entry was made under a wrong heading, or that the order was in fact made several days before it was entered—and the language of the entry is referred to as evidence of this, for it reads, "Now comes said administrator * * * and *files* petition;" and the indorse-

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ment on the back of the petition, as well as entries on another docket, show that the petition was filed on the 9th of December prior. But aside from the rule, that we must take the record as it is, rather than as we think it ought to be, the language of the order is conclusive against any such mistake. It reads, "first Monday in February of *this* term." And as the term commenced January 1st, and the order appears of date January 2d, it could not have been made but one day earlier, and "*this* term" been applicable. Again it is said, that as the petition was filed December 9th, publication of notice may have commenced immediately; that ample time intervened between the filing of the petition and the order of sale for publication in either manner authorized by the statute; that on February 5th, the probate court found that such publication had actually been made, and approved it, and that this subsequent approval is equivalent to a prior order, and that the recital in the order of "due notice" is a judicial finding, and *prima facie* evidence of such due notice, and, as the notice itself and proof of publication are gone, conclusive evidence thereof. With this view the order of January 2d may be entirely disregarded, and jurisdiction sustained upon the finding of "due notice," and the time of filing the petition. To this it is replied, that a finding of due notice, if a general finding, as this is, is always limited by and construed as referring to the actual notice found in the record; that no notice could be given in either manner until the court had first determined which should be pursued; that it did so determine, and that although the notice itself may be gone, yet it must be presumed to have started from and been controlled by the only order in reference thereto found in the record.

The question is not free from difficulty, and the members of this court do not agree in their views. The writer of this opinion is inclined to regard with favor the first of the above lines of argument, and to consider the order of sale as beyond successful attack, while the other members of the court yield their assent to the propositions last stated, and hold the order made without due notice, and therefore void. It is essential

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to jurisdiction of the person that there be notice. A finding of notice is at best but *prima facie* evidence of notice. If an attempt at notice appears in the record, the finding, if a general one, refers to and is limited by such attempted notice. If that be fatally defective, there is no presumption of notice in other or better way. Where the court determines what kind of notice must be given, no right to give any notice exists until the court has made its determination. A determination of that kind does not relate back, so as to ratify unauthorized acts of notice. There is in the entry in this case directing notice nothing in terms or effect like a *nunc pro tunc* order. It operates only in the future; it purports to be only for the future. A notice, without an order prescribing the manner thereof, has no force. If there be an order, the notice must follow the order; and if the order prescribe an impossible or illegal notice, neither order nor notice is of any force, and though the notice be gone the order proves the invalidity of both. Tried by these propositions, the court is of opinion that the order of sale was made without any proper service of notice, and is therefore void. *Valle v. Fleming*, 19 Mo. 454; *Sibley v. Waffle*, 16 N. Y. 180.

But we are met by the further claim that these proceedings for the sale of the real estate of decedents are proceedings *in rem*, and that therefore so far as any question of jurisdiction is concerned it is immaterial whether sufficient or indeed any notice was given; that the provision requiring notice is directory, and that no defect therein affects the jurisdiction. Are these proceedings for the sale of the real estate of decedents proceedings *in rem*? An examination of the authorities discloses a wonderful disagreement. See, among many, the following, holding that they are: *Grignon, Lessee, v. Astor*, 2 How. U. S. 319; *Mohr v. Manierre*, 9 Chicago Legal News, 270; *Sheldon v. Newton*, 8 Ohio St. 494, containing a strong argument by Ranney, J; *Benson v. Alky*, 8 Ohio St. 604. And these, the contrary: *Gibbs v. Shaw*, 17 Wis. 197; *Good v. Norley*, 28 Iowa, 188, opinion by Beck, J.; *Morris v. Hoyle*, 37 Ill. 150; *Sibley v. Waffle*, 16 N. Y. 180. The argument in favor of the

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affirmative is in brief, that the administrator represents the estate, and has its property in his possession; that when the court appoints him it gives him possession and charge of all of decedent's property; that it is optional with the legislature to provide for the sale of the personal or the real estate first; that in certain instances it has authorized the prior sale of the real estate; (Comp. Laws, 581, § 183;) that a sale of the personal estate is made without notice of an application for an order, and even without any order, and that the same provision might have been made for the sale of the real estate; and that as the administrator has possession of the real estate as of other property, notice to other parties when required is to be regarded as directory, but as in no manner affecting the jurisdiction of the court in ordering the administrator to sell the property he has in his possession. On the other hand it is said, that the administrator has no possession of the real estate except when specially ordered by the court; that the title and possession, and right of possession, pass immediately to the heirs, subject to be divested only by the special order directing a lease, or sale; that as the heirs have the title, the possession, and right of possession, a proceeding to divest them of these must in the nature of things be adversary; that it is of ancient law that the title and possession of real estate pass to the heir, of personal to the executor or administrator; that an order to the latter to sell personal property may well be a proceeding *in rem*, as it is an order for the sale of that of which he has both the legal title and the possession, while an order to him to sell real estate, of which he has neither title nor possession, must in the nature of things be, as to those holding both title and possession, adversary. We do not care to enter into any lengthy discussion of this question, which has been so fully discussed in the cases we have cited, as well as in many others. We shall content ourselves with expressing our adherence to the views of those courts which hold the proceeding adversary, so far as the heirs are concerned, and notice to them jurisdictional. Briefly, we may say that the title and possession of real estate pass immediately to the heirs; that it

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is not sold as of course, but only when necessary to pay debts; that until that fact is judicially established, the heirs may not be divested of their title, and before one is divested of title to property he ought to have his day in court; that the appointment of an administrator does not bring the heir into court; that he must be brought in, if brought in at all, by special notice; that as the heir ought to have notice, the legislature has required notice; and that a requirement so wise and just ought not to be weakened or annulled by judicial construction. Further, we may add, that the waste of estates in settlements is proverbial, and that provisions checking hasty sales, and requiring notice to parties interested, tend to diminish the waste, and their salutary effect ought not to be destroyed. While therefore judicial sales ought to be upheld as against any mere errors, yet it is not too much to require purchasers at such sales to examine the records so far as to see that the adverse parties received proper notice of the proceedings, and had therefore the opportunity to contest them.

For the error above indicated, and without pursuing this discussion further, the judgment of the district court must be reversed, and the case remanded for a new trial.

All the Justices concurring.

K. P. RAILWAY CO. V. COMM'RS OF ELLIS CO. *et al.*

ASSESSMENT OF RAILROAD PROPERTY; Powers of County Board; Correcting Assessments. The proceeding under section 65 of the tax law of 1868, is not a judicial proceeding, but one in assessment, and an exercise of the legislative power of the state. And the fact that witnesses were not sworn, and testimony taken, as upon a trial, does not invalidate a proceeding had thereunder. [*Lappin v. Comm'rs*, 6-403, 409, et seq.; *Auditor v. R. R.*, 6-500, 507, et seq.; *Comm'rs v. Lang*, 8-284, 287; *R. R. v. Russell*, 8-558, et seq.; *Ross v. Comm'rs*, 16-411; *R. R. v. Comm'rs*, 16-587; *R. R. v. Smith*, 19-233; *Hall v. Comm'rs*, 22-37; *Comm'rs v. Sergeant*, 24-572.]

Error from Ellis District Court.

On the first of May 1875, the *K. P. Railway Company* made out and returned to the county clerk a sworn statement of

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its property subject to taxation for the year 1875, in Ellis county, stating the kind and value of each class of property, as required by law. The aggregate value of all its property, as returned by the plaintiff, was \$163,510.37. This amount was increased by the *Board of County Commissioners* to \$278,375.17, and so certified to the state board of equalization. This latter board readjusted this valuation, and fixed the value of the property subject to taxation at the sum of \$264,953.01, and at this valuation it was assessed and placed on the tax-roll for 1875. On the 1st of April 1876, the *Railway Company* commenced its action against the *Board of County Commissioners*, and *George Bardsley*, sheriff, for the purpose of restraining the collection of a part of the taxes assessed against its property in Ellis county for the year 1875. A temporary restraining order was granted by the district court; and afterward, at the April Term 1876, judgment was rendered, dissolving the temporary injunction. The plaintiff brings the case here to obtain a reversal of that judgment.

J. P. Usher, and *C. E. Bretherton*, for plaintiff, contended, that proceedings under § 65 of the tax law of 1868, are judicial, not executive, and cited 6 Kas. 408; 8 Kas. 287; 16 Kas. 594. Where the law confers on a board the powers of a court of justice to summon witnesses, etc., such a board must proceed on notice and evidence, in a judicial manner, and cannot arrogate to itself the uncontrolled discretion of an executive body. 58 Mo. 379; 1 Greenl. Ev., § 364.

John Martin, and *D. C. Nellis*, maintained, that the board of county commissioners has the power to increase the value of the *right-of-way* and *telegraph line* of the plaintiff in error, in Ellis county, and that this power was properly and legally exercised. (Laws of 1874, ch. 96; Laws of 1875, ch. 123. The Tax Law of 1868, § 65.) Such power may be executed by both the county clerk and the board of county commissioners; 6 Kas.

408; 16 Kas. 587. That the acts of the county board in tax proceedings are not judicial, is decided in 6 Kas. 500.

The opinion of the court was delivered by

BREWER, J.: This was an action to restrain the collection of taxes, and the case turns on the action of the commissioners in raising the assessment of plaintiff's property. The company received notice of the meeting of the commissioners, and appeared. The finding of the court as to such action is in these words:

"Said increase was made upon the personal knowledge of the members of the board of equalization, and upon their statements made outside of said meeting to each other, but at previous meetings, and upon the returns of plaintiff for previous years, showing a much larger assessment continuously from 1870 to 1875, but there was no evidence of any kind introduced at the meeting of said board on the 19th of July 1875, and nothing was done at said meeting of said board except what is shown by the minutes of said meeting, which are recorded in the records of the board of county commissioners of said county, and a copy of which minutes is attached to the the petition in this case, marked "BB;" and the members of said board at said meeting made no statements as to the value of any of said property, nor were said returns of plaintiff for previous years introduced in evidence at said meeting."

So much of the minutes referred to as bears upon the question is in these words:

"Agreeable to the request of the board, the K. P. Railway Company represented itself at this meeting by its agent, Mr. Colton. The board proceeded to examine the return of property as made by the Kansas Pacific Railway Company for the purpose of assessment. Mr. Colton answered all questions put to him relating to the returned valuation of the property of said K. P. Railway Company, and asserted that in his opinion the valuation as returned by the officers of the aforesaid company was a true and correct valuation of the property owned by said company, and required by law to be listed for the purposes of taxation.

"Mr. Watson moved to raise the assessment of track, road-bed, right-of-way, ties, and iron, from the valuation as returned

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by the K. P. Railway Company to \$7,500 per mile, which motion was lost—Mr. Phillips and Mr. Keach voting nay.

“Mr. Watson then moved it be raised to \$7,000 per mile, which was also lost—Messrs. Phillips and Keach voting nay.

“Mr. Watson then moved it to be \$6,500 per mile, which was carried—all voting yea.”

Upon this counsel for plaintiff in error state in their brief:

“Were these proceedings in conformity with the statute? If the functions of the county board were in the nature of assessment, we concede they could act on their own knowledge; if judicial in their nature, they could not. The knowledge of the court is one of the kinds of evidence, but one that is restricted by law within certain limits, which are usually described as comprising matters of which a court takes judicial notice, as of officers' signatures, seals of court, laws, etc., etc. Beyond those limits the court cannot act on facts which it knows to be true, unless testimony or extraneous evidence is submitted to the same effect by one of the parties in due legal form.”

Accepting this statement as correct, and we think that the action of the county board must be sustained. The proceedings before the county commissioners were not judicial, but in assessment. Section 65 of the tax law under which these proceedings were had, provides simply for the correction of an assessment. It prescribes notice to the taxpayer as a condition of valid action; but such notice does not turn the proceeding from one in the nature of an assessment, into a judicial inquiry. Indeed, unless the legislature had prescribed notice, it is doubtful whether any were essential. Correcting an assessment, is no more of a judicial act than making the assessment originally. True, it involves a determination; but so does almost every political or executive act. But it is not a judicial determination. The most that can be said is, that it is *quasi* judicial. The case of *The Auditor v. The A. T. & S. F. Rld. Co.*, 6 Kas. 500, is directly in point. There it was held that appeal would not lie from an original assessment to this court, because such assessment was the exercise of a legislative power. The county board, sitting as a board of equalization of real-estate assessments, raises the valuation of some tracts, and lowers

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that of others. It thus corrects the assessments. But is it then acting in a judicial capacity? Clearly not. What difference between its action then, and in a case like the present? Each is merely the correction of assessments—the one of real, the other of personal property; the one upon general notice by advertisement, and the other upon direct and personal notice to the individual. In each case testimony may be taken, but the proceeding is not invalidated by a lack of it. This question was not raised in the case of *Lappin v. Comm'rs of Nemaha County*, 6 Kas. 403, and that case is not therefore authority against the views herein expressed.

This disposes of the case. As no tender was made of amount unquestionably due for taxes, it is unnecessary to consider any matter of alleged mistake. The judgment will be affirmed.

All the Justices concurring.

JOHN D. BROWN et al. v. MARTHA KIRKBRIDE.

1. JUDGMENT ON DEMURRER, *Decision on Merits*. When a court sustains a general demurrer to a petition, and renders judgment that the defendants be dismissed and recover their costs, *held*, that this is a judgment upon the merits, and not a dismissal of the action without prejudice.
2. ——— Where one of several defendants demurs to the plaintiff's petition, and no action is ever taken upon the demurrer, but this defendant goes to trial, with the consent of all the parties, as upon the answers and evidence of the other defendants, and by such evidence he makes out a complete defense to the plaintiff's action, *held*, that it is error for the court upon such evidence to find against such defendant and to render judgment against him. [*Rowe v. Palmer*, 29-341; *R. R. v. McCarty*, 8-125; *Mills v. Ralston*, 10-206.]
3. DISMISSAL OF ACTION, *Without Prejudice*. Where a plaintiff asks and obtains leave of the court to dismiss his action without prejudice, and thereupon the court renders judgment in favor of the defendant and against the plaintiff for costs, *held*, that the action is dismissed without prejudice. [*Paine v. Spratley*, 5-525; *Burns v. Spratley*, 5-551.]

Error from Wyandotte District Court.

FORECLOSURE of mortgage, brought by *Kirkbride*, as plaintiff, against *Brown* and six others, as defendants. The note was for \$200, and interest at twelve per cent. per annum. Said note and the mortgage were dated 20th December 1864, were made in favor of one *Cassandra F. Clark*, and were executed by all the defendants except *Bartlett* and *Sawyer*. Plaintiff was the assignee of said *Clark*. Trial at the April Term 1876. The court found in favor of plaintiff. Amount due on the note, \$448. Decree for sale of the mortgaged premises, and foreclosing the equities of all the defendants. The defendants bring the case here.

Wallace Pratt, and *Scroggs & Bartlett*, for plaintiffs in error.

Cobb & Alden, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: On the 8th of January 1872, *Martha Kirkbride*, the defendant in error, filed her petition in the district court of Wyandotte county against *John D. Brown*, *Jane Brown*, *Leander Brown*, *Eliza Ann Spybuck*, *John D. Brown, jr.*, *Allison B. Bartlett*, and *H. H. Sawyer*, plaintiffs in error, and *John M. Wheeler* and *Cassandra F. Clark*, as defendants, for the purpose of foreclosing a certain mortgage and note. To the petition so filed, the defendants *A. B. Bartlett*, *H. H. Sawyer* and *John M. Wheeler* filed their demurrer, on the ground that the petition did not state facts sufficient to constitute a cause of action against them. The other defendants answered to the merits. Upon a hearing of said demurrer the court found that said petition did not state facts sufficient to constitute a cause of action against said defendants so demurring, and thereupon sustained the demurrer, and rendered judgment that they be dismissed thereof, and recover their costs therein. And thereupon the issues joined between the plaintiff *Martha Kirkbride* and the other defendants came on for trial by a jury, and after the plaintiff had submitted all of

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her evidence and rested, the defendants filed their demurrer to the evidence so submitted, which demurrer was sustained by the court. The plaintiff then asked and obtained leave of the court, over the objection and exception of the defendants, to dismiss her said action without prejudice—and judgment was duly rendered in favor of said defendants for their costs. Afterward, on the 12th of August 1875, the said Martha Kirkbride filed her petition in said district court against the plaintiffs in error herein, to foreclose the same note and mortgage upon which said former action was founded. This petition in the new action was almost identical with the one in the former action, and substantially differed from it only in containing the following allegation:

“Plaintiff further states, that on 8th January 1872 she commenced an action in this court against the said John D. Brown, Jane Brown, Leander Brown, Eliza Ann Spybuck, and John D. Brown, jr., to recover a judgment upon the aforesaid writing obligatory, or promissory note, against them, and to foreclose the aforesaid mortgage, and against Allison B. Bartlett and John M. Wheeler, to bar them of certain after-acquired interests in the premises described in said mortgage, which action so commenced failed otherwise than upon the merits at the July term of said court 1875, viz., the said plaintiff caused said action to be dismissed without prejudice because of the failure of proof in the case of the assignment of the cause of action to the plaintiff by the said Cassandra F. Clark.”

To this petition the defendants John D. Brown, Jane Brown, Eliza Ann Spybuck, Leander Brown, and John D. Brown, jr., filed their joint answer, containing three defenses—*first*, a denial of all the allegations of the petition except that of the execution and delivery of the note and mortgage in said petition mentioned; *second*, a special denial of the allegation that plaintiff failed in her former action, commenced 8th January 1872, otherwise than upon the merits, and that plaintiff caused the same to be dismissed without prejudice, accompanied with a plea of the five-years statute of limitations; *third*, a plea of the former judgment in favor of defendants upon the same cause of action, in bar of plaintiff's right of recovery herein. The defendant A. B. Bartlett separately answered substantially

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the same as above. The defendant H. H. Sawyer filed his demurrer to said petition, alleging as the ground thereof that the same did not state facts sufficient to constitute a cause of action. To the answers so filed replies were duly filed by plaintiff. At the April Term 1876 of said court, the issues so joined by petition, answers, and replies in said action came on for trial, and a jury being waived, the same was tried by the court. At the commencement of the trial the following stipulation was entered into in open court:

(*Title, and Court.*) "It is agreed upon between the parties at the trial, that the parties herein, and the subject-matter of this suit, are the same as those contained and included in the case of Martha Kirkbride v. John D. Brown *et al.*, on the files of said district court, and commenced by said plaintiff filing her petition therein on the 8th of January 1872, which facts are considered as proven on the trial of this cause."

The plaintiff, after proving payment of interest to March 1st 1866, and introducing the note, mortgage, and assignment, rested. The defendants then read in evidence the deposition of the defendant John D. Brown, tending to show payment of the note, and also the journal entry and judgment in said former action, and then rested their defense. The court thereupon found for the plaintiff, and against the defendants, and rendered judgment accordingly.

We think the judgment as to A. B. Bartlett was erroneous, for the reasons following. *First:* The record of the former action disclosed a judgment of dismissal by the court, upon sustaining his demurrer to the petition in that case, and that he recovered his costs. His demurrer was to the merits of the petition, and in sustaining it the court expressly decided that there were no merits in the cause of action set forth in the petition as to this defendant. The judgment of dismissal, consequent upon the sustaining of the demurrer, was a judgment upon the merits, and is a bar to any subsequent suit between the same parties upon the same cause of action. In fact, after sustaining the first demurrer, the plaintiff amended her petition, and a second demurrer filed by Bartlett to this amended petition was also sustained. Upon the sustaining of

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this last demurrer judgment of dismissal was entered. Gould's Pleadings, ch. 9, § 42; Freeman on Judgments, § 267, p. 232; *Clearwater v. Meredith*, 1 Wall. 25; *Goodrich v. City*, 5 Wall. 566; *Bouchaud v. Dyas*, 3 Denio, 238. The subsequent order allowing the plaintiff to dismiss without prejudice did not affect this defendant, because he already had the judgment of the court dismissing the action as to him. *Comblos v. Butterfield*, 15 Abb. Pr. Rep. (N. S.) 197.

We also think that the judgment as to H. H. Sawyer was erroneous. No action was ever taken upon his demurrer to plaintiff's petition. But if it be considered from his action in the case that he waived his demurrer, and went to trial with the consent of all the parties as upon the answers of the other defendants, and upon the evidence introduced by them, (and from the record in the case we are inclined to think that this is the true view to be taken of the case,) then he had a good defense, and the same kind of defense that Bartlett had.

As to the other defendants, the judgment was correct. The former action was evidently dismissed without prejudice as to them. And whether it was rightfully or wrongfully dismissed is not a question to be considered in this case. (*Paine v. Spratley*, 5 Kas. 525; *U. P. Rly. Co. v. McCarty*, 8 Kas. 125; *Mills v. Ralston*, 10 Kas. 206.) The court unquestionably had jurisdiction, and therefore the order of the court dismissing said action is not void.

The judgment of the court below will be affirmed as to all the defendants except Bartlett and Sawyer, and as them it will be reversed.

All the Justices concurring.

MARY A. TYPER v. E. C. SOOY.

1. **MOTION FOR NEW TRIAL**—*Must be Preserved in Record.* Where the motion for a new trial is not preserved in the record, nor the grounds therefor stated, this court cannot hold that the district court erred in overruling the motion. [*Ferguson v. Graves*, 12-89; *Ayres v. Crum*, 18-269; *Nesbit v. Hines*, 17-316; *Hover v. Cockins*, 17-518; *Rice v. Harvey*, 19-148; *State v. Riddle*, 20-713; *Ingersoll v. Yates*, 21-95; *State v. Benson*, 22-473; *Gruble v. Ryus*, 23-196; *Shadwell v. Hamilton*, 24-267; *Jarrett v. Apple*, 31-696; *Morse v. Brunswick*, 34-379.]
2. **SPECIAL FINDING**—*When to be Made.* Judgment; Error not Presumed. In cases tried by the court without a jury, no special findings are necessary unless requested; and where in the journal entry of the judgment there appeared only one finding of fact, and the proper judgment is entered upon the pleadings and that single finding, and the record discloses no request for special findings, no exception to that finding, no application for additional findings, and no motion to set aside the judgment for lack of findings on other questions of fact, an appellate court cannot say that there was error in the judgment, even if the district court stated an erroneous conclusion of law from the fact found. [*Major v. Major*, 2-337, 338; *Osborne v. Young*, 28-769; *Horn v. Bank*, 32-523.]

Error from Barton District Court.

ACTION by *Mary A. Typer* as plaintiff, to establish a trust, and compel a conveyance. Plaintiff's petition set forth, that on 6th September 1872 plaintiff was an inhabitant of the city of Great Bend, Kansas, that said city was laid out and located on section 28, township 19, range 18 west, in said county of Barton; that she was a joint occupant with *E. C. Sooy*, the defendant, of lots 28 and 24 in block No. 101 in said city, and a joint owner with him of the improvements thereon; and that as such joint occupant and joint owner she was entitled to an equal participation with defendant in the benefits accruing from a certain contract made and entered into in December 1873 between the occupants of said town-site and the Great Bend Town Company, (setting forth such contract;) that under such contract commissioners were appointed to make a division of the town-site, between the Town Company and the occupants, according to their several and respective interests; that *Sooy*, the defendant, had appeared before the commission-

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ers, and at his instance and request had had allotted and set off to himself both said occupancy lots, and the portion of the unoccupied part of the town-site which under the division accrued to said occupancy lots; that he had also taken a deed of conveyance to himself from the mayor of said city for the whole of said property, when he should have taken the same to himself and the plaintiff jointly; that in pursuance of the terms of the contract he had conveyed a portion of the lots so deeded by the mayor to him, to the Great Bend Town Company, and that he had also sold and conveyed a portion of the lots, and had appropriated the money the proceeds thereof to his own use; that plaintiff was entitled to one-half of said proceeds, less one-half of the assessments made by the commissioners and paid by defendant under the contract, and one-half the taxes paid by him, and that said Sooy then held the legal title to the undivided one-half of all the residue of said lots in trust for the plaintiff; that she had demanded of defendant an accounting, and one-half the proceeds of the lots sold by him, less her share of the assessments, taxes, and expenses paid by him, and prayed for an accounting, for her one-half share of the proceeds received for lots sold, and for a conveyance of the undivided one-half interest in the property unsold, described in said prayer. Sooy answered, a general denial. Trial at March Term 1876 of the district court. Defendant objected to any evidence being received, on the ground that the petition showed no cause of action. Objection overruled. The finding of fact and conclusion of law are copied in the opinion, *infra*. Judgment in favor of defendant, and plaintiff brings the case here.

Clayton & Clayton, for plaintiff, contended, that, if the law and the evidence made it apparent to the court that the court had no jurisdiction, as indicated by its findings, then its decision should have been a dismissal of the action; but if the court had jurisdiction to hear and determine the equitable rights of the parties, (and of this there can be no question,) and if the evidence shows *Typer* to have been a joint occu-

Brief of Plaintiff.

pant and joint owner (or in other words, a tenant in common,) with Sooy of the lots and improvements thereon, (and of this there can be no doubt,) then judgment should have been so prayed for in her petition.

2. The court failed to fully find the essential facts. It is essential that the finding upon the facts be explicit, and cover all the material facts in the case. (20 How. Pr. 282.) The single fact found by the court is not sufficient to sustain the judgment rendered. Three principal questions of fact were raised by the pleadings, viz.: 1st, Was the plaintiff a joint occupant and owner with the defendant of said lots 23 and 24 on the 6th of September 1872, and as such entitled to a one-half interest in that property and in the property accruing to it under the contract between the occupants of the town-site and the town company? 2d, Was the property in question set off by the commissioners to the defendant? 3d, Did the defendant at the commencement of the action hold the legal title to any of said property, or hold any proceeds of any of said property, *in trust for the plaintiff*? These were the principal and vital questions in the case raised by the pleadings. The last one was perhaps a mixed question of law and fact, but each demanded a finding, either affirmative or negative. The court found but one of them, and that one the least important. Plaintiff alleged that one in her petition. It was one of her complaints, as were the others. The two most material questions were not covered by the finding of the court, and yet to sustain the judgment it was necessary that it should have found both of them in the negative. Who can tell from the finding of the court whether the plaintiff had any interest in the property which the commissioners had set off to the defendant? The one fact found by the court might be true, *was true*, but the other facts alleged might also be true, and she might be entitled to all she prayed for. If the court had found all the facts, no doubt they would all have been found in the affirmative, as alleged by the plaintiff. We claim therefore that the single fact found by the court is not sufficient to sustain the judgment, and that the judgment is

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therefore erroneous. (12 Cal. 125.) In the case of *Everett v. Lusk*, decided recently by this court, (which case is especially applicable to the case at bar,) this court use the following language: "But the court has failed to fully find the facts of the case. Who can tell from the foregoing findings where the boundary line between the northeast quarter of sec. 9 and the northwest quarter of sec. 10 is, or who can tell where the quarter-section corner between sections 9 and 10, or the section corner between sections 3, 4, 9 and 10 is located? Neither said boundary line, nor either of said corners, is mentioned in said findings, and yet the location of this boundary line and the location of these corners are really the only contested questions in the case. Now such defective findings will hardly sustain a judgment, and particularly a judgment against the plaintiff. Such judgment could be sustained only upon a finding or findings establishing in effect that *none* of the land in controversy belongs to the plaintiff. Now the findings in this case do not establish any such thing. On the contrary they may all be strictly true, and yet the plaintiff may be the owner of every foot of the land in controversy." In the case at bar, the court in its finding says nothing about whether the plaintiff had any interest in the property, nor does it say whether the defendant held any of the property or its proceeds in trust for the plaintiff; and yet these were really the only contested questions in the case. But the court was possessed with a mistaken idea that the plaintiff had not brought the right kind of an action; that she could not treat the defendant as a trustee, and compel him to convey and to account, but should have commenced an action to set aside the action of the commissioners, for fraud; hence the erroneous conclusion of law. But the judgment of the court is erroneous even upon the theory that the conclusion of law was correct. In that case it should have been dismissed. It is apparent that error was committed by the court to the prejudice of the plaintiff; and if an error has been committed which may possibly have prejudiced the appellant, judgment

Brief of Defendant in Error.

should be reversed. 20 N. Y. 476; 19 N. Y. 299; 1 E. D. Smith, 411; 19 Wend. 232; 2 Hall, 40.

Samuel Maher, and *Ruggles, Scott & Lynn*, for defendant in error, submitted, that the record brought to this court does not contain any motion for a new trial, and nothing that would indicate there ever was a motion for a new trial made or filed, except the following clause: "Now on this day this cause came on to be heard on the motion of the plaintiff to set aside the decision of the court rendered this day in said cause, and to grant a new trial, and the court having heard the argument of the counsel does overrule said motion, to which ruling the plaintiff excepted and excepts." And there is nothing in this to indicate what grounds (if any) were alleged in said motion as grounds for a new trial; and very likely the court below overruled it because there were no grounds stated, or because if any were stated they were wholly insufficient, or on account of its informality; for it seems from the recital above quoted, that it was a motion to set aside the decision of the court, and not to set aside any findings of fact or conclusion of law. However this may be, this court cannot say that the record affirmatively shows that the court erred in overruling the same. (12 Kas. 39; 17 Kas. 518.) And this being so, this court cannot review any ruling of the court below made at or during the trial, nor any matter specified as a ground for a new trial in § 306 of the code, among which are errors of law occurring at the trial, and duly excepted to. 13 Kas. 269; 17 Kas. 316, 518. Suppose that portion of the record above referred to was not before this court: could this court say from what remains, to-wit, the petition, answer, and what purports to contain the substance of the judgment of the court, that the court below erred in its judgment? It will be observed that there is nothing to show that there was any request on the part of either party for separate findings of fact or conclusions of law, and there is nothing to show that the court below did not make numerous findings of fact and conclusions of law, all of which might

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have been conclusive against plaintiff in error, and without objection or exception on her part; nor is there anything to show that the judgment in the case was based on the finding and conclusion appearing in the record. And even to these there is neither objection nor exception, but only a general exception to the "order" of the court. And we say that the court did not err in rendering a judgment for the defendant on the finding; but if the court did err, how is this court to know it? There is nothing in the record that this court can notice that discloses that the plaintiff could by any possibility have had judgment in her favor. If there are not findings of fact sufficient to entitle the plaintiff to judgment, then of course the court was bound to render judgment on such findings in favor of the defendant. (5 Kas. 663.) It might have been error for the court below to have found as few facts as the record exhibits if the plaintiff had requested fuller or additional findings, but no such request appears in the record. Suppose the court, after looking through this record, should think that substantial error appears prejudicial to plaintiff in error, what will the court do with the case? The plaintiff cannot have a new trial, because she has not asked for it in the court below, and the court cannot grant a new trial when no application has been made for one in the court below. 2 Kas. 338; 5 Kas. 569.

The opinion of the court was delivered by

BREWER, J.: Plaintiff brought her action in the district court of Barton county, claiming to be joint owner with defendant of certain property in the city of Great Bend, that the latter held the legal title thereto in trust for her, and asking that he be compelled to convey. The defendant denied generally. The journal entry of findings and judgment reads as follows:

"The court after hearing the testimony of the witnesses, and the arguments of counsel, and being fully advised in the premises, does find as a fact, that the lots in question were by the commissioners set off to E. C. Sooy; and as a conclu-

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sion, that the action of the commissioners is conclusive, and cannot be set aside except for fraud, and then only by a direct proceeding instituted for that purpose. It is considered and adjudged by the court, that the said defendant, E. C. Sooy, have judgment," etc.

Now while the record gives the testimony adduced on the trial, and states that a motion for a new trial was overruled, it does not contain such motion, nor state the grounds upon which it was based. Hence we cannot say that the district court erred in overruling it; (*Ferguson v. Graves*, 12 Kas. 89; *Hover v. Cockins*, 17 Kas. 518;) nor inquire into any errors alleged to have been committed during the trial, either in the admission or exclusion of testimony, nor into the sufficiency of the testimony to sustain the findings. *Ayres v. Crum*, 18 Kas. 269; *Nesbit v. Hines*, 17 Kas. 816; *Hover v. Cockins*, supra. Upon this counsel for plaintiff invoke the aid of the case of *Everett v. Lusk*, recently decided by this court, (*ante*, p. 195,) and say, that the fact found by the court does not sustain its conclusion of law, and therefore does not warrant a judgment adversely to the plaintiff; that the court did not find upon all the issues of fact tendered by the pleadings; that if it had done so, the findings which from the testimony it must have made would have compelled a judgment for plaintiff; that the facts that the legal title to said lots was in defendant, and that it had passed to him by the award of the commissioners, were alleged by her in the petition, and that the basis of her claim was the fact that at the time of entering the town-site she was a joint occupant of the lots and a joint owner of the improvements thereon, and that upon these matters the court made no findings. In other words, the court in substance held that her petition did not state facts sufficient to constitute a cause of action; that in this it erred; that the error is apparent, and the exceptions duly preserved. Counsel have in this framed an argument of great plausibility, but one to which, nevertheless, we are constrained to say we cannot yield our assent. And first, we think they misunderstand the scope of the decision in *Everett v. Lusk*. There, plaintiff had sued to recover

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a strip of land in the possession of defendant, and which was along the boundary between the respective tracts of plaintiff and defendant, and belonged wholly to plaintiff, or wholly to defendant, or partly to each, according as the true boundary line ran. Now the possession being wholly in the defendant, the finding implied that plaintiff was entitled to part of the strip; but because the court was uncertain as to the exact boundary line, (or in other words, uncertain how much of the strip plaintiff was entitled to,) it rendered judgment in favor of defendant for all. This illustration may perhaps make the principle clearer: A. sues B. for \$1,000. The court finds that A. is entitled to recover an amount somewhere between \$200 and \$600, but the exact figures it is unable to give, and therefore renders judgment for defendant. But in the case at bar there is nothing in the finding of fact from which any implication of right in the plaintiff arises. So far as it goes it shows only right in the defendant. Concede that it be, as counsel contend, not conclusive of defendant's title, and that it is a fact consistent with plaintiff's rights, yet it does not tend to show any right in plaintiff, and only supports defendant's title. So that there was clearly no error in rendering a judgment for defendant upon the fact found. But say counsel, the conclusion of law does not follow from the fact found. Concede that, and it would be simply a wrong reason for a right judgment.

But again, say counsel, there were other facts in issue, upon which proof was offered, and upon which special findings should have been made. But no special findings are necessary unless requested by the parties, or one of them, (*Major v. Major*, 2 Kas. 337; Gen. Stat. p. 684, § 290;) and no request for findings appears in the record—no exception to the finding as made, no motion for additional findings, and no application to set aside the judgment for lack of findings on all the matters in issue. Hence it is impossible to say that the court erred in not making further findings. It may have found upon the only matter upon which a special finding was asked. What it might have found upon the other matters concerning

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which testimony was offered, we cannot tell. There was testimony on both sides. Reduced to writing, it may appear to us to preponderate in one direction; when heard from the lips of living witnesses, it may have led the mind of the district court in the other direction. But be that as it may, as was said in the case from 2 Kas. *supra*, "it is only errors apparent upon the record, that this court can take cognizance of, and those are errors of law. We cannot retry the case upon its merits." It is useless therefore for us to speculate as to the conclusion to which the testimony might lead us in those matters. If counsel desired to have them presented for examination here, they should have asked special findings; and the court would then have made such findings, or they could have alleged error in its refusal to find. While it may be, that if the case came before us for review upon the testimony, as under the old practice chancery cases went up on appeal, we should come to a different conclusion as to the rights of the respective parties, yet, as the record stands, we see no error of which the plaintiff can avail herself, and the judgment will have to be affirmed.

All the Justices concurring.

RUFUS B. WAITE v. GEORGE W. BALLOU.

USURIOUS INTEREST; *Injunction to Prevent Collection.* Where a person in borrowing money agrees to pay usurious interest, and thereafter he pays the principal of the loan with legal interest, and does and pays all that either law or equity would require that he should do or pay, equity will interfere, upon a proper application, to prevent the collection of the usurious interest.

Error from Cowley District Court.

INJUNCTION, brought by *Ballou*, as plaintiff. The district judge, on the 6th of July 1876, at chambers, granted a temporary injunction, restraining defendant *Waite* from proceeding

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to enforce certain mortgages. From such order *Waite* appeals, and brings the case here on error.

Pryor, Kager & Pryor, for plaintiff in error.

Hackney & McDonald, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought to set aside and cancel two certain promissory notes and certain mortgages made to secure the same. These notes and mortgages were all made by Ballou, and given to Waite, defendant. Ballou, as plaintiff, asked for and obtained a temporary injunction, or perhaps more properly speaking, two temporary injunctions, restraining the defendant in the meantime from selling or disposing of said notes, and from selling or disposing of or interfering with the mortgaged property. These injunctions were granted originally by the judge of the probate court—the first one upon the original petition filed in the case, and the second one upon an amended petition. Afterward the defendant moved to dissolve these injunctions, and the motion was heard before the judge of the district court, at chambers. The motion was heard upon the original petition, the amended petition, and such affidavits as were presented by the parties respectively. The plaintiff's claim, which he attempted to show by said petitions and affidavits, was, that said promissory notes were given wholly for usurious interest, and that there was no other or different consideration therefor. He claims that the defendant loaned him money, that he gave certain other promissory notes for the principal of the loan, with legal interest, and that he gave these notes in suit merely for the usurious interest agreed to be given on such loan. He also claims that before commencing this action he paid all the principal of said loan, with legal interest thereon, and that he fully paid, satisfied, and discharged all notes and other instruments given on said loan, except merely these two notes with the mortgages made to secure them, which two notes and mortgages were given wholly for usurious interest. The judge

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below decided the said motion of defendant upon the theory that these claims of the plaintiff were all true; and, as the evidence given on the hearing of the motion seems to sustain these claims, we must decide the question upon the same theory. The following is the decision and order of the judge below on the hearing of this motion, to-wit:

(*Court, and Title.*) "The court, after mature deliberation, is of the opinion that the said defendant ought not to be permitted to dispose of or interfere with the property mentioned in the amended petition of the plaintiff in the above action until the same can be legally investigated. It is therefore considered, ordered, and adjudged by the court, that the said defendant be and he is hereby ordered to refrain from taking, selling, molesting, or in any manner whatever interfering with the property mentioned in the amended petition filed in the above cause, or any part thereof, and that this order stand until the further order of this court."

At the time this order was made the defendant was advertising to sell the personal property under the chattel mortgage, and had commenced an action to foreclose the real-estate mortgage. This order was probably intended by the judge of the district court to take the place of and supersede the orders made by the judge of the probate court. Hence it will only be necessary for us to determine whether this order is correct, or not. We think it is correct. Unquestionably it is correct so far as it restrains the sale of the personal property; for what other adequate remedy would the plaintiff have? But we think it is correct in every other particular. Equity always interfered to prevent the collection of usurious interest where the plaintiff himself had previously done equity. (2 Joyce on Injunctions, 1205, et seq.; Hilliard on Injunctions, 338; High on Injunctions, §§ 703 to 705.) In this case the plaintiff did full equity before commencing this action. He did everything and paid everything that the defendant had any right to claim, either in law or equity, that he should do or pay.

The order of the judge of the court below will be affirmed.

All the Justices concurring.

Opdyke v. Crawford.

GEORGE OPDYKE V. GEORGE A. CRAWFORD *et al.*TAX LIEN; PRIORITY; *Payment from Proceeds of Sale; Foreclosure of Mortgage.*

In an action on a promissory note and a real-estate mortgage, where there are taxes due on the mortgaged property, the court should, on the application of the plaintiff, in rendering the judgment on the note and mortgage, order that the taxes due on such mortgaged property be first paid out of the proceeds of the sale of such mortgaged property. [*Stanclift v. Norton*, 11-218; *Sharp v. Barker*, 11-371; *Brown v. Evans*, 15-88; *Watterson v. Devoe*, 18-223; *Alexander v. Shonyo*, 20-708; *Seaman v. Huffaker*, 21-263; *Reading v. Wier*, 29-429, 430; *Ins. Co. v. Swayze*, 30-122.]

Error from Bourbon District Court.

FORECLOSURE of mortgage, brought by *Opdyke*. The defendants were *George A. Crawford*, St. Louis Mutual Life Insurance Company, *Risden Owen*, *Ira D. Bronson*, *Hapgood & Co.*, *James Hart*, and *R. & J. S. McCord*. The mortgage was given in July 1871, and the mortgaged property consisted of four unimproved lots in the city of Fort Scott. *Crawford* was the mortgagor. The other defendants were incumbrancers subsequent to the mortgage-lien in favor of *Opdyke*. Trial at May Term 1876. The court found the liens on the mortgaged property, and the priority thereof, as follows: 1st, the mortgage-lien in favor of *Opdyke*; 2d, a mortgage-lien in favor of the St. Louis Mutual Life Insurance Company; 3d, a judgment-lien in favor of *Owen*; 4th, a judgment-lien in favor of *Bronson*; 5th, judgment-liens in favor of *Hapgood & Co.*, *Hart*, and *McCords*. The amount of *Opdyke's* lien was \$3,507, for which a personal judgment was entered against *Crawford*, and a decree made foreclosing the mortgage held by *Opdyke*, directing a sale of the mortgaged premises, and ordering that "out of the proceeds of said sale the costs of the action and of making sale shall be first paid, and the remainder thereof shall be applied to the payment of the plaintiff's judgment herein, and the residue thereof, if any there be, shall be brought into court, to abide the further order of this court." Before the final decree was entered, *Opdyke* asked the court to ascertain and find the amount of unpaid taxes and assessments on the mortgaged premises, and to order and direct that such taxes

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and assessments be first paid out of the proceeds of the sale; and to this end, plaintiff offered testimony showing that since the date of his mortgage "the property has been subjected to McAdam assessments and general and sidewalk taxes, which with penalty and interest amount to \$2,510, which sum remains as a lien upon said property, as shown by the books of the county treasurer; that said property could not now be appraised for over \$3,800; that because of said taxes and assessments, and the mortgage and judgment-liens thereon, the mortgaged premises would not be purchased by any person other than the plaintiff," and submitted that under the findings already made, and the proposed decree thereon, the plaintiff would be compelled to pay two-thirds the appraised value, (\$2,584,) and then be compelled to pay said sum of \$2,510 for taxes and assessments due thereon, to protect his title under the decree. The court refused to make any finding as to the taxes and assessments, and refused to decree that the taxes and assessments be first paid from the proceeds of the sale. *Opdyke* excepted to such refusal, and brings the case here. (The plaintiff in his petition for foreclosure had alleged the amount due upon the lots for taxes and assessments, and the bidding-in of the property by the county at tax sale, and prayed for general equitable relief.)

Eugene F. Ware, for plaintiff in error:

The gist of this case I suppose to be contained in the following proposition: Suppose a mortgage creditor obtains judgment for \$3,500, and upon a special execution levies upon the mortgaged property worth \$3,000, upon which property \$2,500 of taxes are due: the property must sell for not less than two-thirds of its value; consequently, if the rule of the court below is correct, first, no outsider *will* buy; second, the plaintiff *must* buy; third, he must pay at least \$4,500 for the property. It is no answer to say that the plaintiff might pay off these taxes before trial, and have them included in the judgment. A suitor has a right to justice without buying it. It is not justice to compel a plaintiff to raise money and pay his debt-

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or's debts, to be paid back at seven per cent. interest, when the debtor gets tired of litigation, and netting the debtor 43 per cent. profit in the meantime, (that being the difference between the two rates of interest.) The case of *Wilson v. McKenna*, 52 Ill. 43, is in point, that a suitor is not compelled to purchase justice in such a way. The propriety and justice of paying taxes and assessments out of the proceeds of sale was recognized by Chancellor Kent in 1820; 4 Johns. Ch. 542. In 2 Edw. Ch. (N. Y.) 681, a mortgage was foreclosed and land directed to be sold. It did not sell for over two years. In the meantime large amounts of taxes and assessments became due. The plaintiff paid them and was reimbursed from the proceeds. The New York rule in these cases is well illustrated in *Easton v. Pickersgill*, 55 N. Y., which shows that the payment of taxes and assessments from the proceeds is a long-established custom. In *Cord v. Southwell*, 15 Wis. 211, the court below ordered the liens of taxes and assessments to be paid from the proceeds. The point was raised, and the supreme court decided that the order was proper. A recent case is found in *Tuck v. Calvert*, 33 Md. 209, which says that when land is sold under decree in equity, the taxes must be first satisfied from the proceeds. In the case at bar, it is evident that the property never would sell to an outside purchaser, because he would have to pay more for the property than it was worth. This fact was brought to the knowledge of the court; and the point was appreciated by the court, and commented upon by the court. Now, it is a well-known rule of equity jurisdiction, that when a court of equity takes charge of a case, it forever keeps control of it until complete justice has been done, and draws to itself every incidental power necessary to carry out its decrees. Imagine an *equity court* decreeing land to be sold, and being unable to get it off its hands, although buyers stood around ready to pay the full value of the property! The creditor standing before the court, languishing for his money! the debtor, owning land subject to sale! the buyers, willing to give \$3,000 for three thousand dollars worth of property; and the court powerless! All at once a bright idea strikes the

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court, and it suggests, "some one might buy it, and pay the taxes too." Might pay \$5,500 for three thousand dollars worth of property! Breathes there a man with soul so dead, as to think Kansas contains so phenomenal a buyer! and must we wait *until he comes*? The court as a court of equity had the right to make the order we asked for, and to incorporate it into the decree; and to refuse to do so was error.

Hill & Sallee, C. O. French, and McComas & McKeighan, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action on a promissory note and a real-estate mortgage. A personal judgment was rendered in favor of the plaintiff, George Opdyke, against the defendant Crawford for the sum of \$3,507, and the mortgaged property was ordered to be sold to satisfy this personal judgment. At the time this judgment was rendered there were taxes due on said mortgaged property amounting to \$2,510, and the property itself was not worth more than \$3,800. The plaintiff asked that the mortgaged property be sold in accordance with law, that the taxes be first paid out of the proceeds thereof, and that the balance of the proceeds, if any, should then be applied in part payment of the plaintiff's said personal judgment. But the court refused, and rendered judgment as above mentioned. Under this judgment, and indeed under any judgment which might legally have been rendered, the property should first be appraised and then not sold for less than two-thirds of its appraised value. The only question now to be considered is, whether the court below erred in refusing to render the judgment as asked for by the plaintiff. We think it erred. Taxes are always a lien upon the real estate upon which they are imposed, and are always prior and paramount to any other lien or incumbrance. And courts of equity, in the foreclosure of mortgages, always have the power to ascertain what are liens upon the mortgaged property, to determine their priority, and to order that such liens be discharged out

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of the proceeds of the sale of such real estate in accordance with their priority. (See authorities cited by counsel for plaintiff in error.) In this state a holder of a mortgage has two remedies: *first*, he may pay the taxes, and then recover them back from the mortgagor, or have them included in the judgment rendered in his favor on foreclosure; or, *second*, he, as well as the mortgagor, may neglect to pay the taxes, and then he may have the amount thereof paid out of the proceeds of the sale of the mortgaged property on foreclosure. The statutes upon this subject read as follows:

"In cases where lands are mortgaged, if the mortgagor fails or neglects to pay the taxes, or in case said mortgagor permits any land so mortgaged to be sold for any taxes, the mortgagee may pay said taxes, or redeem any land so sold for taxes. And on the payment of any such mortgage, or in the action to enforce the same, such mortgagee may demand the taxes so paid, with interest thereon at the rate of twelve per cent. per annum, or include them in any judgment rendered on the mortgage; and any taxes so paid by any mortgagee shall be a lien on such land so mortgaged until the same be paid."—(Laws of 1876, page 97, §148; Gen. Stat. of 1868, page 1062, §135.)

"Whenever any lands so held by tenants-in-common, shall be sold upon proceedings in partition, or shall be taken by the election of any parties to such proceedings, *or where any real estate shall be sold at judicial sale*, or by administrators, executors, guardians, or trustees, the court shall order all taxes and penalties thereon against such lands to be discharged out of the proceeds of such sale."—(Laws of 1876, page 70, §56; Gen. Stat. of 1868, page 1034, §40.)

And as sustaining the rule above stated, see *Ketchum v. Fitches*, 13 Ohio St. 201; *Tuck v. Calvert*, 33 Md. 210, 224, 225; *Easton v. Pickersgill*, 55 N. Y. 810; *Brown v. Evans*, 15 Kas. 88, 92, 93.

The judgment of the court below will be modified, so that taxes due on the mortgaged property may first be paid out of the proceeds of the sale of such property. In every other respect the judgment of the court below will be affirmed.

All the Justices concurring.

EXTRA ANNOTATION
TO
PRECEDING VOLUME

NOTES

ON THE

KANSAS REPORTS

CASES IN 19 KANSAS

19 KAN. 9, HEFLEY v. BAKER

Trespass quare clausum fregit—Possessory action.—Cited in *Wilkins v. Lee*, 73 Kan. 321, 85 Pac. 140, holding that trespass quare clausum fregit is a possessory action, based on the disturbance of the possession.

Cited in note in 85 Am. Dec. 322, on remedies for injuries to real estate held adversely; in 30 L. R. A. (N. S.) 262, on necessity and character of title or possession to sustain action of trespass.

Exemplary damages—When recoverable.—Cited in *Wilson v. Vaughn*, 23 Fed. 229, holding that a willful refusal to obey a writ of mandamus requiring the levying of a tax to pay a judgment entitled the judgment creditor to punitive damages, although his actual damages were nominal; *City of Parsons v. Lindsay*, 26 Kan. 426, holding that exemplary damages were not recoverable for negligence, where it was not so gross as to amount to wantonness; *Cady v. Case*, 45 Kan. 733, 26 Pac. 448, holding that exemplary damages are recoverable where elements of fraud, malice, gross negligence, or oppression mingle in the controversy.

Cited in notes in 27 Am. Dec. 687, 689; 50 Am. Dec. 768—as to when exemplary damages are allowable.

19 KAN. 13, SEIP v. PATRIE

Appeal and error—Review of evidence.—Cited in *Union Pac. Ry. Co. v. Diehl*, 33 Kan. 422, 6 Pac. 566, holding that a verdict on conflicting evidence, which has been approved by the trial court, will not be disturbed by the Supreme Court, although apparently against the preponderance of the evidence.

19 KAN. 16, ABELES v. BRANFIELD

Minors—Personal injuries—Damages—Loss of earnings.—Cited in *Farar v. Wheeler*, 145 Fed. 482, 75 C. C. A. 386, holding that a minor, suing for personal injuries, could not recover for loss of earnings during minority, where his father had not waived his right to the minor's services.

Cited in note in 6 L. R. A. (N. S.) 553, on right of infant to recover for loss of services or diminished earning capacity, during minority, from personal injury.

19 KAN. 23, GRIFFITH v. WATSON

Tax—Assessment—Necessity of notice.—Cited in *Dykes v. Lockwood Mtg. Co.*, 57 Kan. 416, 48 Pac. 711, holding that omitted property cannot be entered on the tax rolls without notice to the taxpayer; *Topeka City Ry. Co. v. Roberts*, 45 Kan. 360, 25 Pac. 854, holding that the collection of a tax assessed without notice would be enjoined.

Same—Place of assessment.—Cited in note in 56 Am. Dec. 527, 528, on place for taxation of property.

Same—On credits.—Cited in note in 74 Am. Dec. 95, on taxation of credits.

Same—Restraining collection.—Cited in *Bardrick v. Dillon*, 7 Okl. 535, 54 Pac. 785, holding that the collection of a tax invalid in part will be enjoined, where the complaining party pays or tenders the valid part.

19 KAN. 28, STATE v. BOHAN

Bills of exceptions—Time for filing.—Cited in *State v. Schoenewald*, 26 Kan. 288; *Scott v. McKinstry*, 27 Kan. 162; *State v. Smith*, 38 Kan. 194, 16 Pac. 254; *Martin v. Southern Kansas Ry. Co.*, 51 Kan. 162, 32 Pac. 901—holding that bills of exception filed after the term were no part of the record; *State v. Burrows*, 33 Kan. 10, 5 Pac. 449, holding that a bill of exceptions to a decision in vacation allowed 19 days after the decision could not be considered; *Powers v. McCue*, 48 Kan. 477, 29 Pac. 686, holding that a trial judge would not be compelled by mandamus to settle and sign a bill of exceptions after the term.

Same—Requisites.—Cited in *Atchison & N. R. Co. v. Wagner*, 19 Kan. 335, holding that a skeleton bill of exceptions containing blanks when signed, with directions to the clerk to insert the evidence, would not be considered; *Whitzell v. Forglar*, 30 Kan. 525, 1 Pac. 823, holding that a bill of exceptions, signed in the absence of a justice of the peace by his clerk, was a nullity; *Bruce v. Casey-Swasey Co.*, 13 Okl. 554, 75 Pac. 280, holding that a bill of exceptions, not shown to have been filed, was not a part of the record.

Record on appeal—What constitutes.—Cited in *Re Norris*, 60 Kan. 649, 57 Pac. 528, holding that the stenographer's notes of the testimony, not embodied in a bill of exceptions or case-made, and certified only by the clerk, and not by the trial judge, could not be regarded as a part of the record.

Same—Omissions—Cure.—Cited in *Parker v. Remington Sewing-Mach. Co.*, 24 Kan. 31, holding that omissions in the case-made could not be cured by a subsequent stipulation of counsel.

Terms of court—Termination—Adjournments.—Cited in *State v. Hargis*, 84 Kan. 150, 113 Pac. 401, holding that a term of court continues until adjourned sine die, and is not terminated by a failure to reconvene on an adjourned day.

Venue—Change—Prejudice.—Cited in *State v. Grinstead*, 62 Kan. 593, 64 Pac. 49, holding that proof that defendant was prejudiced against the trial judge and had published libelous articles concerning him did not establish prejudice on the part of the judge, entitling defendant to a change of venue; *State v. Morrison*, 67 Kan. 144, 72 Pac. 554; *State v. Tawney*, 81 Kan. 162, 105 Pac. 218, 135 Am. St. Rep. 355—holding that a trial judge's belief in accused's guilt did not constitute such prejudice as disqualified him; *State v. Parmenter*, 70 Kan. 513, 79 Pac. 123; *State v. Tawney*, 83 Kan. 603, 112 Pac. 161—holding that errors of judgment on legal questions in a case do not show prejudice on the part of the judge; In re *Smith*, 73 Kan. 743, 85 Pac. 584, holding that, where the only evidence of prejudice on the part of the judge was a party's affidavit that he believed the judge was prejudiced, the motion for a change of venue was properly denied.

Jurors—Disqualification—Review.—Cited in *State v. Baldwin*, 86 Kan. 1, 12 Pac. 318, holding that the trial court's finding on conflicting evidence that jurors were not disqualified, as having expressed opinions, was conclusive.

Homicide—Self-defense.—Cited in *State v. Keefe*, 54 Kan. 197, 38 Pac. 302, holding that an instruction on self-defense, requiring defendant to use the same care, effort, and precaution as would have been exercised by an ordinarily prudent man, was erroneous; *State v. Clark*, 69 Kan. 576, 77 Pac. 287, holding that whether there was sufficient cause to produce such passion on the part of accused as would reduce a homicide to manslaughter was a question for the jury; *State v. Keehn*, 85 Kan. 765, 118 Pac. 851, holding that, where the instructions on self-defense as a whole were correct, isolated sentences apparently requiring actual necessity for the killing did not constitute error; *Price v. State*, 1 Okl. Cr. 358, 98 Pac. 447, holding that an instruction on self-defense was erroneous, because it did not authorize accused to act on the appearance of danger from his standpoint; *Mahaffey v. Territory*, 11 Okl. 218, 66 Pac. 342, holding that a person acting in self-defense under an honest conviction of danger, induced by reasonable evidence, is not criminally liable, although mistaken as to the extent of the actual danger.

Cited in note in 3 L. R. A. (N. S.) 537, 542, 547, on standpoint for determining danger and necessity to kill in self-defense.

19 KAN. 57, DARROW v. SCULLIN

Mortgages—Provision for acceleration—Effect.—Cited in *Snyder v. Miller*, 71 Kan. 410, 80 Pac. 970, 69 L. R. A. 250, 114 Am. St. Rep. 489, holding that under a mortgage containing an acceleration clause the statute of limitations ran against the whole debt from the first default; *Kansas Loan & Trust Co. v. Gill*, 2 Kan. App. 488, 43 Pac. 991, holding that under an acceleration clause in a mortgage the mortgagee had a right to declare the whole sum due on default in payment of interest.

Same—Construing note and mortgage together.—Cited in *Cabbell v. Knotte*, 2 Kan. App. 68, 43 Pac. 309, holding that a note and mortgage must be construed together, and where the mortgage was made in a representative capacity the signers were not individually liable, although the note was signed individually; *Wistrand v. Parker*, 7 Kan. App. 562, 52 Pac. 59, holding that a reference in a note to a mortgage by which it was secured and to an acceleration clause therein rendered the note nonnegotiable.

19 KAN. 60, GERMAN SAV. BANK v. WULFEKUEHLER

Cited in *Sargent v. Kansas Midland R. Co.*, 48 Kan. 672, 29 Pac. 1063.

Bank officers—Knowledge—Presumption.—Cited in *First Nat. Bank of Ft. Scott v. Drake*, 29 Kan. 811, 44 Am. Rep. 646, holding that while, as to third persons, bank directors are presumed to know its condition, ratification of a misappropriation of money by the cashier cannot be predicated on such presumed knowledge; *State v. Myers*, 54 Kan. 206, 38 Pac. 296, holding that a bank officer's criminal liability for knowingly receiving deposits after the bank is insolvent cannot be based on presumed knowledge from the mere fact that he is an officer.

Corporations—Purchasing own stock.—Cited in *Kassler v. Kyle*, 28 Colo. 374, 65 Pac. 34; *Bridgens v. Dollar Sav. Bank of Kansas City, Mo.*, 66 Fed. 9; *State Bank of Chatham, N. Y., v. Hutchinson*, 62 Kan. 9, 61 Pac. 443—as to the lack of power in a bank to purchase its own stock; *Abeles v. Cochran*, 22 Kan. 405, 31 Am. Rep. 194, holding that the law does not give directors of a bank authority to purchase its stock for the bank.

Cited in notes in 61 L. R. A. 626, 632; 33 Am. St. Rep. 344, 345—on power of corporation to purchase its own stock; in 2 L. R. A. (N. S.) 130, on corporation's purchase of own stock as fraudulent conveyance.

Same—Corporate stock—Transfer—Effect.—Cited in *Van Demark v. Barons*, 52 Kan. 779, 35 Pac. 798, holding that as a general rule a bona fide transfer of corporate shares terminates the transferor's liability, either to the company or creditors.

Negligence of corporate directors.—Cited in note in 17 Am. St. Rep. 100, on liability of corporate directors for negligence.

19 KAN. 67, **COLLAMORE v. WILDER**

Decedents' estates—Claims—Limitations.—Cited in *Clawson v. McCune's Adm'r*, 20 Kan. 337, holding that oral acknowledgments of a debt by the debtor's administrator do not suspend the running of the statute of limitations; *Scroggs v. Tutt*, 23 Kan. 181, holding that a judgment against a decedent was barred by limitations, when not revived or sued on within three years after the administrator's bond was given; *Clifton v. Meuser*, 79 Kan. 655, 100 Pac. 645, holding that the mere exhibition of a claim to an administrator, without commencing an action in the probate court thereon, did not stop the running of the statute of limitations.

Same—Administrators—Powers.—Cited in *Ætna Life Ins. Co. v. Swayze*, 30 Kan. 118, 1 Pac. 36, holding that an administratrix could not compromise a claim in favor of the estate without the consent of the probate court; *Limekiller v. Hannibal & St. J. R. Co.*, 33 Kan. 83, 5 Pac. 401, 52 Am. Rep. 523, holding that a foreign administratrix cannot maintain in this state an action which she cannot maintain in the state of her appointment.

Same—Liability of heirs.—Cited in *Clawson v. McCune's Adm'r*, 20 Kan. 337, as to the liability of an heir for a debt of his ancestor.

Cited in notes in 21 L. R. A. 92; 48 Am. Dec. 397—on liability of heirs for ancestor's debts.

Probate and district courts—Jurisdiction.—Cited in *Klemp v. Winter*, 23 Kan. 699, holding that a suit to vacate a guardian's settlement in the probate court and set aside a release by the ward was maintainable in the district court; *Kothman v. Markson*, 34 Kan. 542, 9 Pac. 218, holding that, in the absence of special circumstances, the district court will not enforce payment of claims against decedents' estates; *McLean v. Webster*, 45 Kan. 644, 26 Pac. 10, holding that, where there had been no administration and there were no other debts, a suit to subject land of a decedent to the payment of a debt was maintainable in the district court.

19 KAN. 83, **KANSAS PAC. RY. CO. v. CUTTER**

Public officers—Acts of deputy—Force.—Cited in *Flint v. Noyes*, 27 Kan. 351, holding that, under a statute authorizing service outside of the state by the sheriff of the county where made, service by a deputy sheriff was a nullity.

Evidence—Objections—Scope and sufficiency.—Cited in *Abbott v. Coleman*, 22 Kan. 250, 31 Am. Rep. 186, holding that an objection to evidence as incompetent did not raise the questions of the incompetency of the witness or of the necessity of further preliminary proof; *Humphrey v. Collins*, 23 Kan. 549; *Smith v. Leighton*, 38 Kan. 544, 17 Pac. 52, 5 Am. St. Rep. 778; *Blackwelder v. Rock Island Mfg. Co.*, 9 Kan. App. 664, 58 Pac. 1019—holding that a general objection to evidence, not specifying any ground, was insufficient; *Long v. Kasebeer*, 28 Kan. 226, holding that a general objection to the admission in evidence of a petition, because it consisted of conclusions and statements of matters of record, was insufficient, if any part was competent; *Daugherty v. Fowler*, 44 Kan. 628, 25 Pac. 40, 10 L. R. A. 814, holding that an objection to a letter as incompetent and irrelevant did not raise the question of its genuineness; *Roark v. Greeno*, 61 Kan. 299, 59 Pac. 655, holding that an objection that a hypothetical question assumed facts not proved, which did not point out the assumptions not proved, was insufficient; *Priest v. Robinson*, 64 Kan. 416, 67

Pac. 850, holding that a general objection to evidence as incompetent, irrelevant, and immaterial did not raise the point that a foundation had not been laid for secondary evidence; *Mechanics' Savings Bank v. Harding*, 65 Kan. 655, 70 Pac. 655, holding that such an objection to the transcript of a judgment did not raise the question of insufficient authentication; *Long Bell Lumber Co. v. Martin*, 11 Okl. 192, 66 Pac. 328, holding that such an objection to the record of a deed did not raise the point that the authority of an attorney in fact to execute it was not shown.

Instructions—Error—Waiver.—Cited in *Greer v. Higgins*, 20 Kan. 420, holding that an erroneous instruction in accord with one requested by the party complaining thereof was not ground for reversal; *Irwin v. Thompson*, 27 Kan. 643, holding that instructions not objected to were the law of the case and controlling in the Supreme Court.

Wrongful death—Damages.—Cited in *Southern Pac. Co. v. Wilson*, 10 Ariz. 162, 85 Pac. 401; *Atchison, T. & S. F. R. Co. v. Brown*, 26 Kan. 443—holding that the damages for wrongful death are to be left to the sound discretion of the jury, under the direction of the court, but that a verdict may be set aside as excessive; *Union Pac. Ry. Co. v. Dunden*, 37 Kan. 1, 14 Pac. 501, holding that in an action for wrongful death it was not error to refuse to require the jury to itemize the value of deceased's future services, if he had lived; *Atchison, T. & S. F. Ry. Co. v. Townsend*, 71 Kan. 524, 81 Pac. 205, 6 Ann. Cas. 191, holding that in an action for wrongful death exemplary damages are not recoverable; *Missouri, K. & T. R. Co. v. McLaughlin*, 73 Kan. 248, 84 Pac. 989, holding that the present value of the probable accumulations of property by deceased was the proper measure of damages for his wrongful death.

Same—Pleading.—Cited in *Erb v. Morasch*, 8 Kan. App. 61, 54 Pac. 323, holding that the general damages for wrongful death contemplated by the statute can be recovered without any special allegations of pecuniary loss.

Same—Evidence.—Cited in *Coffeyville Mining & Gas. Co. v. Carter*, 65 Kan. 565, 70 Pac. 635, holding that it was competent in an action for wrongful death to show that one of deceased's daughters was in bad health and that he was kind and affectionate towards his children.

Same—Elements of action.—Cited in *Western Union Telegraph Co. v. McGill*, 57 Fed. 699, 6 C. O. A. 521, 21 L. R. A. 818, holding that the existence of one of the beneficiaries specified by statute and pecuniary loss to him must be alleged and proved.

Exemplary damages—When recoverable.—Cited in *Chicago, K. & W. R. Co. v. O'Connell*, 46 Kan. 581, 28 Pac. 947, holding that in an action for personal injuries an instruction authorizing exemplary damages was improper, there being no evidence to justify it.

Cited in note in 59 Am. St. Rep. 599, on exemplary damages against corporations.

Secondary evidence of foreign records.—Cited in note in 5 L. R. A. (N. S.) 958, on admissibility in evidence of copies of records of other states.

19 KAN. 95, ARNOTT v. KANSAS PAC. RY. CO.

Accession—Effect.—Cited in *Atchison, T. & S. F. Ry. Co. v. Schriver*, 72 Kan. 550, 84 Pac. 119, 4 L. R. A. (N. S.) 1066, holding that flour sacks furnished to a manufacturer and filled by him with flour were accessory to the flour, and gave the original owner of the sacks no right of possession.

19 KAN. 111, NEAL v. KELLER

19 KAN. 114, SHUSTER v. FINAN

Appearance—Effect.—Cited in *Miller v. Bogart*, 19 Kan. 117, holding that by the voluntary appearance of the parties in the district court on the appeal

of a nonappealable case that court acquired jurisdiction; *Hodgin v. Barton*, 23 Kan. 740, holding that where the parties appeared in district court, and it had jurisdiction of the subject-matter, a motion to dismiss the appeal for lack of jurisdiction by the justice court was properly denied; *St. Louis, K. & A. Ry. Co. v. Quinn*, 24 Kan. 370, holding that, where the parties appeared in district court on an appeal in eminent domain proceedings, the court acquired jurisdiction, and delay in taking the appeal was waived; *Freeman v. Waynant*, 25 Kan. 279; *Gregg, Son & Co. v. Garverick*, 33 Kan. 190, 5 Pac. 751; *Missouri Pac. Ry. Co. v. Lea*, 47 Kan. 268, 27 Pac. 987—holding that a voluntary appearance in district court on appeal gave that court jurisdiction of the parties.

Jurisdiction—District court.—Cited in *Atchison, T. & S. F. R. Co. v. Ireland*, 19 Kan. 405, as to the jurisdiction of the district court.

Distinguished in *Berroth v. McElvain*, 41 Kan. 269, 20 Pac. 850; *Ball v. Biggam*, 43 Kan. 327, 23 Pac. 565—holding that on appeal in a case where the justice court had no jurisdiction, and the parties did nothing to give the district court any greater jurisdiction than the justice court had, the district court acquired no jurisdiction; *Missouri Pac. Ry. Co. v. Atchison*, 43 Kan. 529, 23 Pac. 610, holding that, when a case involving title or boundaries is certified by a justice of the peace to the district court, that court exercises original and not appellate jurisdiction.

Same—Waiver of objections.—Cited in *Dickson v. Randal*, 19 Kan. 212; *Kansas City, St. J. & C. B. R. Co. v. Rodebaugh*, 38 Kan. 45, 15 Pac. 899, 5 Am. St. Rep. 715—holding that objections to the jurisdiction of a justice of the peace were too late when first made on appeal; *Scott v. Kreamer*, 37 Kan. 753, 16 Pac. 123, holding that, after a new trial in justice court and an appeal to the district court, it was too late to raise the point that the justice lost jurisdiction by delay in granting the new trial; *Limerick v. Gorham*, 37 Kan. 739, 15 Pac. 909, holding that parties voluntarily litigating a matter within the jurisdiction of the district court, without objecting to the form of the proceedings, could not afterwards attack its jurisdiction; *Ennor v. Raine*, 27 Nev. 178, 74 Pac. 1, holding that, where the court had jurisdiction of the subject-matter of a counterclaim, the objection that it was not a proper counterclaim was waived by failure to raise it.

Levy—Trial of ownership—Appealability.—Cited in *Dilley v. McGregor*, 24 Kan. 361, holding that there is no right of appeal in a proceeding to determine the ownership of property levied on by a constable under process of justice court.

19 KAN. 117, MILLER v. BOGART

Appearance—Effect.—Cited in *Hodgin v. Barton*, 23 Kan. 740; *St. Louis, K. & A. Ry. Co. v. Quinn*, 24 Kan. 370; *Gregg, Son & Co. v. Garverick*, 33 Kan. 190, 5 Pac. 751—holding that an appearance in the district court on appeal conferred jurisdiction on that court.

Jurisdiction—District court.—Cited in *Atchison, T. & S. F. R. Co. v. Ireland*, 19 Kan. 405, as to the jurisdiction of the district court; *Berroth v. McElvain*, 41 Kan. 269, 20 Pac. 850; *Ball v. Biggam*, 43 Kan. 327, 23 Pac. 565—holding that where the justice court had no jurisdiction, and the parties did nothing to give the district court any greater jurisdiction than the justice court had, the district court acquired no jurisdiction; *Missouri Pac. Ry. Co. v. Atchison*, 43 Kan. 529, 23 Pac. 610, holding that, where a justice of the peace certified a case involving title or boundaries to the district court, the jurisdiction of that court was original and not appellate.

Same—Waiver of objections.—Cited in *Limerick v. Gorham*, 37 Kan. 739, 15 Pac. 909, holding that parties voluntarily litigating matters without objection to the form of the proceedings could not afterwards attack the court's jurisdiction; *Scott v. Kreamer*, 37 Kan. 753, 16 Pac. 123, holding that, after a

new trial in justice court and an appeal to the district court, it was too late to claim that the justice lost jurisdiction by delay in granting the new trial; *Kansas City, St. J. & C. B. Ry. Co. v. Rodebaugh*, 38 Kan. 45, 15 Pac. 899, 5 Am. St. Rep. 715, holding that an objection to the jurisdiction of a justice of the peace was too late, when first made on appeal.

Replevin—Appealability—Value of property.—Cited in *Nordmark v. Nystrom*, 46 Kan. 117, 26 Pac. 449, holding that no appeal lies in replevin tried in justice court with a jury, where the value of the property and the damages from its detention do not exceed \$20.

19 KAN. 120, JENNINGS v. McKAY

Mortgages—Default—Attorney's fee—When recoverable.—Cited in *Re Roche*, 101 Fed. 956, 42 C. C. A. 115, holding that, under a stipulation for an attorney's fee on foreclosure, none was recoverable where the mortgage debt was proved in bankruptcy and the property sold by the trustee; *Gunby v. Armstrong*, 133 Fed. 417, 66 C. C. A. 627, holding that, under a stipulation in a building and loan mortgage for an attorney's fee in case of default, none was recoverable where the borrower was not in default when the association became insolvent.

19 KAN. 123, McBRIDE v. REITZ

Exemptions.—Cited in note in 91 Am. Dec. 424, on exemption of earnings or wages.

19 KAN. 127, STATE v. SAUNDERS, 27 AM. REP. 98

Interstate commerce—Validity of state laws.—Cited in *McDonald & Johnson v. Southern Express Co.*, 134 Fed. 282, holding that a statute prohibiting the shipment without the state of shad fish, whether caught within or without the state, was void as an interference with interstate commerce; *Stubbs v. People*, 40 Colo. 414, 90 Pac. 1114, 11 L. R. A. (N. S.) 1071, 122 Am. St. Rep. 1068, 13 Ann. Cas. 1025, holding that a statute prohibiting the importation of "docked" horses into a state, or their use after importation, was void as an interference with interstate commerce; *Territory v. Evans*, 2 Idaho (Hash.) 668, 23 Pac. 115, 7 L. R. A. 288, holding that a statute prohibiting the exportation of fish from a territory was void; *Hardy v. Atchison, T. & S. F. R. Co.*, 32 Kan. 698, 5 Pac. 6, holding that the inaction of Congress on the subject of interstate commerce does not justify legislation by the states relative thereto.

Cited in note in 27 Am. St. Rep. 558, on state regulation of interstate commerce.

Game laws—Power of state.—Cited in *Geer v. State of Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793, holding that a state Legislature has power to regulate the killing of game.

19 KAN. 131, NETCOTT v. PORTER

Pleadings—Defects—Waiver or cure.—Cited in *Bashor & Marx v. Nordyke & Marmon Co.*, 25 Kan. 222; *Clay v. Hildebrand Bros. & Jones*, 34 Kan. 694, 9 Pac. 466—holding that a failure to reply to new matter was waived, where the case was tried without objection as if a reply was filed; *Briggs v. Latham*, 36 Kan. 205, 18 Pac. 129, holding that defective pleadings or the want of pleadings may be cured by the subsequent proceedings; *State ex rel. Bradford v. Malo*, 42 Kan. 120, 22 Pac. 849 (dissenting opinion), holding that, where an issue was tried as if raised by the pleadings, they should be regarded as amended to conform to the proof.

19 KAN. 135, BERRY v. CARTER

Set-off and counterclaim—Propriety.—Cited in *Christy v. Jones*, 39 Kan. 183, 18 Pac. 56, holding that a counterclaim, not connected with the subject of

plaintiff's action and not arising on contract, nor ascertained by the decision of a court, was not a proper counterclaim.

Cited in note in 89 Am. Dec. 496, on scope and office of counterclaim.

Arbitration.—Cited in note in 56 Am. Dec. 385 (par. 1), on effect of submitting or agreeing to submit to arbitration; in 15 L. R. A. 143, on agreements to arbitrate; in 31 L. R. A. (N. S.) 689, on bringing suit before award as revocation of submission to arbitration.

Fences.—Cited in note in 22 L. R. A. 109, on sufficiency of fences.

19 KAN. 141, COMMISSIONERS OF POTTAWATOMIE COUNTY v. MORRELL

Counties—Liability for medical services.—Cited in Board of Com'rs of Clay County v. Renner, 27 Kan. 225, holding that a township trustee may bind the county for medical services furnished to a temporary pauper; Board of Com'rs of Smith County v. Board of Com'rs of Osborne County, 29 Kan. 72, holding that a county was not liable for medical services furnished to its prisoners while in the jail of another county, when not authorized by it or any of its officers.

Overseers of the poor—Duty towards sick persons.—Cited in Atchison. T. & S. F. R. Co. v. Weber, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543, as to the duty of overseers of the poor to grant temporary relief to nonresident sick persons.

Statutes—Construction—Examining whole act.—Cited in Wenger v. Taylor, 39 Kan. 754, 18 Pac. 911; Territory ex rel. Sampson v. Clark, 2 Okl. 52, 35 Pac. 832—holding that in construing statutes, the intention must be ascertained from the whole act.

19 KAN. 144, RICE v. HARVEY

Justice's court—New trial—Grounds.—Cited in Thellen v. Hann, 27 Kan. 778, holding that, where it was not claimed that a verdict in justice court was obtained by fraud, partiality, or undue means, a motion for a new trial was properly denied, unless the verdict was unsupported by the evidence or was contrary to law.

Motion for new trial—Necessity.—Cited in Central Branch R. Co. v. Philippi, 20 Kan. 9, as to the necessity for a motion for a new trial in justice court; Holland v. Mudenger, 22 Kan. 731; Mills v. Kansas Lumber Co., 26 Kan. 574—holding that a judgment of a justice of the peace cannot be reversed on error, where no proper motion for a new trial or to set aside the verdict has been made; Decker v. House, 30 Kan. 614, 1 Pac. 584; McNally v. Keplinger, 37 Kan. 556, 15 Pac. 534—holding that errors at the trial, including erroneous findings of the court or jury, are waived where no motion for a new trial is made.

Inferior tribunals—Mode of review.—Cited in Greenwell v. Greenwell, 28 Kan. 413, holding that a case tried in justice court without a jury could not be reviewed on petition in error; Hart Pioneer Nursery Co. v. Scruggs, 36 Kan. 407, 14 Pac. 145, holding that erroneous rulings of a justice of the peace on the admission of evidence cannot be reviewed on error; Estrel v. Diehl, 6 Kan. App. 245, 51 Pac. 810, holding that orders of officers exercising judicial functions can be reviewed by the district court by petition in error, although there is also a remedy by appeal; Maggart v. Keele, 20 Okl. 681, 95 Pac. 466, holding that a final order of a justice of the peace can be reviewed by petition in error.

19 KAN. 150, FOWLER v. YOUNG

Motion for new trial—Time for filing.—Cited in Lucas v. Sturt, 21 Kan. 480; City of Osborne v. Hamilton, 29 Kan. 1—holding that a motion for a new trial, not shown to have been made in time, was properly overruled; Clement, Same

& Co. v. Hartzell, 60 Kan. 317, 56 Pac. 504, holding that a motion for a new trial, filed more than three days after verdict, was improperly sustained; Freelove v. Gould, 8 Kan. App. 760, 45 Pac. 454, holding that the filing of a written motion for a new trial within three days is sufficient, although not actually presented to the court within that time.

Same—Necessity for purpose of review.—Cited in Clayton v. School Dist. No. 1, 20 Kan. 256; Gruble v. Ryus, 23 Kan. 195; Decker v. House, 30 Kan. 614, 1 Pac. 584; McNally v. Keplinger, 37 Kan. 556, 13 Pac. 534; Ryland v. Coyle, 7 Okl. 226, 54 Pac. 456—holding that errors during the trial are waived, unless a proper motion for a new trial is duly filed; State v. Riddle, 20 Kan. 711; City of Atchison v. Byrnes, 22 Kan. 65; State v. Benson, 22 Kan. 471; Jarrett v. Apple, 31 Kan. 693, 3 Pac. 571—holding that errors at the trial, which were not mentioned in the motion for a new trial, could not be reviewed; Lee v. United States, 7 Okl. 558, 54 Pac. 792, holding that errors of law occurring during the trial, which are apparent on the face of the record proper, will be reviewed without any motion for a new trial;

19 KAN. 159, BLANKENSHIP v. BLANKENSHIP

Divorce—Alimony—Lien.—Cited in Gaston v. Gaston, 114 Cal. 542, 46 Pac. 609, 55 Am. St. Rep. 86, holding that, instead of assigning any of the community property to the wife absolutely, the court in a divorce suit could charge a lien thereon in her favor; Johnson v. Johnson, 66 Kan. 546, 72 Pac. 267, holding that in a divorce suit the court may make the alimony awarded a lien on the divorced husband's homestead; Scott v. Scott, 80 Kan. 489, 103 Pac. 1005, 25 L. R. A. (N. S.) 132, 133 Am. St. Rep. 217, 18 Am. Cas. 544, holding that an allowance of alimony payable in installments did not become a lien on the husband's property, it being the court's intention that it should not.

Cited in note in 102 Am. St. Rep. 708, 709, on power of courts to create and enforce liens to secure payment of alimony; in 25 L. R. A. (N. S.) 134, 138, on money decree for alimony or separate maintenance as lien on realty.

Same—Homestead—Who entitled.—Cited in Goldeborough v. Hewitt, 23 Okl. 66, 99 Pac. 907, 138 Am. St. Rep. 795, holding that the court in a divorce suit might have given the homestead to either party, but, having made no disposition of it, it belonged to the husband as the head of the family.

Cited in note in 23 L. R. A. 240, on effect of divorce on homestead rights.

19 KAN. 162, BURNS v. BURGETT

Appeal and error—Record—Requisites.—Cited in Cook v. Challiss, 55 Kan. 363, 40 Pac. 643, holding that a substantial compliance with the statutes relative to transcripts is required when a review is sought by that method of procedure.

19 KAN. 165, MEYER v. GRAEBER

Mortgage—Secured note—Constructing together.—Cited in Spesard v. Spesard, 75 Kan. 87, 88 Pac. 576; Cabbell v. Knote, 2 Kan. App. 68, 43 Pac. 309; Kansas Loan & Trust Co. v. Gill, 2 Kan. App. 438, 43 Pac. 991; Bell v. Engvolsen, 64 Wash. 33, 116 Pac. 456—holding that a note and the mortgage given to secure its payment should be construed together as one instrument.

Same—Default in payment of interest—Effect.—Cited in Farmers' Loan & Trust Co. v. Oregon & C. Ry. Co., 24 Fed. 497, holding that the lien of the mortgage may be enforced as to an installment of interest, although the rest of the debt is not due; Motesinger v. Miller, 50 Kan. 578, 58 Pac. 869, holding that under a provision in a note secured by a mortgage that, if interest was not paid annually, it should become principal without any express promise to pay annually, a failure to so pay was not a default.

Same—Acceleration clause—Effect.—Cited in *Snyder v. Miller*, 71 Kan. 410, 80 Pac. 970, 69 L. R. A. 250, 114 Am. St. Rep. 489, holding that the statute of limitations ran against a mortgage containing an acceleration clause from the date of the first default.

Same—Negotiability of note.—Cited in note in 35 L. R. A. 537, on negotiability of note secured by mortgage as affected by provisions in mortgage.

19 KAN. 168, DOYLE v. BOYLE

False imprisonment—Requisites.—Cited in *Whitman v. Atchison, T. & S. F. R. Co.*, 85 Kan. 150, 116 Pac. 234, 34 L. R. A. (N. S.) 1029, holding that false imprisonment may be committed by acts or words, or both, and that actual confinement is not required.

Imprisonment for debt.—Cited in note in 34 L. R. A. 635, on constitutionality of imprisonment for debt.

19 KAN. 174, ADAMS v. EVANS

Residence—Change.—Cited in *Garlinghouse v. Mulvane*, 40 Kan. 428, 19 Pac. 798, holding that a temporary absence from the state with the intention of returning did not make a party a nonresident; *Hatch v. Smith*, 6 Kan. App. 645, 49 Pac. 698, holding that a person's residence cannot be changed by mere intent, without an actual removal.

Cited in note in 19 L. R. A. 667, on what is nonresidence for purpose of attachment.

19 KAN. 177, HUDSON v. SOLOMON

Cited in *Jones v. Caldwell*, 21 Kan. 186.

Election contests—Ballots as evidence.—Cited in *Spidle v. McCracken*, 45 Kan. 356, 25 Pac. 897; *Dennis v. Caughlin*, 23 Nev. 188, 44 Pac. 818—holding that, where the ballots cast at an election were shown to have been tampered with, they lost their force as evidence and the returns were controlling; *Wheeler v. Lawrence*, 78 Kan. 878, 99 Pac. 228, holding that to render the original ballots admissible in an election contest it is sufficient to show that they have been in the custody of the proper officers and have been so kept as to make it improbable that they have been tampered with; *Farrell v. Larsen*, 20 Utah, 233, 73 Pac. 227; *Fishback v. Bramel*, 6 Wyo. 293, 44 Pac. 840—holding that, where it was not shown that care was exercised to preserve the ballots, they were not admissible to impeach the official canvass; *Avery v. Williams*, 8 Ariz. 353, 76 Pac. 463; *Hartman v. Young*, 17 Or. 150, 20 Pac. 17, 2 L. R. A. 593, 11 Am. St. Rep. 787—holding that the original ballots, when shown to be genuine, are controlling over the canvass as to the votes cast, and that the mere opening of the ballot box by the clerk for the purpose of seeing if the poll book was there was not such tampering with the ballots as required their exclusion.

Cited in note in 11 Am. St. Rep. 798, 799, on ballots as best evidence of votes cast; in 33 L. R. A. 887, on power of courts to require ballot boxes to be produced or opened in proceedings other than election contests; in 30 L. R. A. (N. S.) 606, on scope and effect of election law provisions for preserving ballots.

19 KAN. 187, MOORE v. CUTLER

Judicial sale—Failure to appraise—Effect.—Cited in *Shaffer v. Knox*, 7 Kan. App. 182, 53 Pac. 735, holding that a failure to appraise attached property sold under an order of sale after final judgment did not make the sale absolutely void, where the property sold for more than two-thirds of the appraised value as found under the attachment.

19 KAN. 189, STATE v. GREWELL

19 KAN. 195, EVERETT v. LUSH

Findings—Failure to support conclusions.—Distinguished in *Tyler v. Sooy*, 19 Kan. 593, holding that where the finding, although it did not support the conclusion of law, did not show any right in the complaining party, it could not be said that the judgment was erroneous.

Ejectment—Partial recovery.—Cited in *Gatton v. Tolley*, 22 Kan. 678; *Erskin v. Wood*, 77 Kan. 577, 95 Pac. 418—holding that, in ejectment, the plaintiff may recover any portion of the land claimed to which his proof shows that he is entitled.

Cited in note in 54 Am. Dec. 415, on recovery in ejectment of part under claim for whole.

Surveys—Controlling evidence.—Cited in *Shaffer v. Weech*, 34 Kan. 595, 9 Pac. 202, holding that the monuments and the lines actually run in laying out a road prevailed over the map and field notes of the surveyor; *Foskuhl v. Herzer*, 77 Kan. 809, 91 Pac. 56, holding that, where government corners can be ascertained, the monuments must govern, and the field notes be disregarded.

Same—Missing points—How established.—Cited in *Tarpenning v. Cannon*, 28 Kan. 665, as to proof of the location of boundary lines; *Reinert v. Brunt*, 42 Kan. 43, 21 Pac. 807, holding that a surveyor should establish missing corner from all the nearest known original corners in all directions, following section lines.

19 KAN. 201, HANSON v. LAWSON

Value—Evidence—Market price.—Cited in *Evans v. Moseley*, 84 Kan. 322, 114 Pac. 374, holding that, where the market price of property sold at the place of delivery was largely governed by the market price at another place, evidence of the price at that place was competent.

19 KAN. 204, WANDS v. SCHOOL DIST. NO. 71

Costs—Payment—Imposing as condition of granting privilege.—Cited in *Hockett v. Turner*, 19 Kan. 527, holding that, in the court's discretion, it is proper as a general rule to tax the costs of a term against a party whose fault necessitates a continuance; *Casterline v. Day*, 26 Kan. 306, holding that it was error to require plaintiff to pay all costs as a condition of filing a bill of particulars.

19 KAN. 207, HANSON v. WOLCOTT

Void judgments—Vacation—Extrinsic evidence.—Cited in *Reynolds v. Fleming*, 30 Kan. 106, 1 Pac. 61, 46 Am. Rep. 86; *Dane v. Daniel*, 28 Wash. 155, 68 Pac. 446—holding that a judgment rendered without jurisdiction may be set aside on motion, where extrinsic evidence is necessary to show lack of jurisdiction.

Same—Time for.—Cited in *First Nat. Bank of Newton v. Wm. B. Grimes Dry Goods Co.*, 45 Kan. 510, 26 Pac. 56; *Gille v. Emmons*, 58 Kan. 118, 48 Pac. 569, 62 Am. St. Rep. 609; *Anglea v. McMaster*, 17 Okl. 501, 87 Pac. 660; *Harding v. Gillett*, 25 Okl. 199, 107 Pac. 665; *White v. Ladd*, 41 Or. 324, 68 Pac. 739, 93 Am. St. Rep. 732; *Multnomah County v. Portland Cracker Co.*, 49 Or. 845, 90 Pac. 155—holding that an absolutely void judgment may be set aside on motion at any time.

Same—Unauthorized appearance.—Cited in note in 21 L. R. A. 853, on effect of judgment obtained upon unauthorized appearance by attorney.

Same—Conditions precedent.—Cited in *Ozark Marble Co. v. Still*, 24 Okl. 569, 103 Pac. 586, holding that a judgment against a party who was not served could be set aside, without any showing that he had a valid defense.

Cited in note in 18 L. R. A. (N. S.) 407, on necessity of affidavit of meritorious defense, and necessity of showing such defense, to vacate judgment rendered without jurisdiction of defendant's person.

Same—Form of remedy.—Cited in *McNeill v. Edie*, 24 Kan. 108, holding that the collection of a judgment rendered without jurisdiction may be enjoined; *Steele v. Duncan*, 47 Kan. 511, 28 Pac. 206, holding that parties seeking to vacate a void judgment are not confined to the statutory remedy by motion.

Cited in note in 60 Am. St. Rep. 643, 644, 661, on vacation of judgments on motion when not specially authorized by statute.

Same—Collateral attack.—Cited in *Mastin v. Gray*, 19 Kan. 458, 27 Am. Rep. 149, holding that a domestic judgment rendered without jurisdiction may be impeached collaterally by extrinsic evidence.

Cited in note in 23 Am. St. Rep. 105, on collateral attack upon judgment.

Service—Sheriff's return—Impeachment.—Cited in *Great West Mining Co. v. Woodmas of Alston Mining Co.*, 12 Colo. 46, 20 Pac. 771, 18 Am. St. Rep. 204, holding that a sheriff's return of service may be impeached as to matters not presumptively within his knowledge.

19 KAN. 210, HUBBARD v. COWAN

19 KAN. 212, DICKSON v. RANDAL

Jurisdiction—Effect of appearance.—Cited in *Freeman v. Waynant*, 25 Kan. 279; *Missouri Pac. Ry. Co. v. Lea*, 47 Kan. 268, 27 Pac. 987—holding that a voluntary and general appearance gave jurisdiction over the parties.

Same—Waiver of objections.—Cited in *Dodge v. Kincaid Bros.*, 30 Kan. 346, 1 Pac. 107, as to waiver of objections to jurisdiction by failure to raise.

Replevin—Demand.—Cited in *Johns v. Hastings*, 22 Kan. 464, affirming on the authority of the cited case; *Chapin v. Jenkins*, 50 Kan. 385, 31 Pac. 1084, holding that, where defendant asserted a claim to the property inconsistent with plaintiff's right of possession, replevin could be maintained without a demand; *Burgwald v. Donelson*, 2 Kan. App. 301, 43 Pac. 100; *Burchett v. Purdy*, 2 Okl. 391, 37 Pac. 1053—holding that, where a sheriff levied on the property of one person under process against another, replevin could be maintained without a demand for its return.

Cited in note in 25 Am. St. Rep. 258, on replevin against officer.

Instructions—Refusal—When not error.—Cited in *Western Union Telegraph Co. v. Getto-McClung Boot & Shoe Co.*, 9 Kan. App. 863, 61 Pac. 504, holding that it was not error to refuse an instruction which was not good as asked.

19 KAN. 216, FESSLER v. HAAS

Public lands—Interest of settler—Alienation.—Cited in *Lapham v. Head*, 21 Kan. 382, holding that a sale of the possession and improvements on government land was not void as against public policy; *Reasoner v. Markley*, 25 Kan. 635, holding that a settler on land settled on and occupied as a town site could mortgage it, although the title was still in the government; *Hardesty v. Service*, 45 Kan. 614, 26 Pac. 29; *Tecumseh State Bank v. Maddox*, 4 Okl. 583, 46 Pac. 563—holding that the relinquishment of a right to a homestead entry on public land was a valid consideration for a contract; *Coleman v. Territory*, 5 Okl. 201, 47 Pac. 1079, holding that a relinquishment of a right to a homestead entry was an instrument affecting property rights, and could be the subject of forgery.

19 KAN. 218, STEWART v. WAITE

Justice court—Delay in giving judgment—Effect.—Cited in *Conwell v. Kuykendall*, 29 Kan. 704, holding that judgment rendered, but not entered by

justice of the peace within four days, was valid; *State ex rel. Collier v. Houston*, 36 Mont. 178, 92 Pac. 476, 12 Ann. Cas. 1027, holding that, under a statute requiring judgment to be entered at the close of the trial, the justice lost jurisdiction by taking the case under advisement without adjourning the trial.

Same—Waiver.—Cited in *Stillman v. McConnell*, 36 Kan. 398, 13 Pac. 571, holding that, while a judgment rendered after four days was voidable, and could have been corrected by petition in error, the delay was waived by a party who accepted the judgment; *Scott v. Kreamer*, 37 Kan. 753, 16 Pac. 123, holding that an order of a justice of the peace granting a new trial more than five days after judgment was erroneous, but not void, and the error was waived by a party making no objection at the time or on the new trial.

19 KAN. 221, NEITZEL v. HUNTER

Time—Mode of computation.—Cited in *Mound City Mut. Life Ins. Co. v. Twining*, 19 Kan. 349, as to the mode of computing time; *Schultz v. Hine*, 39 Kan. 334, 18 Pac. 221, holding that, under a statute requiring service of a summons three days before the time for appearance, the day of service should be excluded and the day of appearance included; *Howbert v. Heyle*, 47 Kan. 58, 27 Pac. 116, holding that a petition and notice of hearing served on April 18th was served 10 days prior to the hearing on April 28th.

Cited in note in 49 L. R. A. 216, 217, on first and last days in computation of time.

Answer—Time for service—Time for trial.—Cited in *Lanoue v. McHannan & Co.*, 19 Kan. 408, as to the time within which to answer the summons, and as to the time of trial in case of default.

Default—Leave to answer—Right to.—Cited in *Swerdsfeger v. State*, 21 Kan. 475; *Merten v. Newforth*, 44 Kan. 706, 25 Pac. 204; *Horton v. Haines*, 23 Okl. 378, 102 Pac. 121—holding that a party in default is not entitled as a matter of right to permission to file an answer.

Mortgage—Foreclosure—Personal judgment.—Cited in *Beecher v. Ireland*, 46 Kan. 97, 26 Pac. 448, holding that a personal judgment could not be rendered against a purchaser who had assumed payment of the mortgage, where these facts were not alleged in the petition served on him.

19 KAN. 225, ST. JOSEPH & D. C. R. CO. v. SMITH

Receivers—Jurisdiction of court appointing.—Cited in *Meredith Village Sav. Bank v. Simpson*, 22 Kan. 414; *Howell v. Hough*, 46 Kan. 152, 26 Pac. 436; *State ex rel. Godard v. State Bank of Circleville*, 84 Kan. 366, 114 Pac. 381—holding that a court appointing a receiver could take to itself all controversies affecting the property in his custody, and compel the parties to proceed nowhere else; *Meredith Village Sav. Bank v. Simpson*, 22 Kan. 414, holding that a court appointing a receiver could revoke permission to sue him.

Same—Jurisdiction of other courts.—Cited in *Central Trust Co. of New York v. East Tennessee, V. & G. Ry. Co.*, 59 Fed. 523; *Foreman v. Central Trust Co. of New York*, 71 Fed. 776, 18 C. C. A. 321—as to the right to sue a receiver without leave, in the absence of a statute authorizing such suits; *Brooks v. Vermont Cent. R. Co.*, Fed. Cas. No. 1,964, holding that the fact that the bringing of a suit may be a contempt of another court does not affect the jurisdiction of the court where the suit is brought.

Same—Actions against corporation during receivership.—Cited in *Warner v. Imbeau*, 63 Kan. 415, 65 Pac. 648, holding that a corporation could be sued in its own name, notwithstanding a receivership, where it had not been dissolved.

Same—Leave to sue.—Cited in notes in 5 Am. St. Rep. 316 (par. 2); 74 Am. St. Rep. 288—on necessity of obtaining leave to sue receiver.

Same—Priority of liens or claims.—Cited in note in 54 Am. St. Rep. 421, on claims taking precedence over mortgages of railways and similar property.

Same—Exclusiveness of jurisdiction.—Cited in note in 20 L. R. A. 393, on exclusiveness of jurisdiction by appointment of receiver.

Taxation—Board of equalization—Powers.—Cited in *Gillett v. Treasurer of Lyon County*, 30 Kan. 166, 1 Pac. 577, holding that since 1876 the board of equalization may change assessments of personal property without personal notice to the owner; *Challiss v. Rigg*, 49 Kan. 119, 30 Pac. 190; *State ex rel. Jennings Bros. Inv. Co. v. Armstrong*, 19 Utah, 117, 56 Pac. 1076—holding that the board of equalization could raise the assessment of a whole town, city, or district.

19 KAN. 234, COMMISSIONERS OF OTTAWA COUNTY v. NELSON, 27 AM. REP. 101

Cited in *Towle v. Towle*, 81 Kan. 675, 107 Pac. 228, 27 L. R. A. (N. S.) 550.

Municipal corporations—Change of boundaries—Taxation.—Cited in *Chandler v. Reynolds*, 19 Kan. 249; *State ex rel. Robb v. Board of Com'rs of Kiowa County*, 41 Kan. 630, 21 Pac. 601—holding that Acts 1873, c. 142, relative to taxation on the change of boundary lines, was valid.

Same—Liability of detached territory.—Cited in *Craft v. Lofinck*, 34 Kan. 365, 8 Pac. 359, holding that the Legislature could not make territory detached from a town liable on bonds on which no liability was created prior to the detachment; *State ex rel. Robb v. Board of Com'rs of Kiowa County*, 41 Kan. 630, 21 Pac. 601, holding that Acts 1873, c. 142, applies as well when the detached territory is formed into a new township or county as when it is attached to an existing township or county.

Same—Relation of new to old counties.—Cited in note in 20 Am. St. Rep. 678, on relation of new counties and their officers to old counties.

Taxation—Uniformity.—Cited in *Francis v. Atchison, T. & S. F. R. Co.*, 19 Kan. 303, holding that taxation of railroad property in unorganized counties was valid, although other property was not taxed, owing to lack of means of collection; *Beebe v. Wells*, 37 Kan. 472, 15 Pac. 565, holding that a stenographer's fee required to be paid in actions in the district court, is not a tax within the constitutional provision respecting uniformity; *Board of Com'rs of Franklin County v. City of Ottawa*, 49 Kan. 747, 31 Pac. 788, 33 Am. St. Rep. 396, holding that the constitutional provision relative to uniformity of taxation does not apply to special assessments for public improvements; *Midland Elevator Co. v. Stewart*, 50 Kan. 378, 32 Pac. 33; *State v. Lawrence*, 79 Kan. 234, 100 Pac. 485—holding that an act authorizing a higher rate of taxation in one taxing district than was permitted in others did not violate the constitutional requirement of uniformity; *In re Page*, 60 Kan. 842, 58 Pac. 478, 47 L. R. A. 68, holding that a tax on insurance contracts was one on property, and subject to the constitutional provision requiring uniformity; *Board of Com'rs of Sumner County v. City of Wellington*, 66 Kan. 590, 72 Pac. 216, 60 L. R. A. 850, holding that the constitutional requirement of uniformity of taxation did not prevent the exemption of city property; *Town of Tekoa v. Reilly*, 47 Wash. 202, 91 Pac. 769, 13 L. R. A. (N. S.) 901, as to the application of such a provision to poll taxes.

Same—Special assessment as "tax."—Cited in *Todd v. City of Atchison*, 9 Kan. App. 251, 59 Pac. 676, holding that a special assessment was a "tax." within a constitutional provision that no property should be exempt from sale for taxes.

Same—Power to exempt.—Cited in *National Bank of Lawrence v. Barber*, 24 Kan. 584, as to the power to exempt from taxation personal property in addition to that exempted by the Constitution.

Cited in note in 19 L. R. A. 80, on power of state Legislature to exempt from taxation.

Same—Poll taxes.—Cited in note in 29 L. R. A. 406, on poll taxes.

Public officers—Terms.—Cited in *State ex rel. Little v. Wentworth*, 55 Kan. 298, 40 Pac. 648, as to the term of office of public officers; *Wilson v. Clark*, 63 Kan. 505, 65 Pac. 705, holding that an extension of a term of office in an exceptional case by postponing the election for one year was not unconstitutional.

Public funds—Application.—Cited in *Yamhill County v. Foster*, 53 Or. 124, 99 Pac. 286, holding that a county may be required to apply its funds to any legitimate public purpose, so long as it does not conflict with some constitutional provision.

19 KAN. 249, CHANDLER v. REYNOLDS

Municipal corporations—Change of boundaries—Taxation.—Cited in *State ex rel. Robb v. Board of Com'rs of Kiowa County*, 41 Kan. 630, 21 Pac. 601, as to Acts 1873, c. 142, relative to taxation on a change of boundaries; *Commissioners of Ottawa County v. Nelson*, 19 Kan. 234, 27 Am. Rep. 101; *Hurt v. Hamilton*, 25 Kan. 76; *Board of Com'rs of Morris County v. Hinchman*, 81 Kan. 729, 3 Pac. 504—as to taxation on a change of boundary lines.

Same—Liability of detached territory.—Cited in *Board of Com'rs of Marion County v. Board of Com'rs of Harvey County*, 28 Kan. 181, holding that, where bonds were issued before certain territory was detached from the issuing county, funding bonds subsequently issued to take up the first issue were a charge on the detached territory; *Craft v. Lofinck*, 34 Kan. 365, 8 Pac. 359, holding that, where township bonds were issued after a detachment of territory, a subsequent act making detached territory liable for bonds authorized and not issued at the time of the detachment, if applicable in such a case, was void; *Vandriess v. Hill*, 58 Kan. 611, 50 Pac. 872, holding that where a township was destroyed, made a part of an unorganized county, and subsequently divided into three townships, they were not liable for its debts.

Same—Rights of detached territory.—Cited in *City of Wellington v. Wellington Tp.*, 46 Kan. 213, 26 Pac. 415, holding that territory detached from a town had thereafter no interest in property belonging to the original township.

19 KAN. 253, MANVILLE v. FELTER, Same case on subsequent appeal, 23 Kan. 191

Remedies—Civil or criminal.—Cited in *State ex rel. Vance v. Crawford*, 28 Kan. 743, holding that the remedy given by statute to shut up and abate places where intoxicating liquors are manufactured, sold, etc., is a criminal proceeding, and not a civil action.

19 KAN. 256, PACIFIC R. CO. v. THOMAS

Corporations—Authority of officers and agents.—Cited in *Central Branch R. Co. v. Ingram*, 20 Kan. 66, holding that, under a statute requiring a demand on railroad companies for payment for injuries to property, a demand on the general superintendent was sufficient; *Union Pac. Ry. Co. v. Beatty*, 35 Kan. 265, 10 Pac. 845, 57 Am. Rep. 160, holding that a division superintendent is presumed to have authority to employ a physician to attend injured employes, but not injured passengers; *Union Pac. Ry. Co. v. Winterbotham*, 52 Kan. 433, 34 Pac. 1052, holding that a division superintendent had authority to employ a physician to attend an injured employe; *Kansas City v. Oullinan*, 65 Kan. 68, 68 Pac. 1099, holding that a general manager of a town-site company was presumed to have authority to sign a petition for street improvements; *Spelman v. Gold Coin Mining & Milling Co.*, 26 Mont. 76, 66 Pac. 597, 55 L. R. A. 640, 91 Am. St. Rep. 402, holding that a general manager of a mining

corporation had no such implied authority; *Baines v. Coos Bay Navigation Co.*, 45 Or. 307, 77 Pac. 400, holding that the general manager of a railroad company had implied authority to issue promissory notes, especially in case of an emergency.

Cited in note in 20 L. R. A. 696, on authority to employ medical services for employé or other person.

Medical services—Liability of employer.—Cited in *Hentig v. Kernke*, 25 Kan. 559, holding that where an employer requested a physician to attend an employé and upon presentation of the bill did not disclaim liability, he was liable.

Cited in note in 4 L. R. A. (N. S.) 39, 62, on duty to provide medical assistance for servant.

19 KAN. 260, *STATE v. LEWIS*, 27 AM. REP. 113

Breaking jail—Unlawful imprisonment as defense.—Cited in *People v. Ah Teung*, 92 Cal. 421, 28 Pac. 577; 15 L. R. A. 190, holding that it was not a crime to escape from imprisonment which was unlawful, without color of authority.

Same—Innocence as defense.—Cited in *State v. Daly*, 41 Or. 515, 70 Pac. 706, holding that a prisoner's innocence is not a defense to a prosecution for aiding him to escape.

Cited in note in 15 L. R. A. 191, on justification of prison breach.

Manacles on accused.—Cited in note in 39 L. R. A. 823, 824, on right of prisoner to appear unmanacled at trial.

19 KAN. 267, *KANSAS PAC. RY. CO. v. LITTLE*

Cited in *Speer v. Missouri, K. & T. Ry. Co.*, 28 Kan. 571.

Exemplary damages—When recoverable.—Cited in *City of Parsons v. Lindsay*, 26 Kan. 426, holding that exemplary damages can be recovered for negligence only when it amounts to wantonness; *Wheeler & Wilson Mfg. Co. v. Boyce*, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571, holding that exemplary damages can be recovered from a corporation for the torts of its agents and servants involving a wrongful intention.

Master and servant—Fellow servants—Who are.—Cited in *Atchison, T. & S. F. R. Co. v. McKee*, 37 Kan. 592, 15 Pac. 434, holding that an employé, assigned to the duty of inspecting, repairing, and providing machinery, stood in the place of the employer, and was not a fellow servant with those operating the machinery; *Atchison, T. & S. F. R. Co. v. Sly*, 41 Kan. 729, 21 Pac. 790, holding that a foreman, who hired, discharged, and paid other employés, represented the employer, and was not a fellow servant; *Atchison & Eastern Bridge Co. v. Miller*, 71 Kan. 13, 80 Pac. 18, 1 L. R. A. (N. S.) 682, holding that employés engaged in the same general business, and whose efforts tend to promote the same general purpose, are fellow servants; *Consolidated Kansas City Smelting & Refining Co. v. Peterson*, 8 Kan. App. 316, 55 Pac. 673, holding that a foreman, who employed and had absolute control of other employés, without immediate supervision by any one else, was not their fellow servant.

Cited in note in 67 Am. Dec. 590, on who are fellow servants.

Same—Vice principal—Liability for negligence.—Cited in *Howard v. Denver & R. G. Ry. Co.*, 26 Fed. 837, holding that an employer is liable for the negligence of a vice principal.

Cited in note in 51 L. R. A. 548, 553, 580, 589, 610, 611, on vice principalship considered with reference to superior rank of negligent servant.

Same—Knowledge of master.—Cited in note in 41 L. R. A. 124, on knowledge as element of employer's liability.

Appeal and review—Harmless error.—Cited in *Woodman v. Davis*, 32 Kan. 844, 4 Pac. 262; *Clouston v. Gray*, 48 Kan. 31, 28 Pac. 983—holding

that a judgment will not be reversed for immaterial or nonprejudicial errors; *Kansas City, Ft. S. & G. R. Co. v. Kier*, 41 Kan. 671, 21 Pac. 770, 13 Am. St. Rep. 311, as to whether erroneous instruction on exemplary damages was prejudicial.

Evidence—Agent's declarations—Admissibility.—Cited in *St. Louis & S. F. Ry. Co. v. Weaver*, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176, holding that it was error to admit the declarations of a party's agent not constituting a part of the res gestæ.

Instructions to disregard testimony.—Cited in note in 86 Am. Dec. 328 (par. 2), on instructing jury to disregard testimony of competent witness.

19 KAN. 273, HANSON v. TOWLE

Decedents' estates—Claims—Necessity of exhibiting.—Cited in *Clawson v. McOune's Adm'r*, 20 Kan. 337, holding that claims against a decedent's estate should be formally exhibited to the executor or administrator, although he has knowledge thereof.

Same—When barred.—Cited in *Screegs v. Tutt*, 23 Kan. 181, holding that a claim was barred where the claimant did not take proceedings to establish it within three years after the administrator gave a bond.

Cited in note in 65 Am. Dec. 597, on running of limitations against estate of decedent.

Same—Powers of administrator.—Cited in *Etna Life Ins. Co. v. Swayze*, 30 Kan. 118, 1 Pac. 36, holding that an administrator had no power to compromise a claim due the estate without the consent of the probate court.

Cited in note in 52 Am. St. Rep. 123, on liabilities of estates of decedents on contracts and for torts of personal representatives.

Limitation of actions—Suspension—Acknowledgment or new promise.—Cited in *Clawson v. McOune's Adm'r*, 20 Kan. 337, holding that an acknowledgment of a claim made in writing by an administrator, not to the claimant, but to the probate court, did not suspend the running of limitations; *Elder v. Dyer*, 26 Kan. 604, 40 Am. Rep. 320, holding that any acknowledgment of a debt indicating that the party making it admits that he is still liable is sufficient to revive debt; *Gragg v. Barnes*, 32 Kan. 301, 4 Pac. 276, holding that note given by a surety on another note to secure the performance of an oral agreement respecting the collection of the other note was not an acknowledgment of liability on the other note; *Clark v. King*, 54 Kan. 222, 38 Pac. 281, holding that an acknowledgment of a debt will revive it, without any promise to pay; *Haythorn v. Cooper*, 65 Kan. 338, 69 Pac. 333; *Durban v. Knowles*, 68 Kan. 397, 71 Pac. 829; *Hawkins v. Brown*, 78 Kan. 284, 97 Pac. 479; *King v. City of Frankfort*, 2 Kan. App. 530, 43 Pac. 983; *Dezell v. Thayer*, 2 Kan. App. 587, 44 Pac. 686; *Richards v. Hayden*, 8 Kan. App. 816, 57 Pac. 978; *Andrew v. Kennedy*, 4 Okl. 625, 46 Pac. 435—holding that an acknowledgment which will revive a debt must be an unqualified and direct admission of a present subsisting debt on which the party is liable.

Modified in *Elder v. Dyer*, 26 Kan. 604, 40 Am. Rep. 320, holding that it is not necessary that an acknowledgment of a debt should contain language indicating a willingness to pay.

Cited in notes in 102 Am. St. Rep. 766, 775; 36 Am. Rep. 197; 40 Am. Rep. 161—on acknowledgment or new promise to suspend running or remove bar of statute of limitations.

Same—Acknowledgment by administrator.—Cited in *Dern v. Olsen*, 18 Idaho, 358, 110 Pac. 164, Ann. Cas. 1912A, 1, holding that an acknowledgment of a debt by an administrator will not suspend the running of the statute of limitations.

Cited in note in 12 Am. Dec. 658, on executor's power to revive debt.

Same—Death of debtor.—Cited in *Alice E. Mining Co. v. Blanden*, 136 Fed. 252; *Nelson v. Herkel*, 30 Kan. 456, 2 Pac. 110—holding that the running of the statute of limitations is suspended between the death of the debtor and the appointment of the administrator; *Bauserman v. Charlott*, 46 Kan. 480, 26 Pac. 1051; *Robertson v. Tarry*, 83 Kan. 716, 112 Pac. 603; *Glazier v. Heneybuss*, 19 Okl. 316; *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316—holding that the death of the debtor will not indefinitely suspend the running of the statute of limitations, where the creditor neglects to take out letters of administration.

Same—Exhibiting claim to administrator.—Cited in *Clifton v. Meuser*, 79 Kan. 655, 100 Pac. 645, holding that exhibiting a claim to an administrator does not suspend the running of the statute of limitations.

Same—Conditional promise to pay.—Cited in *Tridell v. Munhall*, 124 Fed. 802, holding that a conditional promise to pay a debt will not revive it, without proof that the condition has been fulfilled.

Same—Hearing in probate court as "suit."—Cited in *Clawson v. McCune's Adm'r*, 20 Kan. 337, holding that the hearing and allowance of a claim against a decedent's estate by the probate court is a "suit," within the limitation of suits against executors and administrators.

19 KAN. 262, TOWNSDIN v. NUTT

Cited in *Cady v. Case*, 45 Kan. 733, 26 Pac. 448.

Married women—Personal injuries—Recovery for loss of time.—Cited in *City of Wyandotte v. Agan*, 37 Kan. 528, 15 Pac. 529, holding that a married woman, suing for personal injuries, may recover for time lost from a separate business conducted by her, but not for time lost from her household duties; *Atchison, T. & S. F. R. Co. v. Dickey*, 1 Kan. App. 770, 41 Pac. 1070, holding that a husband, suing for loss of his wife's services from personal injuries, must, in addition to alleging the marital relation, show other facts indicating that he was entitled to such services.

Same—Right of action by wife.—Cited in *Mehrhoff v. Mehrhoff*, 26 Fed. 13, holding that a married woman may sue in her own name for the alienation of her husband's affections.

Evidence—Testimony as to feelings.—Cited in *State ex rel. Jackson v. Lindsay*, 85 Kan. 192, 116 Pac. 209, holding that a witness could testify that she heard screams, which disturbed her and made her nervous.

Injuries to relatives.—Cited in note in 48 Am. Dec. 621, on actions for injuries to or death of relatives.

19 KAN. 287, SCHOOL DIST. NO. 82 v. TAYLOR

Possession of land as notice of rights.—Cited in *Greer v. Higgins*, 20 Kan. 420, holding that a purchaser of land had notice of the rights of a person in open, notorious, and exclusive possession under an unrecorded deed, and acquired no title as against him; *Brace v. McBea*, 23 Kan. 379; *McNeil v. Jordan*, 28 Kan. 7; *Deetjen v. Richter*, 33 Kan. 410, 6 Pac. 595; *Uiley v. Fee*, 33 Kan. 683, 7 Pac. 555; *Sheldon v. Atkinson*, 38 Kan. 14, 16 Pac. 68; *Stough v. Badger Lumber Co.*, 70 Kan. 713, 79 Pac. 737; *Janes v. Wilkinson*, 2 Kan. App. 361, 42 Pac. 735; *Kansas City Inv. Co. v. Fulton*, 4 Kan. App. 115, 46 Pac. 188; *Edwards v. Montgomery*, 28 Okl. 862, 110 Pac. 779, 138 Am. St. Rep. 975—holding that actual possession under an apparent claim of ownership is notice to the world of the title or interest of the possessor; *Beaubien v. Hindman*, 38 Kan. 471, 16 Pac. 796, holding that, where a party's possession was not so open, notorious, and exclusive as to put a purchaser on inquiry, one purchasing without actual knowledge was a bona fide purchaser.

Cited in note in 104 Am. St. Rep. 841, on effect of possession of real property as notice.

Instruments—Failure to record—Effect.—Cited in *Tucker v. Vandermark*, 21 Kan. 263, holding that an attachment on land in the actual possession of a third person holding under an unrecorded deed from the attachment debtor created no lien thereon; *Holden v. Garrett*, 23 Kan. 98, holding that the lien of a mortgage was prior to that of a judgment under which a levy was made before the mortgage was recorded.

Notice—Duty of inquiry.—Cited in *Ely v. Pingry*, 56 Kan. 17, 42 Pac. 830, holding that a mortgagee knowing that land was incumbered, but failing to examine the records, was not a bona fide purchaser.

19 KAN. 293, OXFORD FERRY CO. v. SUMNER COUNTY COM'RS

Ferries.—Cited in note in 59 L. R. A. 532, on establishment, regulation, and protection of ferries.

19 KAN. 299, COMMISSIONERS OF OSBORNE COUNTY v. BLAKE, **Same case on subsequent appeal, 25 Kan. 356**

Tax—Amount of levy—Covering previous deficit.—Cited in *Bowen v. West*, 10 Colo. App. 322, 50 Pac. 1035; *Bergman v. Bullitt*, 43 Kan. 709, 23 Pac. 938—as to the right to exceed the authorized tax levy to cover deficits in previous years.

19 KAN. 303, FRANCIS v. ATCHISON, T. & S. F. R. CO.

Taxation—Railroads—Unorganized counties.—Cited in *State ex rel. Atchison, T. & S. F. R. Co. v. Francis*, 23 Kan. 495, as to the constitutionality of a tax on railroad property in unorganized counties.

Same—Uniformity.—Cited in *McHenry v. Alford*, 168 U. S. 651, 18 Sup. Ct. 242, 42 L. Ed. 614, holding that the Legislature may provide different methods of taxation for different classes of property; *Commissioners of Ottawa County v. Nelson*, 19 Kan. 234, 27 Am. Rep. 101, as to differences between Constitution of Kansas and of other states concerning uniformity of taxation; *Pryor v. Bryan*, 11 Okl. 857, 66 Pac. 348, holding that a statute taxing property on Indian reservations for some purposes and not for others was not invalid for non-uniformity; *Crawford v. Linn County*, 11 Or. 482, 5 Pac. 788, holding that a provision for the taxation of mortgages where the land was situated, if wholly within one county, leaving other mortgages to be taxed at the mortgagee's domicile, was not void for nonuniformity.

Distinguished in *Graham v. Board of Com'rs of Chautauqua County*, 31 Kan. 478, 2 Pac. 549, holding that the taxation of one particular class of property brought into the state after March 1st violated the constitutional requirement of uniformity.

Cited in note in 60 L. R. A. 340, 346, 358, on constitutional equality in relation to corporate taxation.

Same—Power to exempt.—Cited in *National Bank of Lawrence v. Barber*, 24 Kan. 534; *Board of Com'rs of Sumner County v. City of Wellington*, 66 Kan. 500, 72 Pac. 216, 60 L. R. A. 850—as to the power of the Legislature to exempt from taxation property in addition to that exempted by the Constitution.

Cited in note in 19 L. R. A. 80, on power of state Legislature to exempt from taxation; in 93 Am. St. Rep. 107, on constitutional inhibition against special legislation where general law can be made applicable.

Same—License taxes—Power of Legislature.—Cited in *City of Newton v. Atchison*, 31 Kan. 151, 1 Pac. 288, 47 Am. Rep. 486, holding that the Constitution does not restrict the power of the Legislature to levy and collect license taxes or to delegate this power to municipal corporations.

Same—Board of equalization—Powers.—Cited in *Board of Com'rs of Geary County v. Missouri, K. & T. Ry. Co.*, 62 Kan. 168, 61 Pac. 693, holding that the state board of equalization cannot control the valuation of county property for purposes other than state taxation.

Homestead right—Power to extend.—Cited in *Towle v. Towle*, 81 Kan. 675, 107 Pac. 228, 27 L. R. A. (N. S.) 550, holding that the Legislature may extend, although it could not restrict, the homestead right conferred by the Constitution.

Statutes—Special legislation.—Cited in *Carpenter v. People ex rel. Tilford*, 8 Colo. 118, 5 Pac. 828, holding that ordinarily it is a question for the Legislature whether a general law cannot be made applicable so as to authorize a special law; *Anderson v. Ritterbusch*, 22 Okl. 761, 98 Pac. 1002, holding that a statute not restricted in operation to any particular locality was not invalid as one not having a uniform operation, although it would not practically have operation in every part of the state.

Same—Validity—Determination.—Cited in *State v. Ide*, 35 Wash. 576, 77 Pac. 961, 67 L. R. A. 280, 102 Am. St. Rep. 914, 1 Ann. Cas. 684; *Thurston County v. Tenino Stone Quarries*, 44 Wash. 351, 87 Pac. 684, 9 L. R. A. (N. S.) 306, 12 Ann. Cas. 314—holding that a statute should not be declared void unless its unconstitutionality is apparent beyond reasonable doubt.

Cited in note in 81 Am. Dec. 507, on conclusiveness of legislative determination as to applicability of general law.

Executive officers—Power of court over.—Cited in *Martin v. Ingham*, 38 Kan. 641, 17 Pac. 162, holding that the courts may issue injunctions and writs of mandamus against executive officers of the state government.

19 KAN. 317, LEAVENWORTH, L. & G. R. CO. v. VAN RIPER

Amendment of pleadings—Notice to adverse party.—Cited in *Vermont Loan & Trust Co. v. McGregor*, 5 Idaho, 510, 51 Pac. 104; *St. Louis & S. F. Ry. Co. v. McReynolds*, 24 Kan. 368; *Kansas City, L. & S. Ry. Co. v. Richolson*, 31 Kan. 28, 1 Pac. 138; *Wood v. Nicolson*, 48 Kan. 461, 23 Pac. 587; *Beecher v. Ireland*, 46 Kan. 97, 26 Pac. 448; *Beekman v. Trower*, 82 Kan. 327, 108 Pac. 110—holding that it is error to permit a party to amend his pleading in the absence of, and without notice to, an adverse party.

Same—Changing cause of action.—Cited in note in 51 Am. St. Rep. 434, on amendments which are not admissible because changing cause of action.

19 KAN. 321, ST. JOSEPH & KANSAS LOAN & BUILDING ASS'N v. THOMPSON, Same case on subsequent appeal, 23 Kan. 209

Loan associations—Membership relation.—Cited in *Mutual Home & Savings Ass'n v. Worn*, 67 Kan. 506, 73 Pac. 116, holding that a borrower from a loan association was not a member, but only a debtor, where the membership arrangement was a mere guise for the purpose of obtaining usurious interest.

Same—Law governing.—Cited in *Royal Loan Ass'n v. Forter*, 68 Kan. 468, 75 Pac. 484, 1 Ann. Cas. 794, holding that a loan by a Missouri building and loan corporation to a resident of Kansas was a Kansas contract and subject to its laws relative to usury.

Cited in note in 69 Am. Dec. 159, 162, on building and loan associations; in 83 Am. Dec. 614, as to when contracts of loan associations are usurious.

19 KAN. 330, SMITH v. MCNAIR, 27 AM. REP. 117

Rescission—Restoration—Necessity.—Cited in *Wicks v. Smith*, 21 Kan. 412, 30 Am. Rep. 433; *H. A. Pitt's Sons Mfg. Co. v. Lewis*, 30 Kan. 541, 1 Pac. 812—holding that a return of the property is not essential to a rescission of a contract of sale, where the property is worthless.

Sale—Warranties—When implied.—Cited in *Meyer v. Richards*, 163 U. S. 385, 16 Sup. Ct. 1148, 41 L. Ed. 199, holding that on a sale of commercial paper there was an implied warranty that it was what it appeared to be.

Distinguished in *Ehssam v. Brown*, 76 Kan. 206, 91 Pac. 179, 15 L. R. A. (N. S.) 877, holding that on a sale of a known and specified article there is no implied warranty that it will answer the purpose intended by the buyer.

Cited in note in 36 L. R. A. 92, on implied warranty of genuineness upon sale of negotiable paper; in 35 L. R. A. (N. S.) 279, on effect of sale with particular description of kind or quality.

Same—Right to recover for breach of warranty.—Cited in note in 3 L. R. A. (N. S.) 466, on right of reselling purchaser, not actually making good to vendee, to recover for breach of warranty as to quantity or quality.

Same—Forged instruments—Recovery of price.—Cited in *Parmelee v. Knox*, 24 Kan. 113, holding that a purchaser of a forged school district bond could recover the purchase price from the seller.

Cited in note in 50 Am. Dec. 606, on liability of seller of forged note.

19 KAN. 335, ATCHISON & N. R. CO. v. WAGNER

Appeal and error—Bill of exceptions or case-made.—Cited in *Shurtleff v. Extension Ditch Co.*, 14 Idaho, 416, 94 Pac. 574, holding that, where documents were properly identified by the bill of exceptions, it was not necessary that they should have been copied therein before the bill was settled; *Western Union Telegraph Co. v. Rich*, 19 Kan. 517, 27 Am. Rep. 159; *Schuler v. Collins*, 58 Kan. 578, 50 Pac. 597—as to the sufficiency of a "skeleton" case-made or bill of exceptions, containing blanks with directions to the clerk to insert; *Pfeiffer v. Union Evangelical Church*, 20 Kan. 100, holding that, where the record was incomplete, alleged errors could not be reviewed; *Smith v. Moore*, 21 Kan. 161, holding that the pleadings, etc., should have been copied and attached to the case-made, or made a part of it, at the time it was signed and certified; *Allen v. Krueger*, 25 Kan. 74, holding that the record should be complete and perfect when signed and allowed by the judge; *Billard v. Erhart*, 35 Kan. 616, 12 Pac. 42; *State v. Dugan*, 52 Kan. 23, 34 Pac. 409—as to incomplete bills of exceptions; *Bruce v. Casey-Swasey Co.*, 13 Okl. 554, 75 Pac. 280, holding that an affidavit referred to in the bill of exceptions as "Exhibit A," but not incorporated therein, was not a part of the bill.

19 KAN. 349, MOUND CITY MUT. LIFE INS. CO. v. TWINING

Term of court—Adjournment—Effect.—Cited in *Smith v. Eureka Bank*, 24 Kan. 528, holding that a probate court did not lose jurisdiction of a judicial settlement of an executor's accounts by letting it go over the term without a formal continuance.

Case-made—Time for making and filing.—Cited in *Osborne v. Young*, 28 Kan. 769, holding that, under a statute requiring proceedings in error to be instituted within one year, the filing of a case-made more than one year after judgment, but within one year after the order denying a new trial, authorized a review of that order; *Springfield Fire & Marine Ins. Co. v. Gish, Brook & Co.*, 23 Okl. 824, 102 Pac. 708, holding that the time to make and serve a case ran from the overruling of the motion for a new trial, where the questions for review required such a motion.

Same—Extension.—Cited in *Missouri Pac. Ry. Co. v. Haynes*, 1 Kan. App. 586, 42 Pac. 259, holding that where the court, after overruling a motion for a new trial, continued the matter more than three days and then again overruled it, it could then extend the time to make and serve a case.

Time—Computation.—Cited in *Reed v. Sexton's Adm'rs*, 20 Kan. 195, holding that a law required to be published for four weeks was in effect on the beginning of the 28th day after the first publication.

Cited in note in 49 L. R. A. 195, on first and last days in computation of time.

Insurance—Waiver.—Cited in note in 107 Am. St. Rep. 145, on waiver of provisions of nonwaiver or written waiver of conditions and forfeitures in policies.

19 KAN. 382, BEQUILLARD v. BARTLETT, 27 AM. REP. 120

Trial—Demurrer to evidence—Determination.—Cited in *Wolf v. Wasber*, 32 Kan. 533, 4 Pac. 1086; *Schuster, Hingston & Co. v. Kurtz*, 47 Kan. 255, 27 Pac. 994; *Edmison v. Drumm-Flato Commission Co.*, 13 Okl. 440, 73 Pac. 958; *Conklin v. Yates*, 16 Okl. 266, 83 Pac. 910—holding that, on a demurrer to plaintiff's evidence, every portion of it must be regarded as true; *Christie v. Barnes*, 33 Kan. 317, 6 Pac. 599; *St. Paul Fire & Marine Ins. Co. v. Kelly*, 43 Kan. 741, 23 Pac. 1046—holding that the court will not weigh conflicting evidence on a demurrer thereto; *McCune Mining Co. v. Adams*, 35 Kan. 193, 10 Pac. 468, as to when a demurrer to the evidence should be sustained.

Exemption laws—Tools or implements—What are.—Cited in *Jenkins v. McNall*, 27 Kan. 532, 41 Am. Rep. 422, holding that a press used in carrying on business as a job printer is a tool or implement, within the exemption laws; *Bliss v. Vedder*, 34 Kan. 57, 7 Pac. 599, 55 Am. Rep. 237, holding that a printing press and printing materials used in publishing a newspaper were tools and implements, and exempt; *Williams v. Vincent*, 70 Kan. 595, 79 Pac. 121, 68 L. R. A. 634, 109 Am. St. Rep. 469, holding that a bowling alley is not a tool or implement used in carrying on business.

Cited in notes in 21 Am. Dec. 547, 548, 553; 123 Am. St. Rep. 140—on exemption of tools and implements.

Same—Stock in trade of merchant.—Criticised in *Martin v. Bond*, 14 Colo. 466, 24 Pac. 328, holding that an exemption of stock in trade applied to a merchant as well as a mechanic.

19 KAN. 388, GRANT v. DABNEY, 27 AM. REP. 125, Same case on subsequent appeal, 19 Kan. 390

19 KAN. 390, GRANT v. DABNEY

Judgment—Enforcement notwithstanding review.—Cited in *Water Power Co. v. Brown*, 23 Kan. 695, holding that an action by sureties on a note against their principal to recover payments by them was one on a contract for the payment of money only, in which the court could permit the enforcement of the judgment notwithstanding proceedings in error; *Gill v. Buckingham*, 7 Kan. App. 237, 52 Pac. 903, holding that a landlord's action against the purchaser of a crop was based on the lease, and was not one on a contract for the payment of money only.

Distinguished in *Commercial Union Assur. Co. v. Norwood*, 54 Kan. 500, 38 Pac. 557; *American Central Ins. Co. v. Cox*, 54 Kan. 502, 38 Pac. 558—denying a motion to fix the amount of a supersedeas bond to stay execution, where the trial court had authorized execution notwithstanding the proceedings in error.

19 KAN. 394, HAGAMAN v. CLOUD COUNTY COM'RS

Tax—Partial illegality—Necessity of tender.—Cited in *Miller v. Madden*, 35 Kan. 455, 11 Pac. 449; *Frans v. Krebs*, 41 Kan. 223, 21 Pac. 99; *Parsons Natural Gas Co. v. Rockhold*, 79 Kan. 661, 100 Pac. 639—holding that tax proceedings will not be restrained for partial illegality, without payment or tender of the legal portion of the tax.

Followed in *Houston v. Commissioners of Cloud County*, 19 Kan. 396, affirming on the authority of the cited case.

Same—Restraining collection.—Cited in notes in 22 L. R. A. 702, 703; 69 Am. Dec. 200, 204—on injunction against collection of taxes and assessments.

19 KAN. 396, *HOUSTON v. CLOUD COUNTY COMRS*

Jury trial—Suits in equity.—Cited in *Keith v. Keith*, 26 Kan. 26, holding that, where an action in ejectment was so amended as to be substantially one in equity to quiet title, neither party was entitled to a jury trial as a matter of right; *Woodman v. Davis*, 32 Kan. 344, 4 Pac. 262; *Henderson v. New England Loan & Trust Co.*, 6 Kan. App. 279, 51 Pac. 61—holding that a jury trial is not demandable as of right in suits in equity.

Same—Statutory actions.—Cited in *Rich v. Bowker*, 25 Kan. 7, holding that in a statutory action the Legislature may dispense with a jury.

19 KAN. 397, *BRAKE v. BALLOU*, Same case on subsequent appeals, 25 Kan. 618; 27 Kan. 594

Conveyances of interests in public lands—Validity.—Cited in *Kreamer v. Earl*, 91 Cal. 112, 27 Pac. 735; *Mellison v. Allen*, 30 Kan. 382, 2 Pac. 97; *Weeks v. White*, 41 Kan. 569, 21 Pac. 600—holding that an agreement by a settler for a sale of the land prior to acquiring title from the government was void; *Wilcox v. John*, 21 Colo. 367, 40 Pac. 880, 52 Am. St. Rep. 246; *Weber v. Laidler*, 28 Wash. 144, 66 Pac. 400, 90 Am. St. Rep. 726—holding that a mortgage or deed of trust by a pre-emptor of government land before final proof is not void under the United States Revised Statutes; *Armstrong v. Henderson*, 16 Idaho, 566, 102 Pac. 361, holding that an agreement by trespassers on government land to make homestead entry and then by conveyances adjust their title to conform to their occupancy was void; *Jarvis v. Campbell*, 28 Kan. 370, holding that a transfer of a claim to government land not subject to homestead settlement was not a sufficient consideration for a note; *Kine v. Turner*, 27 Or. 356, 41 Pac. 664, holding that an agreement by a purchaser of land from the government at public sale to convey part to another in consideration of his refraining from bidding was against public policy and would not be enforced.

Distinguished in *O'Neill v. Martin*, 26 Kan. 494, holding that specific performance of a contract for the sale of school land by a settler, who subsequently acquired title, would be decreed; *Church v. Adams*, 37 Or. 355, 61 Pac. 639, holding that a contract to sell a timber culture claim, made before final proof, was not void as against public policy.

Fraudulent transactions—Relief.—Cited in *Buchtella v. Stepanek*, 58 Kan. 373, 36 Pac. 749; *McKinnis v. Scottish American Mortgage Co.*, 55 Kan. 259, 30 Pac. 1018—holding that the courts will not aid either party to a fraudulent transaction.

Parol trust—Enforcement.—Distinguished in *First Nat. Bank of Peoria, Ill. v. Jeffray*, 41 Kan. 694, 21 Pac. 242, as to the enforcement of an express parol trust.

19 KAN. 403, *CLIPPENGER v. HASTINGS*

19 KAN. 405, *ATCHISON, T. & S. F. R. CO. v. IRELAND*

19 KAN. 408, *LANOUE v. MCKINNON*

Cited in *Richards v. Tarr*, 42 Kan. 547, 22 Pac. 557.

Pleadings—Relating back to commencement of action.—Cited in *Neddo v. Neddo*, 56 Kan. 507, 44 Pac. 1, holding that ordinarily pleadings subsequent to

the petition relate back to the commencement of the action, but not where they set up a separate and distinct cause of action by way of cross-petition.

19 KAN. 414, FISHER v. RUSH COUNTY COM'RS

Cited in *Brooks v. Kager*, 23 Kan. 114.

Taxation—Property subject—Situs of debt.—Cited in *Board of Com'rs of Kingman County v. Leonard*, 57 Kan. 531, 46 Pac. 960, 34 L. R. A. 810, 57 Am. St. Rep. 347; *Dykes v. Lockwood Mortgage Co.*, 2 Kan. App. 217, 43 Pac. 268—holding that domestic judgments in favor of nonresidents were not subject to taxation; *Mecartney v. Caskey*, 66 Kan. 412, 71 Pac. 832, holding that tax sale certificates issued by a county treasurer of this state and owned by nonresidents are not taxable; *Board of Com'rs of Johnson County v. Hewitt*, 76 Kan. 816, 93 Pac. 181, 14 L. R. A. (N. S.) 493, holding that promissory notes belonging to a resident of Kansas were taxable there, although not actually within the state; *Gibbins v. Adamson*, 5 Kan. App. 90, 48 Pac. 871, holding that a note secured by a mortgage is taxable at the residence of the creditor, irrespective of the location of the mortgaged land.

Cited in notes in 16 L. R. A. 731; 56 Am. Dec. 530; 62 Am. St. Rep. 458—on place for taxation of property; in 36 L. R. A. (N. S.) 299, on personal property having taxation situs elsewhere, as subject of taxation in state of owner's domicile.

Same—Power to tax mortgages.—Cited in note in 16 L. R. A. 61, on power to tax mortgages.

Promissory notes—Situs.—Cited in *Blain v. Irby*, 25 Kan. 490; *New Orleans v. Stempel*, 175 U. S. 309, 20 Sup. Ct. 110, 44 L. Ed. 174—holding that promissory notes may have a situs of their own, independent of that of their owner.

19 KAN. 417, CASTLE v. HOUSTON, 27 AM. REP. 127

Libel and slander—Truth as defense.—Cited in *Mundy v. Wight*, 26 Kan. 173, holding that the truth is a complete defense to civil actions for libel and slander; *State v. Conklin*, 47 Or. 509, 84 Pac. 482, as to statutory and constitutional provisions respecting the truth as a defense to actions and prosecutions for libel.

Cited in notes in 21 L. R. A. 503; 31 L. R. A. (N. S.) 123, 134—on truth as defense to libel or slander; in 91 Am. St. Rep. 288, 290, on justification in slander and libel.

Same—Plea of justification—Sufficiency.—Cited in *Dever v. Clark*, 44 Kan. 745, 25 Pac. 205, holding that, where the alleged libel was specific, it was sufficient in a plea of justification to merely allege in general terms that the matter published was true.

Same—What constitutes libel.—Cited in *State v. Clyne*, 53 Kan. 8, 35 Pac. 759, as to what constitutes a libel.

Cited in note in 15 Am. St. Rep. 868, on newspaper libel.

Same—Jury as judge of law and facts.—Cited in note in 33 L. R. A. (N. S.) 208, on effect of provision that jury shall determine law and facts in libel cases.

19 KAN. 439, O'RILEY v. WATERS

19 KAN. 441, KEELING v. KUHN

License—Revocability.—Cited in *McCullagh v. Ruins*, 75 Kan. 453, 89 Pac. 1041, holding that a parol grant of the privilege of mining on lands was a mere license, revocable at will.

19 KAN. 445, STATE v. WHITE, 27 AM. REP. 137

Evidence—Privileged communications.—Cited in *People v. Mullings*, 83 Cal. 188, 23 Pac. 229, 17 Am. St. Rep. 223, holding that accused could not be compelled to testify to conversations between himself and his wife; *Wilkins v. Moore*, 20 Kan. 388, holding that it was not error to exclude communications between a party and his attorney; *Tays v. Carr*, 37 Kan. 141, 14 Pac. 456, holding that it is the attorney, and not the communication between him and his client, that is incompetent, and hence, where the communication was a letter, it was admissible.

Cited in note in 38 Am. Rep. 632, on confidential communications to attorney.

Same—Privilege of witness.—Cited in note in 21 Am. Dec. 62, on privilege of witnesses; in 66 Am. St. Rep. 242, on attorneys as witnesses.

Same—Cross-examination.—Cited in note in 14 Am. St. Rep. 480 (par. 2), on cross-examination of witnesses; in 15 L. R. A. 674; 38 Am. St. Rep. 897—on cross-examination of accused.

Criminal law—Jury—Discharge before verdict.—Cited in *State v. Smith*, 44 Kan. 75, 24 Pac. 84, 8 L. R. A. 774, 21 Am. St. Rep. 266, holding that the court may discharge a jury on account of the sickness of a juror, and that, in discharging a jury before verdict for the sickness of a juror, the court should require the sickness to be judicially established, like any fact, in the presence of accused.

Same—Arrest of judgment.—Cited in note in 27 Am. Rep. 394, on ground for arrest of judgment in criminal case.

Marriage—How proved.—Cited in *Baughman v. Baughman*, 29 Kan. 283, holding that the record of licenses issued and returned is not the only competent proof of marriage, but that it may be proved by those witnessing the ceremony.

19 KAN. 451, LITOWICH v. LITOWICH, 27 AM. REP. 145

Judgments—Impeachment—Extrinsic evidence.—Cited in *Mastin v. Gray*, 19 Kan. 458, 27 Am. Rep. 149; *Amsbaugh v. Exchange Bank of Maquoketa*, 33 Kan. 100, 5 Pac. 394; *Thorn v. Salmonson*, 37 Kan. 441, 15 Pac. 588; *Larimer v. Knoyle*, 43 Kan. 338, 23 Pac. 487—holding that judgments, either domestic or foreign, may be impeached collaterally for want of jurisdiction by extrinsic evidence.

Same—Lack of jurisdiction—Effect.—Cited in *Brinkman v. Shaffer*, 23 Kan. 528; *Kay v. Walter*, 28 Kan. 111; *Jones v. Marshall*, 3 Kan. App. 529, 49 Pac. 840—holding that a personal judgment against a party of whom the court had no jurisdiction was void.

Same—Foreign judgment.—Cited in note in 32 L. R. A. (N. S.) 927, on right to resist judgment of sister state on ground of fraud.

Divorce—Foreign decree.—Cited in *Reis v. Lawrence*, 63 Cal. 120, 49 Am. Rep. 83 (dissenting opinion); *Bell v. Bell*, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. Ed. 804—holding that a divorce obtained in a state where plaintiff was not domiciled on publication notice was not entitled to faith and credit in another state; *McCormick v. McCormick*, 82 Kan. 31, 107 Pac. 546, holding that under Acts 1907, c. 184, a foreign divorce in favor of the husband, granted on substituted service, was a bar to a suit by the wife for alimony.

Cited in note in 19 L. R. A. 814, on validity of decree of divorce obtained on publication or service out of state where defendant did not appear.

Same—Jurisdiction—Necessity of residence.—Cited in *Masterman v. Masterman*, 58 Kan. 748, 51 Pac. 277, holding that, to give a court jurisdiction to grant a divorce, plaintiff at least must be a bona fide resident of the state.

Same—What law governs.—Cited in note in 59 L. R. A. 145, 183, on conflict of laws on divorce.

Same—Alimony—Application of statutes relative to divorce.—Cited in *McCormick v. McCormick*, 82 Kan. 31, 107 Pac. 546, holding that residence in the state or in any county for one year is not necessary to a suit for alimony; *Selders v. Selders*, 9 Kan. App. 428, 58 Pac. 1038, holding that the statutory provision authorizing a wife, suing for a divorce, to testify against her husband, does not apply to suits for alimony without divorce.

Cited in note in 60 Am. Dec. 674, 675, 679, on alimony and its allowance; in 25 L. R. A. (N. S.) 392, on alimony pendente lite or counsel fees, when marriage is denied.

19 KAN. 458, MASTIN v. GRAY, 27 AM. REP. 149

Jurisdiction—Extrinsic evidence to impeach.—Cited in *Reynolds v. Fleming*, 30 Kan. 106, 1 Pac. 61, 46 Am. Rep. 86; *Amsbaugh v. Exchange Bank of Maquoketa*, Iowa, 33 Kan. 100, 5 Pac. 384; *Thorn v. Salmonson*, 37 Kan. 441, 15 Pac. 588; *Ewing v. Mallison*, 65 Kan. 484, 70 Pac. 369, 93 Am. St. Rep. 299—holding that a void judgment may be impeached for want of jurisdiction, where extrinsic evidence is necessary to show the lack of jurisdiction; *Ex parte Watson*, 30 Kan. 753, 1 Pac. 775, holding that, where the court had jurisdiction of the parties, the judgment record could not be impeached by parol evidence; *Pray v. Jenkins*, 47 Kan. 599, 28 Pac. 716, holding that, in ejectment, it could be shown that a foreclosure judgment under which a party claimed was rendered without service of process.

Same—Extrinsic evidence to uphold.—Cited in *Jones v. Charles P. Kellogg & Co.*, 51 Kan. 263, 33 Pac. 997, 37 Am. St. Rep. 278, holding that the trial court's jurisdiction to settle and sign a case-made could be supported by extrinsic evidence; *Noyes v. Tootle*, 8 Okl. 505, 58 Pac. 652, as to upholding the jurisdiction of the court making a judgment or order by extrinsic evidence.

Same—Absentee.—Cited in note in 58 Am. St. Rep. 182, on jurisdiction over absent citizens.

Same—Lack of—Effect.—Cited in *Brinkman v. Shaffer*, 23 Kan. 528; *Kay v. Walter*, 28 Kan. 111; *Larimer v. Knoyle*, 43 Kan. 338, 23 Pac. 487; *Brown v. Dann*, 71 Kan. 738, 81 Pac. 471; *Kelso v. Norton*, 74 Kan. 442, 87 Pac. 184—holding that a personal judgment rendered against a party of whom the court had no jurisdiction was void; *Perry v. St. Joseph & W. R. Co.*, 29 Kan. 420, holding that a judgment of the probate court granting letters of administration was without jurisdiction and void, where the intestate left no estate within the state.

Cited in note in 83 Am. Dec. 451 (par. 1), on validity of court without jurisdiction.

Same—Necessity of service or notice.—Cited in *Butler v. Craig*, 29 Kan. 205, holding that a judgment or order without notice is void; *Craven v. Bradley*, 51 Kan. 336, 32 Pac. 1112, holding that a foreclosure judgment was void for want of jurisdiction, where the heirs of the deceased mortgagor were not made parties.

Judgment—Restraining enforcement.—Cited in *Missouri Pac. Ry. Co. v. Reid & Holladay*, 34 Kan. 410, 8 Pac. 846, holding that the enforcement of a void judgment may be restrained by injunction.

Same—Direct or collateral attack.—Cited in *McNeill v. Edie*, 24 Kan. 108, holding that an action to enjoin a judgment is a direct attack on the judgment, and may be maintained, although the judgment appears on its face valid and regular; *O'Keefe v. Behrens*, 73 Kan. 469, 85 Pac. 555, 8 L. R. A. (N. S.) 354, 9 Ann. Cas. 867, holding that ejectment by the heirs of a decedent whose land was sold by the administrator was a collateral attack on the judgment of the probate court.

Cited in note in 13 Am. Dec. 365 (par. 1), on attack on judgment for want of jurisdiction.

Same—Unauthorized appearance.—Cited in note in 21 L. R. A. 853, 856, on effect of judgment obtained upon unauthorized appearance by attorney.

Same—Foreign judgment.—Cited in note in 103 Am. St. Rep. 811, on judgments of courts of other states.

Same—Void judgments—Setting aside.—Cited in Great West Mining Co. v. Woodmas of Alston Mining Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204, holding that a void judgment may be set aside, although property sold thereunder has passed into the hands of third parties.

Same—Invalidity of execution sale.—Cited in Schott v. Linscott, 80 Kan. 536, 103 Pac. 997, holding that an execution sale under a void judgment is void, and confers no title.

Service—Conclusiveness of return.—Cited in Great West Mining Co. v. Woodmas of Elston Mining Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204, holding that as to matters not presumptively within his personal knowledge a sheriff's return was not conclusive; Goddard v. Harbour, 56 Kan. 744, 44 Pac. 1055, 54 Am. St. Rep. 608, holding that an officer's return of service was conclusive as to matters within his personal knowledge.

Same—At former residence—Force.—Cited in Amabaugh v. Exchange Bank of Maquoketa, Iowa, 38 Kan. 100, 5 Pac. 384, holding that service at a person's former residence after he had left was not service at his "usual place of residence."

19 KAN. 471, MISSOURI & KANSAS TRANSP. CO. v. PALMER

Case-made—What regarded as a part.—Cited in Shumaker v. O'Brien, 19 Kan. 476, holding that certified copies of the pleadings attached to the case-made, but not incorporated or referred to therein, were not a part of the case-made and should be disregarded; Smith v. Moore, 21 Kan. 161, holding that copies of papers neither incorporated in, attached to, nor properly identified by the case-made were not a part thereof.

Same—Not part of the record.—Cited in Brush Electric Light & Power Co. v. Grosch, 1 Kan. App. 110, 40 Pac. 933; St. Louis & S. F. R. Co. v. Messenger, 28 Okl. 590, 110 Pac. 893—holding that a case-made is not a part of the record of the district court.

Same—Including pleadings—Necessity.—Cited in Shumaker v. O'Brien, 19 Kan. 476; Sanford v. Weeks, 50 Kan. 335, 31 Pac. 1087—holding that, in the absence of the pleadings from the record, it could not be determined whether the evidence was sufficient.

Same—Changes and amendments.—Cited in Parker v. Remington Sewing Mach. Co., 24 Kan. 31, holding that defects in the record cannot be cured by stipulations of counsel not included in the case-made; Snively v. Abbott Buggy Co., 36 Kan. 106, 12 Pac. 522; City of Ft. Scott v. Deeds, 36 Kan. 621, 14 Pac. 268; Graham v. Shaw, 38 Kan. 734, 17 Pac. 332; Ewing v. Cooper, 9 Kan. App. 677, 59 Pac. 176—holding that the case-made cannot be supplemented by inserting or attaching anything not a part thereof when settled and signed; Grand Lodge, A. O. U. W. v. Furman, 6 Okl. 649, 52 Pac. 932, holding that neither the Supreme Court nor the trial court could amend the case-made after being settled and signed.

Same—Original or copy.—Cited in Thompson v. Williams, 30 Kan. 114, 1 Pac. 47; Richards v. Gaskill, 39 Kan. 428, 18 Pac. 494—holding that the original and not a copy of the case-made must be attached to the petition in error.

Same—What it should contain.—Cited in Davis v. Ringer, 1 Kan. App. 32, 41 Pac. 676, holding that the case-made must contain so much of the proceedings, evidence, or other matters as is necessary to present the errors complained of, and cannot be combined with the transcript; Kansas City & Ft. Scott

Cement Co. v. Reese, 3 Kan. App. 135, 42 Pac. 832, holding that a case-made need contain no more of the proceedings than is necessary to present the questions relied on; *Hunt v. Spencer*, 20 Kan. 126, holding that a "bill of exceptions or case-made" was not sufficient as a case-made, because incomplete and not served on the opposite party, nor as a bill of exceptions, because not signed and filed during the term; *Smith v. Moore*, 21 Kan. 161, holding that copies of the case-made, the pleadings, and journal entries attached to the petition in error were not available for review.

Followed in *Howe Mach. Co. v. Peterson*, 22 Kan. 37.

Review—Sufficiency of record.—Cited in *Connelly v. Central Branch Union Pac. R. Co.*, 22 Kan. 685, dismissing the proceedings in error on the authority of the cited case; *Allen v. Krueger*, 25 Kan. 74, holding that the record must be complete and perfect when allowed and signed by the trial judge.

19 KAN. 474, KARR v. HUDSON

Case-made—Authentication by clerk—Necessity.—Cited in *Shumaker v. O'Brien*, 19 Kan. 476; *Linton v. Frazier*, 29 Kan. 20; *Limerick v. Gwinn*, 44 Kan. 604, 24 Pac. 1097; *German Reformed Church v. Abbey*, 54 Kan. 766, 39 Pac. 691—holding that a paper purporting to be a case-made would not be regarded as such, where it was not attested by the clerk and the seal of the court was not affixed; *Shumaker v. O'Brien*, 19 Kan. 476, holding that proceedings in error would be dismissed, where the case-made was not properly authenticated.

Same—Time for.—Cited in *Pierce v. Myers*, 28 Kan. 364, holding that where the plaintiff in error, after the case-made was brought to the Supreme Court, withdrew it, and had it attested and authenticated by the clerk, it would be considered; *Atchison, T. & S. F. R. Co. v. Whitbeck*, 57 Kan. 729, 48 Pac. 16, holding that the seal could be attached to the clerk's attestation of a case-made more than one year after the rendition of judgment.

19 KAN. 476, SHUMAKER v. O'BRIEN

Appeal and error—Bill of exceptions and case-made.—Cited in *Hunt v. Spencer*, 20 Kan. 126, holding that a "bill of exceptions or case-made" was not sufficient as a case-made, because incomplete and not served on the opposite party, nor as a bill of exceptions, because not signed and filed during the term; *Smith v. Moore*, 21 Kan. 161, holding that copies of the pleadings, etc., certified by the clerk and attached to the transcript, were not a part of the case-made; *Parker v. Remington Sewing Mach. Co.*, 24 Kan. 31, holding that omissions from the case-made could not be supplied by a stipulation of counsel not made a part of the case; *State v. Nickerson*, 30 Kan. 545, 2 Pac. 654, holding that a criminal case should be taken to the Supreme Court on a transcript of the record, and not on an original bill of exceptions; *Neiswender v. James*, 41 Kan. 463, 21 Pac. 573; *Sanford v. Weeks*, 50 Kan. 335, 31 Pac. 1087—holding that a case-made should contain the pleadings or a statement of the issues; *Brush Electric Light & Power Co. v. Grosch*, 1 Kan. App. 110, 40 Pac. 933, holding that the office and manner of preparation of a case-made and bill of exceptions are dissimilar; *Kansas City & Ft. Scott Cement Co. v. Reese*, 3 Kan. App. 135, 42 Pac. 832, holding that a case-made need contain only enough of the proceedings to present the questions relied on; *Bruce v. Casey-Swasey Co.*, 13 Okl. 554, 75 Pac. 280, holding that, after a bill of exceptions is signed, filed, and made a part of the record, it can be presented to the Supreme Court in a transcript of the case.

Same—Review dependent on record.—Cited in *Whitney v. Harris*, 21 Kan. 96; *Allen v. Krueger*, 25 Kan. 74—holding that the record must be complete and perfect when allowed and signed by the judge; *Piper v. Thompson*, 34 Kan. 62, 7 Pac. 793, holding that a judgment cannot be reviewed on a bill of exceptions alone, without a case-made or transcript; *State v. McFarland*, 38 Kan. 664, 17

Pac. 654, holding that errors could not be reviewed, where there was no certified transcript of the whole record.

19 KAN. 479, REISNER v. STATE, Same case on subsequent appeal, 20 Kan. 548

Criminal law—Review.—Cited in *State v. Elrod*, 35 Kan. 639, 12 Pac. 42, holding that a judgment in a criminal case could not be reviewed by petition in error.

19 KAN. 481, STATE v. CAMPBELL

Criminal law—Costs—Liability of prosecuting witness.—Cited in *Ex parte Stoneberger*, 31 Kan. 638, 3 Pac. 416, holding that the justice could not adjudge costs against the complaining witness, where accused was discharged because the complaint did not state an offense.

Same—Liability of county.—Cited in *Commissioners of Shawnee County v. Ballinger*, 20 Kan. 590, holding that a county is not liable for the fees of witnesses in a criminal case in district court, resulting in the discharge of accused; *Board of Com'rs of Labette County v. Keirsev*, 28 Kan. 40, holding that under Acts 1881, c. 108, the county is liable for fees in misdemeanor cases, where they cannot be collected from accused or the prosecuting witness; *Gunning v. Board of Com'rs of Wyandotte County*, 81 Kan. 708, 106 Pac. 999, holding that the liability of a county for costs in criminal case must be determined from the statutes, and is not finally established by their taxation; *Board of Com'rs of Greer County v. Watson*, 7 Okl. 174, 54 Pac. 441, holding that a county is not liable for witness fees in a criminal case, in the absence of a statute imposing such liability.

Same—Liability of city.—Cited in *Mariner v. Mackey*, 25 Kan. 669, holding that, on the discharge of defendant in a suit by a city for violation of an ordinance, judgment against the city for costs was proper.

Same—Review of judgment for costs.—Cited in *State v. Elrod*, 35 Kan. 639, 12 Pac. 42; *Foss v. Jones*, 43 Kan. 72, 22 Pac. 1001—holding that a judgment against a prosecuting witness for costs should be reviewed by appeal.

Costs—Dependence on statute.—Cited in *Bennett v. Kroth*, 37 Kan. 235, 15 Pac. 221, 1 Am. St. Rep. 248; *Board of Com'rs of Greenwood County v. Board of Com'rs of Elk County*, 63 Kan. 857, 66 Pac. 1018—holding that the allowance of costs depends wholly on statute.

Same—Fees—Application of statute.—Cited in *State v. Reisner*, 20 Kan. 548, holding that section 13 of the act relating to fees (Gen. St. 1868, c. 39) does not apply to trials in district court.

Followed in *Heller v. Board of Com'rs of Shawnee County*, 23 Kan. 130, affirming on the authority of the cited case.

19 KAN. 485, COMMISSIONERS OF JOHNSON COUNTY v. WILSON

Costs in criminal cases—Liability of county.—Cited in *Board of Com'rs of Labette County v. Keirsev*, 28 Kan. 40, holding that under Acts 1881, c. 108, the county is liable for fees in misdemeanor cases, where they cannot be collected from accused or the prosecuting witness; *Board of Com'rs of Barton County v. Negbaur*, 34 Kan. 285, 8 Pac. 396, holding that the county was not liable for costs, where accused, although charged with a felony, was convicted of a misdemeanor within the jurisdiction of a justice of the peace.

Same—Liability of city.—Cited in *Mariner v. Mackey*, 25 Kan. 669, holding that a city, prosecuting for a violation of an ordinance, was liable for costs on the discharge of defendant.

19 KAN. 488, UNION PAC. RY. CO. v. YOUNG

Negligence—Instructions—Comparative negligence.—Cited in *Kansas Pac. Ry. Co. v. Richardson*, 25 Kan. 391; *Atchison, T. & S. F. R. Co. v. Hughes*,

55 Kan. 491, 40 Pac. 919; *Atchison, T. & S. F. R. Co. v. O'Melia*, 1 Kan. App. 374, 41 Pac. 437—holding that an instruction that plaintiff could recover, notwithstanding slight negligence, if defendant's negligence was gross, was not erroneous; *Atchison, T. & S. F. R. Co. v. Morgan*, 31 Kan. 77, 1 Pac. 298; *Missouri Pac. Ry. Co. v. Walters*, 78 Kan. 39, 96 Pac. 346—holding that an instruction permitting the jury to compare the negligence of the parties was erroneous.

Same—Degrees.—Cited in *Central Branch Union Pac. R. Co. v. Henigh*, 23 Kan. 347, 33 Am. Rep. 167, as to the different degrees of care and negligence.

Same—Contributory negligence—Province of jury.—Cited in *Wichita & W. R. Co. v. Davis*, 37 Kan. 743, 16 Pac. 78, 1 Am. St. Rep. 275, holding that whether plaintiff exercised the care and caution of an ordinarily prudent person in crossing a railroad was a question for the jury.

Same—Petition—Sufficiency.—Cited in *Speer v. Missouri, K. & T. Ry. Co.*, 23 Kan. 571, as to the sufficiency of a petition charging negligence.

Liability of master for injuries to servant.—Cited in notes in 25 L. R. A. 713; 48 L. R. A. 375; 14 L. R. A. (N. S.) 759—on liability of master for injuries to servant by incompetency of fellow servant.

Damages for personal injuries—Excessiveness.—Cited in *Kansas Pac. Ry. Co. v. Peavey*, 29 Kan. 169, 44 Am. Rep. 630, holding that a verdict of \$6,500 for the loss of a thumb and finger was so excessive as to require a reversal; *Hannibal & St. J. R. Co. v. Fox*, 31 Kan. 586, 3 Pac. 320, holding that a verdict of \$10,000 for personal injuries was not, under the circumstances, excessive; *Atchison, T. & S. F. Ry. Co. v. Sledge*, 68 Kan. 321, 74 Pac. 1111, holding that a verdict of \$7,000 for the loss of an arm was not so excessive as to require a reversal; *Choctaw, O. & G. R. Co. v. Burgess*, 21 Okl. 653, 97 Pac. 271, holding that a verdict of \$5,000 for personal injuries would not be disturbed; *St. Louis & S. F. R. Co. v. Richards*, 23 Okl. 256, 102 Pac. 92, 23 L. R. A. (N. S.) 1032, holding that a verdict of \$6,300 for personal injuries was not so excessive as to indicate passion or prejudice.

Same—Evidence.—Cited in note in 1 L. R. A. (N. S.) 1152, on evidence of earnings in higher position to show damage for injury to person in line of promotion.

19 KAN. 501, **BROOKS v. WRIGHT**

19 KAN. 504, **STATE v. O'LAUGHLIN**, Same case on subsequent appeal, 29 Kan. 20

Highways—Who may dedicate.—Cited in *Smith v. Smith*, 34 Kan. 293, 8 Pac. 385, holding that a pre-emptor of government land could not dedicate a portion of it as a public road until he had done all that was required to obtain title; *Boerner v. McKillip*, 52 Kan. 508, 35 Pac. 5, holding that a party having only a parol contract for the purchase of land could not dedicate it as a street, so as to estop him and his grantees after acquiring the legal title.

19 KAN. 507, **STATE v. HOWARD**

Witnesses—Incompetency—Conviction of crime.—Cited in *State v. Conway*, 56 Kan. 682, 44 Pac. 627; *State v. Clark*, 60 Kan. 450, 56 Pac. 767—holding that in a criminal case a witness who had been convicted of an infamous crime was incompetent, and that imprisonment at hard labor is necessary to render a person incompetent as a witness.

Same—Application of statutes.—Cited in *State v. Buffington*, 20 Kan. 599, 27 Am. Rep. 193, holding that the provisions of the Civil Code relative to the competency of witnesses do not apply to criminal cases.

Conviction of offense included in charge.—Cited in note in 70 Am. Dec. 191 (par. 2), on conviction of larceny and included offenses under indictment for robbery.

19 KAN. 510, KELLEY v. DAVIS

Error—Burden of showing.—Cited in Lucas v. Sturr, 21 Kan. 480, holding that error will not be presumed, but must be affirmatively shown.

19 KAN. 511, HAXTON v. HARRIS

Taxation—Purchase by county treasurer at tax sale.—Cited in Spicer v. Rowland, 39 Kan. 740, 18 Pac. 908, holding that a tax sale to the county treasurer or to a firm of which he was a member was absolutely void.

Cited in note in 20 L. R. A. 508, on right of auctioneer or officer conducting sale to bid.

Same—Who benefited by void sale.—Cited in Sapp v. Commissioners of Brown County, 20 Kan. 243, as to whether the owner or the public should benefit by a tax deed being declared void; Belz v. Bird, 31 Kan. 139, 1 Pac. 246, holding that the payment of taxes for the purpose of acquiring a tax title did not inure to the benefit of the owner.

Same—Effect of setting aside sale.—Cited in Harris v. Drought, 24 Kan. 524; Dudley v. Gilmore, 35 Kan. 555, 11 Pac. 398—holding that, where a tax sale was set aside and the money paid by the purchaser refunded, the taxes were still unpaid and could be collected.

19 KAN. 517, WESTERN UNION TEL. CO. v. RICH, 27 AM. REP. 159

Case-made—"Skeleton" case—Rules governing.—Cited in Crosby v. Wilson, 53 Kan. 565, 36 Pac. 985, holding that the sufficiency of a skeleton case-made is governed by the same rules as skeleton bills of exceptions.

Additional burden on land devoted to public purpose.—Cited in McCann v. Johnson County Telephone Co., 69 Kan. 210, 76 Pac. 870, 66 L. R. A. 171, 2 Ann. Cas. 156, holding that the construction of a telephone line on a rural highway was not an additional servitude for which an adjoining owner was entitled to compensation; Abraham v. Oregon & C. R. Co., 37 Or. 495, 60 Pac. 899, 64 L. R. A. 391, 82 Am. St. Rep. 779, holding that whether the operation of a hotel was a legitimate railroad purpose within a grant of land for such purposes was a mixed question of law and fact, requiring testimony to aid in its determination; City of Portland v. Metzger, 58 Or. 276, 114 Pac. 106, holding that under a grant of a right of way for a pipe line a telephone line could be maintained, if necessary or convenient in the operation of the pipe line.

Cited in note in 28 Am. St. Rep. 233, on telegraph and telephone poles and wires in streets and highways across private property; in 36 L. R. A. (N. S.) 513, 518, on uses to which railroad right of way may be devoted.

19 KAN. 522, CLARK v. CLARK

Assumed names—Right to sue and do business.—Cited in Latham Mercantile & Commercial Co. v. Harrod, 71 Kan. 565, 81 Pac. 214, holding that the L. M. & C. Co. could recover on a policy of insurance issued to the L. M. Co., in which name it transacted business for convenience; Deets v. Smith, 6 Kan. App. 601, 51 Pac. 581, holding that a married woman could sue in the name of her deceased husband, where she had business transactions and was known by that name.

Cited in note in 132 Am. St. Rep. 571, 572, on proceedings against persons by less or other than full Christian names; in 2 L. R. A. (N. S.) 1090, on sur-name under which suit may be brought.

19 KAN. 525, SCHOOL DIST. NO. 67 v. VEDDER

Justices of the peace—Abstract of judgment—Sufficiency.—Cited in *Hamilton v. Thomson*, 3 Kan. App. 8, 44 Pac. 437, holding that the abstract of a judgment of a justice of the peace, when docketed in the district court, must be complete and perfect in itself.

19 KAN. 527, HOCKETT v. TURNER

Appeal and error—Review—Necessity of final judgment.—Cited in *Paul v. Whetstone*, 28 Kan. 634, holding that, where the record on error did not show a final judgment, the case would be dismissed; *Kansas Rolling Mill Co. v. Board*, 34 Kan. 21, 7 Pac. 622, holding that an order refusing to set aside service of the summons would not be reviewed on error, where the case was still pending in the district court; *Snively v. Abbott Buggy Co.*, 36 Kan. 106, 12 Pac. 522, holding that an order overruling a motion to discharge an attachment was not reviewable prior to final judgment.

19 KAN. 529, ATCHISON & N. R. CO. v. HARPER

Imposing liability on railroad companies.—Cited in note in 25 L. R. A. 163, on constitutionality of statutes making railroads absolutely liable for fires set out or stock killed; in 31 L. R. A. (N. S.) 862, 864, on constitutionality of statutes requiring railroad to fence tracks and build cattle guards.

19 KAN. 535, KANSAS PAC. RY. CO. v. BALL

Railroads—Killing stock—Prerequisites to suit.—Cited in *Central Branch Union Pac. R. Co. v. Young*, 21 Kan. 532; *Central Branch Union Pac. R. Co. v. Holcomb*, 21 Kan. 533—affirming on the authority of the cited case; *Kansas City, Ft. S. & G. R. Co. v. Frazier*, 23 Kan. 698, holding that, under the stock-killing act, a demand on the railroad's station and ticket agent was sufficient; *Kansas Pac. Ry. Co. v. Taylor*, 23 Kan. 730; *Central Branch Union Pac. R. Co. v. Walters*, 24 Kan. 504—holding that there could be no recovery under such act, where no demand was proved; *Kansas City, Ft. S. & G. R. Co. v. McHenry*, 24 Kan. 501, holding that a demand under that act was sufficiently proved; *Becker v. Atchison, T. & S. F. Ry. Co.*, 70 Kan. 193, 78 Pac. 408; *Chicago, K. & W. R. Co. v. Totten*, 1 Kan. App. 538, 42 Pac. 269—holding that one seeking the benefits of such act must bring himself squarely within its terms.

19 KAN. 537, STATE v. COUGHLIN**19 KAN. 539, KANSAS PAC. RY. CO. v. DUNMEYER, Same case on subsequent appeal, 24 KAN. 725**

Variance between pleadings, proof and judgment.—Cited in *St. Louis & S. F. Ry. Co. v. Fudge*, 39 Kan. 543, 18 Pac. 720; *First Nat. Bank of Peoria, Ill., v. Jaffray*, 41 Kan. 691, 19 Pac. 626—holding that a judgment which departs from the issues made by the pleadings will be reversed; *Oil Well Supply Co. v. Johnson*, 78 Kan. 751, 98 Pac. 381; *Chicago, K. & W. Ry. Co. v. Bell*, 1 Kan. App. 71, 41 Pac. 209—holding that the submission of an issue not within the pleadings was erroneous; *Walker v. Kinsner*, 2 Kan. App. 371, 42 Pac. 596, holding that in a suit for breach of covenant of warranty a failure to prove the particular eviction alleged was a fatal variance.

Warranty—Breach—Constructive eviction.—Cited in *Herrington v. Clark*, 56 Kan. 644, 44 Pac. 624; *Jennings v. Kiernan*, 35 Or. 349, 55 Pac. 443, 56 Pac. 72—holding that a grantee of land could voluntarily submit to the paramount title of the government without losing his right of action on the grantor's covenant of warranty; *Burr v. Greeley*, 52 Fed. 926, 3 C. C. A. 357, holding that proof of an outstanding title in the government is sufficient proof of an eviction to support an action for breach of covenant of warranty.

Same—Scope—Warranting against government.—Cited in *West Coast Mfg. & Inv. Co. v. West Coast Improvement Co.*, 25 Wash. 627, 66 Pac. 97, 62 L. R. A. 763, holding that a grantor was liable on his warranty of title against all "persons" whatsoever, where the outstanding paramount title was in the state.

Cited in notes in 14 Am. Dec. 53; 122 Am. St. Rep. 857—on breach of covenant of warranty.

19 KAN. 544, *STATE v. ASHMORE*

Criminal cases—Mode of review.—Cited in *McLean v. State*, 28 Kan. 372, holding that criminal cases can be taken to the Supreme Court only by appeal.

19 KAN. 546, *STATE v. EMMERT*

School lands—Forfeiture by purchaser.—Cited in *Ewing v. Baldwin*, 24 Kan. 82; *Board of Com'rs of Dickinson County v. Baldwin*, 29 Kan. 538; *Flint v. Board of Com'rs of Jackson County*, 43 Kan. 656, 23 Pac. 1048; *Menger v. Board of Com'rs of Douglas County*, 48 Kan. 553, 29 Pac. 588; *Robertson v. Low*, 44 Or. 587, 77 Pac. 744—holding that a default in payment of principal or interest by a purchaser of school lands ipso facto worked a forfeiture of his interest; *Newland v. Baker*, 26 Kan. 341, holding that a defaulting purchaser of school lands forfeited, not only the land, but the improvements as well; *State v. Haney*, 32 Kan. 428, 4 Pac. 831; *Phipps v. Phipps*, 39 Kan. 495, 18 Pac. 707; *Logan, Rand & Co. v. Board of Com'rs of Clark County*, 51 Kan. 747, 33 Pac. 603—as to forfeiture by a purchaser of his rights in school lands; *Hansen v. Wilson*, 40 Kan. 211, 19 Pac. 717, holding that under Acts 1879, c. 161, a purchaser of school lands does not forfeit his rights until notice is given as therein required.

Same—Waiver of forfeiture.—Cited in *Baker v. Newland*, 25 Kan. 25, holding that, although a default by a purchaser of school land worked a forfeiture, a subsequent tax sale was not void, a waiver of the forfeiture not being open to attack by third parties; *Reynolds v. Reynolds*, 30 Kan. 91, 1 Pac. 388, holding that, if there had been any forfeiture by a purchaser of school lands through non-payment of interest or taxes, it had been waived.

Necessity of declaration of forfeiture.—Cited in *Neer v. Williams*, 27 Kan. 1, as to the necessity of a declaration of forfeiture by a grantor for a default by the grantee.

19 KAN. 550, *BECK v. BIRDSALL*

Landlord and tenant—Improvements by tenant—Lien.—Cited in *Gardner v. Samuels*, 116 Cal. 84, 47 Pac. 935, 58 Am. St. Rep. 135, holding that a tenant had no lien on leased premises for improvements placed thereon under an agreement by the landlord to pay for them at the expiration of the term.

19 KAN. 556, *WINTER v. SASS*

Followed in *Central Branch Union Pac. R. Co. v. Young*, 21 Kan. 532, affirming on the authority of the cited case.

Verdict on conflicting evidence—Force and effect.—Cited in *Elerick v. Braden*, 38 Kan. 83, 15 Pac. 887, holding that a general verdict on conflicting testimony was a finding of everything necessary to sustain it.

Argument by counsel—Improper remarks.—Cited in *State v. Comstock*, 20 Kan. 650, holding that, the trial court having overruled a motion for a new trial, it would be presumed that improper remarks of the county attorney were not prejudicial.

Witnesses—Competency—Convicts.—Cited in *State v. Clark*, 60 Kan. 450, 56 Pac. 767, as to the competency of witnesses who have been convicted of crime;

State v. Yordi, 30 Kan. 221, 2 Pac. 161; *State v. Martin*, 31 Kan. 353, 2 Pac. 781; *Buckles v. Reynolds*, 58 Wash. 485, 108 Pac. 1072—holding that remarks of counsel were not so intemperate or prejudicial as to require a new trial; *Surface v. Douglas*, 1 Kan. App. 78, 41 Pac. 207, holding that remarks of counsel outside of the evidence were prejudicial, and required a new trial.

19 KAN. 567, **BROWN v. HOLMES**

Default—Leave to answer—Discretion.—Cited in *Wingrove v. Williams*, 6 Kan. App. 262, 51 Pac. 52, holding that it could not be said that the court abused its discretion in denying a party in default leave to file a pleading, where it did not appear what showing he made in support of his application.

Amendments—Permission—When granted.—Cited in *Wells, Fargo & Co. v. Danford*, 28 Kan. 487, holding that permission to file an amended attachment affidavit should have been granted, when it would have been in furtherance of justice.

19 KAN. 570, **HUBBARD v. CRAWFORD**

Officers—Tenure—Qualification of successor.—Cited in *Salamanca Tp. v. Wilson*, 109 U. S. 627, 3 Sup. Ct. 344, 27 L. Ed. 1055, holding that a township officer was presumed to be still in office until his successor qualified; *Pruitt v. Squires*, 64 Kan. 855, 68 Pac. 643, holding that, under a law prohibiting any person from holding certain offices more than two terms consecutively, an officer's second consecutive term continued until his successor qualified; *In re Moore*, 4 Wyo. 98, 31 Pac. 980, holding that, where the attempted qualification by the successor of an acting Governor was premature and void, the acting Governor continued in office.

19 KAN. 574, **O'DRISCOLL v. SOPER**

Service—Finding in judgment—Force.—Cited in *Crist v. Cosby*, 11 Okl. 635, 69 Pac. 885, holding that a finding of due personal service contained in a judgment could not be contradicted in a suit to enjoin the judgment.

Presumptions—When negatived by record.—Cited in *Patterson v. Patterson*, 57 Kan. 275, 46 Pac. 304, holding that a recital in the decree of due service by publication was prima facie evidence thereof, but, where the record showed an insufficient affidavit for publication, it did not justify a presumption that a further sufficient affidavit had been lost; *City Ry. Co. v. Chesney*, 30 Kan. 199, 1 Pac. 520, holding that, where the record showed publication of notices of tax sale, in nonconsecutive weeks, it could not be presumed that it was published for four consecutive weeks.

19 KAN. 578, **MICKEL v. HICKS**, 21 AM. REP. 161

Cited in *Clevenger v. Figley*, 68 Kan. 699, 75 Pac. 1001.

Administrator's sale—Notice to heirs—Necessity.—Cited in *Fudge v. Fudge*, 23 Kan. 416; *Rogers v. Clemmans*, 26 Kan. 522; *Chicago, K. & N. Ry. Co. v. Cook*, 43 Kan. 83, 22 Pac. 988; *O'Keefe v. Behrens*, 73 Kan. 469, 85 Pac. 555, 8 L. R. A. (N. S.) 354, 9 Ann. Cas. 867 (dissenting opinion); *Crappster v. Taylor*, 74 Kan. 771, 87 Pac. 1138—holding that an administrator's sale of realty was adversary as to the heirs, and notice to them was jurisdictional; *O'Keefe v. Behrens*, 73 Kan. 469, 85 Pac. 555, 8 L. R. A. (N. S.) 354, 9 Ann. Cas. 867, as to the necessity of notice to the heirs of an administrator's sale.

Same—How notice given.—Cited in *Graden v. Mals*, 77 Kan. 702, 86 Pac. 412, 127 Am. St. Rep. 456, holding that notice of the hearing on an administrator's application to sell realty must be given as ordered by the court, and where it made no order the notice given and the sale were nullities.

Invalid judicial sale—Rights of purchaser.—Cited in note in 2 Am. St. Rep. 880, on rights of purchaser at invalid judicial sale.

Service of process—Computation of time.—Cited in *Howbert v. Heyle*, 47 Kan. 53, 27 Pac. 116, holding that service on April 18th of a notice of a hearing on April 28th on a guardian's application for leave to sell realty was properly served at least 10 days prior to the time fixed for the application.

Distinguished in *Fleming v. Bale*, 28 Kan. 88, holding that a hearing in the probate court on January 20th, under an order of January 18th requiring notice thereof to be published two weeks, was not a nullity on the ground that the required notice was impossible.

Presumptions—When negatived by record.—Cited in *City Ry. Co. v. Chesney*, 30 Kan. 199, 1 Pac. 520, holding that, where the record showed publication of notices of tax sale in nonconsecutive weeks, it could not be presumed that it was published for four consecutive weeks; *Beachy v. Shomber*, 73 Kan. 62, 84 Pac. 547, holding that the confirmation of a guardian's sale would not justify the presumption that proper notice was given, where the record showed the giving of a notice which was insufficient.

Cited in note in 1 L. R. A. (N. S.) 741, on presumption as to jurisdiction where record shows defect.

Recitals in record—Force and effect.—Cited in *State v. Horn*, 34 Kan. 556, 9 Pac. 208, holding that the report of viewers appointed to lay out a highway was better evidence of what they did than recitals in the record of the board of county commissioners.

19 KAN. 584, KANSAS PAC. RY. CO. v. ELLIS COUNTY COM'RS

Taxation—Assessment—Judicial or administrative function.—Cited in *Symms v. Graves*, 65 Kan. 628, 70 Pac. 591, holding that, assessment being an administrative and not a judicial act, the courts cannot substitute their idea of value for that of the board of equalization; *Silven v. Board of Com'rs of Osage County*, 76 Kan. 687, 92 Pac. 604, 13 L. R. A. (N. S.) 716, 14 Ann. Cas. 163, holding that, assessment not being a judicial function, a statute authorizing an appeal from the board of equalization to the district court was unconstitutional.

19 KAN. 588, BROWN v. KIRKBRIDE

Res judicata—Judgment on demurrer.—Cited in *Hyatt v. Challiss*, 59 Kan. 422, 53 Pac. 467; *Holderman v. Hood*, 78 Kan. 46, 96 Pac. 71—holding that a judgment on demurrer was as conclusive as if based on proof at a trial of the facts alleged; *Goldsborough v. Hewitt*, 23 Okl. 66, 99 Pac. 907, 138 Am. St. Rep. 795, holding that a judgment sustaining a demurrer for misjoinder of causes of action was not available to sustain a plea of res judicata.

Same—Dismissal.—Cited in *Hargis v. Robinson*, 70 Kan. 589, 79 Pac. 119, holding that a dismissal "with," or "without prejudice" has reference to, and is determinative of, the right to bring a new action; *McClung v. Hohl*, 10 Kan. App. 93, 61 Pac. 507, holding that a dismissal on demurrer or motion because of the omission of essential allegations does not bar a new action in which the petition contains such allegations.

Same—Matters concluded.—Cited in *John V. Farwell Co. v. Lykins*, 59 Kan. 96, 52 Pac. 99, holding that where a petition sought a recovery on note, or in the alternative on the original consideration, a judgment for defendant barred a new action on the original consideration, although the findings in the first action showed no determination of this issue.

Demurrer—Failure to withdraw—Effect as admission.—Cited in *Jacobs v. Vaill*, 67 Kan. 107, 72 Pac. 530, holding that a failure to withdraw a demurrer to the petition, which was not acted on, did not constitute an admission of the truth of the petition's allegations, where defendant by answer denied them.

Judgment on demurrer—Finality.—Cited in *Brenholts v. Miller*, 80 Kan. 185, 101 Pac. 998, holding that a judgment on demurrer is a final judgment.

19 KAN. 593, TYPER v. SOOY

Motion for new trial as prerequisite to review.—Cited in *Morse v. Brunswick & Co.*, 34 Kan. 378, 8 Pac. 398, holding that errors occurring at the trial could not be reviewed, where the record showed no motion for a new trial; *White v. Douglas*, 51 Kan. 402, 32 Pac. 1092, holding that such errors could not be reviewed, where the grounds on which the motion for a new trial was made were not shown.

Followed in *Shadwell v. Hamilton*, 24 Kan. 266, affirming on the authority of the cited case.

19 KAN. 601, WAITE v. BALLOU

Injunction against foreclosure sale.—Cited in note in 35 L. R. A. (N. S.) 911, on injunction against sale under power in mortgage because of overstatement of amount due.

19 KAN. 604, OPDYKE v. CRAWFORD

Judicial sale—Taxes—Payment out of proceeds.—Cited in *Alexander v. Shonyo*, 20 Kan. 705; *Capital Bank of Topeka v. Huntoon*, 35 Kan. 577, 11 Pac. 369; *Kerr v. Hoskinson*, 5 Kan. App. 193, 47 Pac. 172—holding that overdue taxes were to be paid first out of the proceeds of a judicial sale.

Taxes—Payment by mortgagee—Recovery.—Cited in *Seaman v. Huffaker*, 21 Kan. 254, holding that a mortgagee, who had paid taxes in order to preserve his lien, could have a judgment against the land therefor.

